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PRINCIPLES OF STATE CONSTITUTIONAL INTERPRETATION*

CLINT BOLICK**

State constitutionalism—the practice of state courts deciding cases on independent state constitutional grounds—is a vital yet underdeveloped attribute of American federalism. Our system of dual sovereignty ensures the capacity of state courts to interpret their own constitutions to provide greater protections for individual rights than the federal constitution.[1] When they do so, their decisions are not subject to review by federal courts absent a federal issue.[2]

The subject has received significant judicial and academic attention ever since U.S. Supreme Court Justice William J. Brennan, Jr., in a pair of trail-blazing law review articles in 1970 and 1984, urged state courts to independently interpret their constitutions to elevate the protection of individual rights.[3] Indeed, in the years leading up to his second article, Brennan counted over 250 state court decisions "holding that the constitutional minimums set by the United States Supreme Court were insufficient to satisfy

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[1] *See, e.g.*, PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980).

[2] Michigan v. Long, 463 U.S. 1032, 1040–41 (1983).

[3] William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) [hereinafter Brennan, *State Constitutions*]; William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986) [hereinafter Brennan, *Bill of Rights*].

the more stringent requirements of state constitutional law."[4] On issues encompassing free speech, religious liberty, private property rights, due process, privacy, capital punishment, education, victims' rights, and the rights of criminal defendants, state courts have frequently identified greater constitutional protections than their federal counterparts.

And yet the methodology of state constitutional interpretation remains largely unexamined. Rarely have state courts specified *when* they will interpret their state constitutions independently and *how* they will go about that task. As a result, the jurisprudence is inconsistent and confusing, and constitutional rights may not be protected to the extent the framers of our state constitutions intended. State court judges typically, and often correctly, blame practitioners for failing to raise and develop state constitutional arguments adequately. But if our jurisprudence lacks coherent methodology to determine whether and how to independently interpret our state constitutions, how can practitioners know when to raise such arguments and how to present them effectively?

Arizona jurisprudence is especially bereft of such coherent methodology. Sometimes we decide cases on independent state grounds, holding that certain state constitutional provisions provide greater protections than the federal constitution.[5] In other cases, we interpret state constitutional provisions in lockstep with federal jurisprudence construing federal constitutional provisions, even where the language is starkly different.[6] In one recent decision in which *only* state constitutional and statutory claims were raised, the majority nonetheless decided the case on the basis of federal precedents, reasoning that if the local ordinance at issue violated narrower federal constitutional constraints, it would necessarily also offend more protective state

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[4] Brennan, *Bill of Rights*, *supra* note 3, at 548 (citing Ronald K.L. Collins, *Reliance on State Constitutions*, *in* DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 1, 2 (B. McGraw ed., 1985)).

[5] *See, e.g.*, State v. Stummer, 194 P.3d 1043, 1049–50 (Ariz. 2008) (declining to follow the federal test for secondary effects of speech because it is inconsistent "with the broad protection of speech afforded by the Arizona Constitution"); Mountain States Tel. & Tel. Co. v. Ariz. Corp. Comm'n, 773 P.2d 455, 459–61 (Ariz. 1989) (applying "the broader freedom of speech clause of the Arizona Constitution" before consulting the U.S. Constitution); Phx. Newspapers, Inc. v. Superior Court, 418 P.2d 594, 596 (Ariz. 1966) (declining to resolve issues under the U.S. Constitution after holding that a judge's ban on publications of open court proceedings violated the Arizona Constitution).

[6] *See, e.g.*, State v. Mixton, 478 P.3d 1227, 1244–45 (Ariz. 2021) (interpreting the Private Affairs Clause in article 2, section 8 of the Arizona Constitution in lockstep with U.S. Supreme Court interpretations of the Fourth Amendment).

constitutional protection.[7] What we have never done is to explain when or why we will take one approach or another, resulting in an entirely subjective, ad hoc approach that must be mystifying to the advocates who appear before us.

In this Article, I explain why it is important for state judges to vigorously enforce their constitutions and propose several principles of state constitutional interpretation that may help alleviate the current jurisprudential cacophony. Although this article focuses primarily on the Arizona Constitution, the proposed principles are applicable to state constitutions generally. By creating a sensible and consistent methodology for interpreting state constitutions, we can better vindicate the precious guarantees that the framers intended to protect.

I. THE MAJESTY OF STATE CONSTITUTIONS

Both by content and their role in our federalist republic, state constitutions are freedom documents. In addition to containing protections for individual rights and constraints on government power that are similar to the national constitution, they contain additional protections that are completely unknown to the United States Constitution.[8] Moreover, the national constitution provides a "floor" for the protection of rights, above which state courts may find greater protections in their state constitutions.[9] State constitutionalism, in our system of federalism, thus properly serves as a one-way ratchet in the protection of individual rights.

The original state constitutions preceded the United States Constitution, and many of the protections of the Bill of Rights were based on similar pro-

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[7] Brush & Nib Studio, LC v. City of Phoenix, 448 P.3d 890, 901 (Ariz. 2019). *But see id.* at 927 (Bolick, J., concurring) (urging resolution under state law).

[8] Clint Bolick, *Vindicating the Arizona Constitution's Promise of Freedom*, 44 ARIZ. ST. L.J. 505, 506 (2012). Among many other examples, although the U.S. Supreme Court has held that no right to education exists under the national constitution, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973), most if not all state constitutions clearly establish, or have been construed to provide, such a right. *See* ARIZ. CONST. art. XI, § 1 ("General and Uniform" Public School System Clause); Roosevelt Elementary Sch. Dist. No. 66 v. Bishop, 877 P.2d 806, 811 (Ariz. 1994). Several states, including Arizona, expressly protect the rights of crime victims. *See* ARIZ. CONST. art. II, § 2.1.

[9] Clint Bolick, *State Constitutions as a Bulwark for Freedom*, 37 OKLA. CITY U. L. REV. 1, 6 (2012); Brennan, *Bill of Rights*, *supra* note 3, at 548.

tections in state constitutions.[10] Apart from a handful of constraints on the power of state governments in the national constitution, state constitutions provided the primary protections for individual rights; thus, for the first 150 years of our republic, most constitutional litigation took place in the states.[11] That equation changed, of course, with the adoption of the Fourteenth Amendment and its protections of privileges or immunities, equal protection, and due process against the states. But even then, the Bill of Rights was not applied to the states until the twentieth century, when specific guarantees were incorporated through the Fourteenth Amendment.[12] That evolution occurred slowly over the past century: only recently were the Second Amendment's right to keep and bear arms and the Eighth Amendment's prohibition against excessive fines extended to individuals against their state governments.[13] So long as the rights contained in the Bill of Rights were not applied against state governments, they were either protected by state courts under state constitutions, or not at all.

With the emergence of a robust federal Bill of Rights and Fourteenth Amendment jurisprudence, most Americans have come to view the national constitution as the primary, if not sole, protection for their rights. That view is doctrinally embedded in American legal education, where "Constitutional Law" is usually taken to mean federal constitutional law, and state constitutional law is consigned to elective law school courses that few stu-

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[10] *Brush & Nib*, 448 P.3d at 927–28 (Bolick, J., concurring); *see* Turken v. Gordon, 224 P.3d 158, 161–62 (Ariz. 2010); Moore v. Chilson, 224 P. 818, 829 (Ariz. 1924) (applying prior-construction canon); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 322–23 (2012) (discussing prior-construction canon).

[11] JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 13 (2018). *See* Brennan, *State Constitutions*, *supra* note 3, at 493; Gitlow v. New York, 268 U.S. 652, 669–70 (1925) (holding that the Due Process clause imposes restrictions on the states concerning freedom of speech); Chi., Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226 (1897) (holding that the Due Process Clause requires just compensation for state-seized property).

[12] *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335, 341 (1963) (incorporating the right to counsel in all felony cases); Malloy v. Hogan, 378 U.S. 1, 5–6 (1964) (incorporating the right to be free from self-incrimination); Pointer v. Texas, 380 U.S. 400, 403 (1965) (incorporating the right to confront adverse witnesses); Washington v. Texas, 388 U.S. 14, 17–18 (1967) (incorporating the right to obtain defense witnesses); Duncan v. Louisiana, 391 U.S. 145, 147–48 (1968) (incorporating the right to a jury trial in non-petty cases); Benton v. Maryland, 395 U.S. 784, 794 (1969) (incorporating the Double Jeopardy Clause); McDonald v. City of Chicago, 561 U.S. 742, 791 (2012) (incorporating the 2nd Amendment); Timbs v. Indiana, 139 S. Ct. 682, 686 (2019) (incorporating the Excessive Fines Clause); Ramos v. Louisiana, 140 S. Ct. 1390, 1397 (2020) (incorporating the Sixth Amendment right to a jury trial).

[13] *McDonald*, 561 U.S. at 749–50; *Timbs*, 139 S. Ct. at 686.

dents take and is sparsely tested on state bar examinations. I have often quipped that were my Court to insert questions on state constitutional law on our bar exam, almost everyone would fail them. Yet for lawyers who defend their clients' constitutional rights or who advise government officials on the scope of their powers, ignorance of state constitutional law ought to be intolerable.

As the reach of the federal constitution grew, interest in state constitutionalism diminished. Especially during the Warren era, the United States Supreme Court expanded the rights of criminal defendants and found in the Fourteenth Amendment's Due Process Clause rights to privacy and abortion.[14] A more robust application of the Equal Protection Clause yielded greater constraints against race and sex discrimination.[15] Most litigators seeking to expand constitutional rights have focused largely if not exclusively on federal lawsuits. After all, a single powerful precedent like *Brown v. Board of Education*[16] could effect nationwide change. State constitutions were relegated to afterthought.[17]

Ironically, one of the main architects of the Warren Court's expansion of constitutional rights also provided the intellectual foundation for the revival of state constitutionalism. Alarmed that the emergence of a more conservative Court would curtail recently recognized federal constitutional rights, Justice Brennan urged state courts and practitioners to advance state constitutional protections.[18] "The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law," Brennan urged, "for without it, the full realization of our

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[14] *See, e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961) (holding that the exclusionary rule applies to the states); Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that a married couple has a constitutional right of access to contraceptives); Roe v. Wade, 410 U.S. 113 (1973) (holding that the Fourteenth Amendment protects a woman's right to have an abortion).

[15] Loving v. Virginia, 388 U.S. 1 (1967) (holding that prohibiting interracial marriages violates the Equal Protection Clause); United States v. Virginia, 518 U.S. 515 (1996) (holding that a public institution's single-sex admission policy, without "exceedingly persuasive justification," violates the Equal Protection Clause).

[16] Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483 (1954), *aff'd in part, rev'd in part sub nom.* Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294 (1955).

[17] *See* SUTTON, *supra* note 11, at 13–14.

[18] *See* Brennan, *State Constitutions*, *supra* note 3, at 491.

liberties cannot be guaranteed."[19] Brennan observed that state constitutional protections preceded the Bill of Rights, the drafters of which drew upon such provisions, and that for many years "these state bills of rights, independently interpreted, were the primary restraints on state action since the federal Bill of Rights had been held inapplicable."[20] He urged that constitutional decisions by federal courts "are not mechanically applicable to state law issues," and that "only if they are found to be logically persuasive and well-reasoned, paying due regard to precedent and the policies underlying specific constitutional guarantees, may they properly claim persuasive weight as guideposts when interpreting counterpart state guarantees."[21] Of the growing propensity of state courts to independently interpret provisions in their constitutions, Brennan remarked that "[e]very believer in our concept of federalism . . . must salute this development in our state courts."[22] More pointedly, nine years later he remarked that "[a]s state courts assume a leadership role in the protection of individual rights and liberties, the true colors of purported federalists will be revealed."[23]

More recently, Judge Jeffrey Sutton, chief judge of the U.S. Court of Appeals for the Sixth Circuit, weighed in with the book *51 Imperfect Solutions,* reminding us that we have not one constitution but fifty-one.[24] "The most inspired constitution writing in this country, perhaps at any time, perhaps anywhere, occurred before 1787," Sutton remarked, "and it occurred in the States."[25] State constitutions adopted since then reflect the times and circumstances in which those documents were created. As Sutton suggests, "State constitutional law respects and honors these differences between and among the States by allowing interpretation of the fifty state constitutions to account for these differences in culture, geography, and history."[26]

Acknowledging the highly divisive issues that occupy much of the U.S. Supreme Court's docket, Sutton posits, "what better time to permit the

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[19] *Id.*

[20] *Id.* at 501–02.

[21] *Id.* at 502.

[22] *Id.*

[23] Brennan, *Bill of Rights*, *supra* note 3, at 550.

[24] SUTTON, *supra* note 11, at 2.

[25] *Id.* at 11.

[26] *Id.* at 17. Judge Gerald A. Williams and I recently explored similarities and differences between the state constitutions of Oklahoma (where he attended law school) and Arizona. *See* Clint Bolick & Gerald A. Williams, *The Role of State Constitutions in the Protection of Individual Rights*, OKLA. BAR J., Mar. 2020, at 18.

state courts to adopt their own interpretations of similarly worded constitutional guarantees found in their constitutions?"[27] Indeed, he asserts that "[r]espect for state constitutional law as an independent source of rights, and its revitalization as a litigation tool, may be the best thing that could happen for federal constitutional law."[28] He argues that "[f]or too long, we have lived in a top-down constitutional world, in which the U.S. Supreme Court announces a ruling, and the state supreme courts move in lockstep in construing the counterpart guarantees of their own constitutions. Why not do the reverse?" Sutton asks.[29]

Good question. As Sutton notes, decisions in other major areas of law, such as tort and contract law, tend to originate in state courts.[30] A major attribute of our system of federalism is that different states can try different ideas on for size—and other states (as well as the national government) can see what happens.[31] As Justice John Paul Stevens observed, "some conflict among state courts on novel questions . . . is desirable as a means of exploring and refining alternative approaches to the problem."[32]

In a nation whose constitution invests limited and defined powers in the national government, with the residuum of legitimate government powers remaining in the states,[33] it is curious that many state courts have largely ceded to the U.S. Supreme Court the power of state constitutional interpretation through its decisions interpreting the national constitution. Justice Brennan, Judge Sutton, and others have voiced many reasons why we should not persist in that practice. In a recent dissenting opinion, I articulated what I consider the most compelling reason for state judges to take responsibility for independently interpreting their state constitutions: "After all, Supreme Court justices do not take an oath to uphold the Arizona Constitution. But we do."[34]

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[27] SUTTON, *supra* note 11, at 18.

[28] *Id.* at 19–20.

[29] *Id.* at 20.

[30] *Id.*

[31] FERC v. Mississippi, 456 U.S. 742, 787–88 (1982) (O'Connor, J., concurring).

[32] California v. Carney, 471 US 386, 397 n.7 (1985) (Stevens, J., dissenting).

[33] *See* U.S. CONST. amend. X; *see also* Bond v. United States, 572 U.S. 844, 854 (2014) ("[T]he National Government possesses only limited powers; the States and the people retain the remainder.").

[34] *Mixton*, 478 P.3d at 1249 (Bolick, J., dissenting).

II. Jurisprudential Cacophony

Before we can vindicate the unfulfilled promise of state constitutions, we must first make some sense over when and how we should do so. Despite renewed interest in state constitutionalism, state court jurisprudence and legal scholarship are almost entirely devoid of established or even suggested principles guiding how and when we should independently interpret our state constitutions.

As in many other states, our approach to state constitutional interpretation in Arizona is inconsistent and entirely ad hoc. As former Arizona Supreme Court Chief Justice Stanley Feldman and constitutional scholar David Abney have argued, "In some cases, the court ignored the [state] constitution, even where there were significant textual differences between it and the federal counterpart. In other cases, the court relied on textual disparity to formulate its decision."[35] The Court has never explained the divergence in its approach.

Our ad hoc approach to state constitutional interpretation leaves our jurisprudence susceptible to the perception that it is subjective and results-oriented, and it tends to produce inconsistency and unpredictability. As Professor James A. Gardner has asserted, the failure of state courts to create a coherent discourse on state constitutional law has led to "confusing, conflicting, and essentially unintelligible pronouncements."[36]

A prime example is our cases interpreting article 2, section 8 of the Arizona Constitution, which provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law."[37] The first clause, referred to as the "private affairs" clause, has no analogue in the U.S. Constitution.[38] By contrast, the second provision, the "home invasion" clause, covers terrain similar to the Fourth Amendment, which among other things protects the "right of the people to be secure in their . . . houses . . . against unreasonable searches and seizures."[39] The Arizona Supreme Court has held that the home invasion clause, article 2, section 8 of the Arizona Constitution, provides broader protection than the Fourth Amendment,

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[35] Stanley G. Feldman & David L. Abney, *The Double Security of Federalism: Protecting Individual Liberty Under the Arizona Constitution*, 20 ARIZ. ST. L.J. 115, 144 (1988) (footnote omitted).

[36] James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 763 (1992).

[37] ARIZ. CONST. art. 2, § 8.

[38] Timothy Sandefur, *The Arizona "Private Affairs" Clause*, 51 ARIZ. ST. L.J. 723, 723 (2019).

[39] U.S. CONST. amend. IV.

and that it is not bound by the U.S. Supreme Court's construction of the Fourth Amendment.[40] The Court did so "based upon our own constitutional provision, its specific wording, and our own cases, independent of federal authority."[41] By contrast, in *State v. Mixton*, a 4-3 majority of our Court applied the U.S. Supreme Court's Fourth Amendment jurisprudence to the private affairs clause, even though that protection does not appear in the Fourth Amendment.[42] Anyone looking for clues about how to anticipate or reconcile these divergent approaches to state constitutional interpretation will not find them.

Judges often assign blame for our failure to independently interpret state constitutions to lawyers who fail to raise or develop such arguments. True enough. But as Feldman and Abney argue, "In the final analysis, . . . the fault is judicial."[43] Why should advocates devote finite time and resources to do so if they have no assurance courts will take such arguments seriously? Because we have failed to articulate guidance for when and how we will interpret the Arizona Constitution, it is impossible for litigators to know when they should make state constitutional arguments, and when doing so would be a waste of time. Yet we cannot address state constitutional issues if litigators do not raise, preserve, and meaningfully develop them. If they do so, I believe it is our duty as state court judges to address them meaningfully.

III. Principles of Interpretation

Our citizens deserve more than most state courts have given them: a cogent, coherent articulation of when we will interpret our state constitution independently and the methods we will use in doing so.

In *State v. Gunwall*,[44] the Washington Supreme Court articulated principles by which it will resolve state constitutional issues. Former Washington Supreme Court Justice Robert F. Utter explained that *Gunwall* was in-

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[40] *See* State v. Ault, 724 P.2d 545, 550–51 (Ariz. 1986); State v. Bolt, 689 P.2d 519, 523–24 (Ariz. 1984).

[41] *Bolt*, 689 P.2d at 524.

[42] 478 P.3d 1227, 1227 (Ariz. 2021) (Bolick, J., dissenting).

[43] Feldman & Abney, *supra* note 35, at 146.

[44] 720 P.2d 808, 811 (Wash. 1986).

tended to create neutral principles to guide state constitutional interpretation, partly in response to the criticism that the prior approach "was solely result-oriented."[45] The "*Gunwall* factors," as Justice Utter summarized them, are "(1) textual language; (2) differences in the texts of the state and federal constitutions; (3) constitutional history; (4) preexisting state law; (5) structural differences between the state and federal constitutions; and (6) matters of particular state or local concern."[46] These factors help inform the inquiry into when to interpret a state constitution independently, but they fail to provide clear guidance to courts and advocates on how to do so.

Arizona should heed the Washington Supreme Court's wisdom in developing interpretative methodology but improve upon its model. As Feldman and Abney have argued, "If a jurisprudence of neutral principles is truly governed by text and original intent, then its adherents can hardly ignore either the unique text of the Arizona Constitution or the intent of those who drafted the document."[47] By articulating clear principles, we can bring consistency and predictability to the law while vindicating the promise of our constitution. The following are five principles, derived from the constitution's structure and intent, that I propose to help guide jurists and advocates in this vital endeavor.

A. The Primacy Principle

State judges have an obligation to enforce two constitutions, not one. Where state and federal claims are raised, as the Arizona Supreme Court has held, we should "first consult our constitution."[48] Of course, by virtue of the Supremacy Clause,[49] where national law governs a matter, it prevails over contrary state law. But where a lawsuit brought in state court seeks to protect individual rights or constrain government action under both the state and national constitutions, we should accord primacy to our own constitution.[50] "By turning to our own constitution first we grant the proper respect to our own legal foundations and fulfill our sovereign duties," the Washington Supreme Court has instructed, a duty "that stems from the

[45] Robert F. Utter, *The Practice of Principled Decision-Making in State Constitutionalism: Washington's Experience*, 65 TEMP. L. REV. 1153, 1161 (1992).

[46] *Id.* (citing *Gunwall*, 720 P.2d at 811).

[47] Feldman & Abney, *supra* note 35, at 117.

[48] *Mountain States Tel. & Tel. Co.*, 773 P.2d at 461.

[49] U.S. CONST. art. VI, cl. 2.

[50] *See* State v. Coe, 679 P.2d 353, 359 (Wash. 1984).

very nature of our federal system and the vast differences between the federal and state constitutions and courts."[51]

That rule makes sense. Only state court judges proclaim fidelity to state constitutions. If we do not enforce those protections, who will? Put another way, if we subordinate state constitutional protections to federal constitutional jurisprudence, we risk sacrificing liberties that were important to our state constitution's framers.[52] As Feldman and Abney point out, given that the Bill of Rights was not yet incorporated to the states when our constitution was enacted, neither the Arizona Constitution's framers nor the citizens who adopted it "could have intended that *federal* constitutional law would protect the rights and liberties of Arizona's populace."[53]

Prudential reasons also counsel consulting the state constitution first: finality, stability, and predictability. Finality, because cases decided on independent state law grounds are unreviewable by the U.S. Supreme Court, so long as no separate federal law argument is made and the state court decision itself does not violate valid federal law or the U.S. Constitution.[54] Stability and predictability, for our decisions need not follow the vagaries and shifting tides of federal jurisprudence.

Former Oregon Supreme Court Justice Hans A. Linde, who devoted much of his distinguished career to state constitutional scholarship and taught at Arizona State University School of Law following his retirement from the bench, observed that independent state constitutional holdings "can bring stability to the state's law in the face of frequent inconsistencies and changes in Supreme Court [decisions]."[55] Indeed, as he points out, "[Is it not] an illusion to seek stability by following the Supreme Court in deciding a state claim; for once it has been decided, does the decision not contin-

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[51] *Id.*

[52] *See Mixton*, 478 P.3d at 1249 (Bolick, J., dissenting).

[53] Feldman & Abney, *supra* note 35, at 116; *see also* Ruth V. McGregor, *Recent Developments in Arizona State Constitutional Law*, 35 ARIZ. ST. L.J. 265, 275 (2003).

[54] *See, e.g.*, *Long*, 463 U.S. at 1043; *see also* Paul Bender, *Some Thoughts on the Interpretation of Arizona Constitutional Rights*, 35 ARIZ. ST. L.J. 295, 300 (2003) ("[I]t would advance both judicial economy and the prompt finality of Arizona Supreme Court decisions if, in cases in which both state and federal individual rights protections are invoked . . . court[s] were to adopt the general practice of considering the state constitutional question first.").

[55] Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 177 (1984).

ue to bind the state's courts even when the Supreme Court doctrine changes?"[56] The Iowa Supreme Court recently took that approach in the search and seizure context, proclaiming that "we encourage stability and finality in law by decoupling Iowa law from the winding and often surprising decisions of the United States Supreme Court" under the Fourth Amendment, and "take the opportunity to stake out higher constitutional ground."[57]

Justice Linde aptly summarized the proper approach:

> The right question is not whether a state's guarantee is the same as or broader than its federal counterpart as interpreted by the Supreme Court. The right question is what the state's guarantee means and how it applies to the case at hand. The answer may turn out the same as it would under federal law. The state's law may prove to be more protective than federal law. The state law also may be less protective. In that case the court must go on to decide the claim under federal law, assuming it has been raised.[58]

Justice Brennan offered an additional expedient: correction of constitutional errors.[59] If the U.S. Supreme Court errs in constitutional interpretation, it is difficult for the people to correct it because the amendment process is nearly impossible.[60] But state constitutions are usually easier to amend and therefore constitutional errors are easier to correct.[61] All of those advantages accrue from according primacy to state constitutional provisions. State constitutionalism is an important component of federalism.[62] Justice Brennan commented that "one of the strengths of our federal system is that it provides a double source of protection for the rights of our citizens."[63] As a unanimous Supreme Court declared in *Bond v. United States*, "Federalism secures the freedom of the individual. By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power."[64] We vindicate that

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[56] *Id.*

[57] State v. Ingram, 914 N.W.2d 794, 797–98 (Iowa 2018) (declining to follow the U.S. Supreme Court's Fourth Amendment analysis in favor of Iowa's constitutional provisions relating to search and seizure upon a driver's challenge to the constitutionality of an inventory search); *see also* State v. Wright, 961 N.W.2d 396, 396 (Iowa 2021).

[58] Linde, *supra* note 55, at 179.

[59] *See* Brennan, *Bill of Rights*, *supra* note 3, at 551.

[60] *Id.*

[61] *Id.*

[62] *See, e.g.*, Brennan, *State Constitutions*, *supra* note 3, at 503.

[63] *Id.*

[64] 564 U.S. 211, 221–22 (2011).

principle when we apply the greater protective force of state constitutional law in the first instance.

B. The Serious Examination Principle

The Arizona Supreme Court has expressly rejected a lockstep approach in construing provisions of the Arizona Constitution.[65] Yet many older Arizona cases concluded, with little or no analysis, that state provisions are coextensive with federal provisions.[66] Those cases are then cited for the proposition that Arizona has adopted federal jurisprudence in interpreting provisions of the state constitution.[67] In this manner, as to many state constitutional provisions, our courts have adopted a de facto lockstep approach in which federal precedents are presumed to govern interpretation of similar state constitutional provisions. Lower courts, which are required to follow Arizona Supreme Court precedents, further embed these precedents within our jurisprudence.[68] Although this practice is typically not the product of anything approaching rigorous analysis, it undermines case law calling for independent interpretation of our state constitution while contributing to our confusing jurisprudence. As former Arizona Supreme Court Chief Justice Ruth McGregor has observed, "None of the opinions from our court provide any in-depth analysis of the reasons we have so often opted for a goal of uniformity."[69]

A case in point is our private affairs clause jurisprudence. The Court's initial analysis of the interplay between article 2, section 8 of the Arizona Constitution and the Fourth Amendment in *Malmin v. State* comprised fewer than fifty words, concluding that federal cases governed because the

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[65] *See* Pool v. Superior Court, 677 P.2d 261, 271 (Ariz. 1984).

[66] *See, e.g.*, Malmin v. State, 246 P. 548, 548–49 (Ariz. 1926) (stating that, although the Arizona Constitution's private affairs clause is "different in its language," it is "of the same general effect and purpose as the Fourth Amendment" and is thus appropriately analyzed under federal precedent).

[67] *See, e.g.*, State v. Reyna, 71 P.3d 366, 369 (Ariz. Ct. App. 2003) (citing *Malmin*, 246 P. at 549, in noting that "[o]ur supreme court long ago held that . . . the decisions concerning the scope of allowable vehicle searches under the federal constitution are 'well on point' in deciding cases under the Arizona Constitution").

[68] *See id.*

[69] McGregor, *supra* note 53, at 276.

provisions "[are] of the same general effect and purpose."[70] Still, shortly thereafter, the Court affirmed that despite *Malmin*, "[w]e have the right . . . to give such construction to our own constitutional provisions as we think logical and proper, notwithstanding their analogy to the Federal Constitution and the federal decisions based on that Constitution."[71] Indeed we do. Yet in *Mixton*, the Court continued to reflexively follow *Malmin* without pausing to examine that decision's lack of analytical foundation.[72]

The lockstep precedents do not merit stare decisis because they are bereft of reasoned analysis and may drain state constitutional provisions of their intended meaning.[73] Precedential effect is deserving only where the court gave fulsome analysis of why the provisions are coextensive, and more importantly, why they should track evolving federal decisions.

Justice Clarence Thomas admonishes that when prior precedents have drained a right of meaning, a case that raises the question of "whether, and to what extent, a particular Clause in the Constitution protects the particular right at issue" creates "an opportunity to reexamine, and begin the process of restoring, the meaning" of the provision "agreed upon by those who ratified it."[74] It is surely easier to simply accept the earlier decisions, but doing so abdicates the judiciary's central duty of enforcing constitutional rights and boundaries. And, of course, giving meaning to a constitutional provision for the first time inevitably raises new issues of how to apply it. "To be sure, interpreting the [constitutional provision] may produce hard questions," Justice Thomas acknowledges, "[b]ut they will have the advantage of being questions the Constitution asks us to answer."[75]

If we choose to follow federal precedent to interpret state constitutional provisions, we should do so deliberately and explain why, only after a rigor-

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[70] 246 P. at 549.

[71] Turley v. State, 59 P.2d 312, 316–17 (Ariz. 1936).

[72] *See Mixton*, 478 P.3d at 1235.

[73] *See, e.g.*, *McDonald*, 561 U.S. at 854–55 (Thomas, J., concurring) (arguing that precedent is entitled to no respect when it contains flawed interpretations that contravene original meaning); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992) (stating that it is necessary to reject stare decisis if "a prior judicial ruling should come to be seen so clearly as error that its enforcement [is] for that very reason doomed"); Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2478 (2018) (quoting Pearson v. Callahan, 555 U.S. 223, 233 (2009) (noting that "stare decisis is 'not an inexorable command'")).

[74] *McDonald*, 561 U.S. at 813 (Thomas, J., concurring). In his *McDonald* concurrence, Justice Thomas engaged in extensive examination of the original meaning of the Privileges and Immunities Clause, which was eviscerated by the *Slaughter-House Cases*, 83 U.S. 36 (1872). *See McDonald*, 561 U.S. at 813–58 (Thomas, J., concurring).

[75] *Id.* at 855.

ous analysis of the text, history, and meaning of the provision at issue. Failure to do that in the past does not excuse us from doing so now.

C. The Independent Meaning Principle

As Arizona was the forty-eighth state, its framers "had the opportunity to ponder more than 100 years of United States history before penning their own constitution, allowing them to adopt or adjust provisions employed by the federal government or other states to meet Arizona's needs."[76] Arizona adopted many provisions completely unknown to the national constitution (although many have antecedents in other state constitutions).[77] Other provisions were essentially the same as provisions in the Bill of Rights, and others modified language from the national constitution.[78]

It is a maxim of constitutional interpretation that where different language is consciously used, a different meaning was intended.[79] Our job is then to interpret the difference, through plain language, original public meaning, legislative history, and decisions of other state courts at the time our state adopted similar constitutional language.

Where the text's meaning is clear—which it often is not, given the general wording typically used in constitutional text—we should enforce it as written.[80] If not, we should examine the original public meaning of the words as understood by the drafters and people at the time of adoption.[81] Among the tools available for doing so is corpus linguistics, pioneered by Utah Supreme Court Justice Thomas Lee, among others.[82] Beyond that, we can employ legislative history.[83] Where such history is lacking as to our own

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[76] Rebecca White Berch et al., *Celebrating the Centennial: A Century of Arizona Supreme Court Constitutional Interpretation*, 44 ARIZ. ST. L.J. 461, 468 (2012).

[77] *See, e.g.*, John D. Leshy, *The Making of the Arizona Constitution*, 20 ARIZ. ST. L.J. 1, 81–88 (1988) (discussing provisions of the Arizona Constitution that differ from the U.S. Constitution and the influence that the constitutions of Rocky Mountain states and the State of Washington had on these Arizona provisions).

[78] *See* Feldman & Abney, *supra* note 35, at 121–22.

[79] *See* SCALIA & GARNER, *supra* note 10, at 256.

[80] Baker v. Univ. Physicians Healthcare, 296 P.3d 42, 46 (Ariz. 2013).

[81] *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 576–77 (2008).

[82] *See, e.g.*, Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 830 (2018).

[83] See Phelps v. Firebird Raceway, Inc., 111 P.3d 1003, 1007 (Ariz. 2005); Boswell v. Phx. Newspapers, Inc., 730 P.2d 186, 189 (Ariz. 1986). *See also Turken*, 224 P.3d at 167 (citing Fain

constitution, we may inform ourselves of the purposes and meaning of our provisions by examining history and decisions from states whose provisions we adopted, as they can guide us about why our framers did so.[84] All of these tools help us give the intended meaning to our state constitutional provisions.

The contrary approach is that when state constitutional provisions have similar purposes, even if the language is starkly different, we should extol "the value in uniformity with federal law when interpreting and applying the Arizona Constitution."[85] After all, the argument goes, a person's rights should not differ from one state to another. That uniformity can be achieved only by interpreting our state constitutional provisions in lockstep with federal court decisions interpreting provisions with similar purpose or effect in the national constitution.

That argument has some facial appeal: we are, after all, a national union. But it deprives residents of our state of rights our constitution's framers intended to protect. It also places us on the often unpredictable path of U.S. Supreme Court jurisprudence.

The U.S. Supreme Court has consistently repudiated any requirement of uniformity in state constitutional decisions. It has ruled that the interest in uniformity "does not outweigh the general principle that States are independent sovereigns with plenary authority to make and enforce their own laws as long as they do not infringe on federal constitutional guarantees . . . Nonuniformity is, in fact, an unavoidable reality in a federalist system of government."[86] Indeed, divergent approaches to important issues were a central part of the federalist design, which was intended to fragment popular opinion and consign the most divisive disputes to the states, in order to reduce the danger of a tyrannical majority coalescing at the national level.[87] It furthers the purposes of federalism for Arizonans to possess greater private property rights, religious liberty, freedom of speech, rights to redress for

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Land & Cattle Co. v. Hassell, 790 P.2d 242, 251 (Ariz. 1990) (noting that the prospective application of an opinion is a discretionary policy question for the appellate court)).

[84] *See, e.g.*, *Mixton*, 478 P.3d at 1235, 1241-42 (analyzing several Washington state court decisions to inform interpretation of Arizona's private affairs clause, which "was adopted verbatim from the Washington State Constitution").

[85] *Id.* at 1235.

[86] Danforth v. Minnesota, 552 U.S. 264, 280 (2008).

[87] *Cf.* Letter from James Madison to George Washington (Apr. 16, 1787), *in* 9 PAPERS OF JAMES MADISON 382, 383–84 (Robert A. Rutland et al. eds., 1975).

personal injuries, freedom of enterprise, victims' rights, or privacy rights than citizens of other states.

Not only do constitutions vary from state to state, but so, of course, do statutes. Legislative enactments vary widely in myriad ways. Yet in construing unique state statutes, state courts rarely recourse to federal court decisions interpreting similar federal statutes unless some connection exists between them.[88] That is because our obligation is to effectuate our legislature's intent in enacting the statute.[89] In such instances, we do not worry about uniformity, even though our state's laws may differ dramatically from federal law or that of neighboring states.[90] If we do not seek uniformity in interpreting our state's positive law, why should we do so with regard to its organic law? To the contrary, that law is basic and fundamental, and deserves our faithful fidelity.

Courts in other states have strongly rejected uniformity with federal precedent in interpreting their state constitutions. "Although Delaware is bound together with forty-nine other States in an indivisible federal union, it remains a sovereign State, governed by its own laws and shaped by its own unique heritage," declared the Delaware Supreme Court.[91] "If we were to hold that our Constitution is simply a mirror image of the Federal Constitution, we would be relinquishing an important incident of this State's sovereignty."[92] The New Hampshire Supreme Court stated its "responsibility to make an independent determination of the protections afforded under the New Hampshire Constitution. If we ignore this duty, we fail to live up to our oath to defend our constitution."[93] The Texas Supreme Court added, "When a state court interprets the constitution of its state merely as a restatement of the Federal Constitution, it both insults the dignity of the state

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[88] *See, e.g.*, *Brush & Nib*, 448 P.3d at 918 (citing federal cases interpreting the Federal Religious Freedom Restoration Act to interpret a state law that was derived from its federal counterpart).

[89] Rasor v. Nw. Hosp., LLC, 403 P.3d 572, 576 (Ariz. 2017).

[90] *Cf. id.* (stating that "[i]f the statute is subject to only one reasonable interpretation, we apply it without further analysis").

[91] Sanders v. State, 585 A.2d 117, 145 (Del. 1990).

[92] *Id.*

[93] State v. Ball, 471 A.2d 347, 350 (N.H. 1983).

charter and denies citizens the fullest protection of their rights."[94] The list of state court decisions that have rejected uniformity is long.

The rule in Arizona is that we do not have a consistent rule.[95] The rule should be that where our constitutional language differs from the national constitution, we will examine the differences and follow that examination where it leads us. Anything less diminishes our state's constitutional legacy.

D. The Originalist Principle

The converse of the maxim for the preceding principle is also true: where our constitution's framers adopted language from the federal constitution, we may presume that they did so deliberately, and intended to adopt its meaning as they understood it.

However, this emphatically does not mean that they intended to hitch interpretation of the state constitution to evolving Supreme Court jurisprudence. Rather, the meaning was established at the time the provision was adopted. "The meaning of a writing or saying is in part a function of the context in which the communication occurs; the relevant context is the context at the time of writing or saying."[96]

We may safely assume this for three reasons. First, the dominant judicial philosophy at the time of Arizona's statehood was originalism,[97] thus our framers would have assumed that the provisions they drafted would be interpreted in accordance with original meaning. Second, as discussed previously, at the time of our constitutional ratification, the Bill of Rights was not yet applied to the states.[98] So our framers would not have viewed evolving
U.S. Supreme Court explication of federal constitutional rights as especially meaningful, as those decisions had no effect in the states. Finally, and relatedly, the framers would have found it incredible that judges in our nation's capital could evolve the meaning of the Arizona Constitution. Thus, as con-

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[94] Davenport v. Garcia, 834 S.W.2d 4, 12 (Tex. 1992).

[95] *See Pool*, 677 P.2d at 271 (stating that uniformity is desirable, but courts should not follow federal precedent blindly when interpreting articles of the Arizona Constitution that correspond with federal provisions).

[96] Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 25 (2015).

[97] *See* Jeremy M. Christiansen, *Originalism: The Primary Canon of State Constitutional Interpretation*, 15 GEO. J.L. & PUB. POL'Y 341, 351–52, 368–69 (2017) (recounting Arizona cases to that effect).

[98] *E.g.*, Barron v. City of Baltimore, 32 U.S. 243, 243 (1833) (holding that the Fifth Amendment did not apply to the states).

stitutional scholar Timothy Sandefur explains, "Even if the wording of both constitutions is identical, there is no constitutional justification for following federal precedent that only originates *after* the people of a state ratify their state constitution."[99]

Certainly, many current federal constitutional protections were narrower, or nonexistent, when Arizona's constitution was adopted.[100] In such instances, where an Arizona constitutional provision does not separately establish the right, we must look to more protective federal jurisprudence that has developed over time to safeguard rights. However, the opposite is also true: many federal constitutional provisions enjoyed greater or different protection than they do today;[101] and we must assume that such meaning was embraced by our constitution's drafters when they adopted similar provisions.

Among other rights, private papers and effects were accorded greater protection under the Fourth Amendment at the turn of the last century than they are today.[102] Likewise, the U.S. Supreme Court protected freedom of enterprise within the Equal Protection and Due Process clauses.[103] Paul Avelar and Keith Diggs observe that early Arizona cases provided extensive protection for economic liberty, but "[t]his tradition was seemingly abandoned as the Arizona Supreme Court embraced—without explanation— a 'lockstep' approach to economic liberty by adopting federal jurisprudence to interpret the relevant provisions of the Arizona Constitution."[104] They argue that "this lockstep approach cannot be squared with the original cases, ig-

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[99] *See* Timothy Sandefur, *supra* note 38, at 750.

[100] *See, e.g.*, Wickard v. Filburn, 317 U.S. 111, 119–25 (1942) (expanding protections for Congress to regulate commerce under the federal constitution after the adoption of the Arizona Constitution).

[101] *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905), *abrogated by* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

[102] Boyd v. United States, 116 U.S. 616, 621–22 (1886) (holding that a compulsory production of private books and papers, without entry, constituted an unreasonable search and seizure). *See generally* Sandefur, *supra* note 38, at 726 (explaining that the Fourth Amendment barred forced production of private papers).

[103] *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (holding that discriminatory application of a neutral state ordinance banning wooden laundromats violated the Equal Protection Clause).

[104] Paul Avelar & Keith Diggs, *Economic Liberty and the Arizona Constitution: A Survey of Forgotten History*, 49 ARIZ. ST. L.J. 355, 355–56 (2017).

nores unique aspects of the Arizona Constitution, and leads to incorrect results."[105]

A recent Texas Supreme Court case drew upon its state constitution's Due Course of Law Clause to invalidate state regulatory provisions governing eyebrow threading.[106] In a concurring opinion for three justices, then-Justice Don Willett (now a judge on the U.S. Court of Appeals for the Fifth Circuit) explained the import of the ruling:

> Today's case arises under the *Texas* Constitution, over which we have final interpretive authority, and nothing in its 60,000-plus words requires judges to turn a blind eye to transparent rent-seeking that bends government power to private gain, thus robbing people of their innate right—antecedent to government—to earn an honest living. Indeed, even if the Texas Due Course of Law Clause mirrored perfectly the federal Due Process Clause, that in no way binds Texas courts to cut-and-paste federal rational-basis jurisprudence that long post-dates enactment of our own constitutional provision, one more inclined to freedom.[107]

Our state constitution clearly was intended to preserve at least as much freedom—and certainly, by its unique and expansive terms, much greater freedom—than the federal constitution.[108] To the extent that federal jurisprudence has eroded federal constitutional protections, our state jurisprudence should not automatically follow suit.

E. The Broader Purpose Principle

Constitutions should be interpreted in their overall context. As the U.S. Supreme Court declared in *M'Culloch v. Maryland*, constitutional interpretation must "depend on a fair construction of the whole instrument."[109] Antonin Scalia and Bryan Garner explain in *Reading Law*: "Context is a primary determinant of meaning. A legal instrument typically contains many interrelated parts that comprise the whole. The entirety of the document thus provides the context for each of its parts."[110]

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[105] *Id.* at 356.

[106] Patel v. Tex. Dep't of Licensing & Regul., 469 S.W.3d 69, 80–90 (Tex. 2015). Despite numerous efforts by well-meaning people to overcome his ignorance, the author has been unable to fathom eyebrow threading, blockchains, or cryptocurrencies.

[107] *Id.* at 98 (Willett, J., concurring).

[108] *See* Berch et al., *supra* note 76, at 468–503 (suggesting several ways in which the Arizona Constitution provides protections and guarantees for individual rights that are more substantial than those found in the U.S. Constitution).

[109] 17 U.S. 316, 406 (1819).

[110] SCALIA & GARNER, *supra* note 10, at 167.

Here, preambles and overall constitutional structure are important.[111] Like other constitutions, the Arizona Constitution provides a roadmap for its interpretation. For instance, our Declaration of Rights begins with this admonition: "A frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government."[112] Likewise, it provides that "governments . . . are established to protect and maintain individual rights."[113]

Reference to these guideposts while interpreting more specific provisions can help vindicate our state constitution's promise. Retired Justice John Pelander and I have argued, for example, that these principles are inconsistent with the presumption of constitutionality of laws, which is taken for granted in federal jurisprudence.[114]

A contextual reading of the Arizona Constitution also yields themes of interpretation. Constitutional historian John D. Leshy observes that in the drafting of the Arizona Constitution, "perhaps the single dominant idea was one shared by constitutions across the United States; that is, they manifested 'more distrust than confidence in the uses of authority.'"[115] For instance, several provisions of our Progressive-era Constitution appear aimed at thwarting the combination of government and private power for private ends.[116] A recent Arizona Supreme Court decision effectuated that purpose in the context of taxpayer subsidies.[117]

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[111] Frederick Douglass made this argument when he asserted that the U.S. Constitution was an anti-slavery document: "I am prepared for those rules of interpretation which when applied to the Constitution make its details harmonize with its declared objects in its preamble." Letter from Frederick Douglass to Gerrit Smith (May 1, 1851), *quoted in* DAMON ROOT, A GLORIOUS LIBERTY: FREDRICK DOUGLASS AND THE FIGHT FOR AN ANTISLAVERY CONSTITUTION 47 (2020).

[112] ARIZ. CONST. art. II, § 1.

[113] *Id.* § 2.

[114] *See* State v. Arevalo, 470 P.3d 644, 652–56 (Ariz. 2020) (Bolick & Pelander, JJ., concurring).

[115] John D. Leshy, *supra* note 77, at 58 (citation omitted).

[116] *See, e.g.*, ARIZ. CONST. art. II, § 17 (Eminent Domain Clause); *id.* art. IX, § 7 (Gift Clause); *id.* art. IV, § 19 (Special Law Clause).

[117] *See* Schires v. Carlat, 480 P.3d 639, 646–47 (Ariz. 2021) (holding that subsidies paid by municipality to private university violated the Arizona Constitution's Gift Clause because payments were grossly disproportionate to fair market value).

A constitution should be interpreted in light of its objectives, particularly those that are stated expressly. Doing so ensures that the boundaries of government power are enforced and the rights of the people are secured.

IV. Human Impact

Discussions about state constitutionalism are conducted largely in esoteric terms. But how we interpret state constitutional protections has profound real-world ramifications.

Among the many examples I could cite, my personal favorite involves eminent domain. Under the Fifth Amendment of the United States Constitution, the government may take private property for a "public use."[118] Over time, and culminating in the infamous *Kelo v. City of New London* decision, the Supreme Court rewrote the "public use" provision, substituting it with the far less demanding requirement of "public benefit."[119] By a 5-4 decision, over an emphatic dissenting opinion by Justice Sandra Day O'Connor,[120] the Court sanctioned the taking of a working-class neighborhood to make way for amenities for a Pfizer pharmaceutical facility.[121]

At the same time that Susette Kelo and her neighbors were losing their homes and businesses in federal court,[122] Randy Bailey, owner of Bailey's Brake Service in Mesa, Arizona, was waging a similar battle in state court.[123] The city sought to take his business and provide the property to a hardware store that wanted to expand in a prime retail location.[124] But Bailey had a weapon that Kelo lacked: Article 2, Section 17 of the Arizona Constitution,[125] which on its face provides greater protection against eminent domain than does its federal counterpart.

The Arizona Court of Appeals could have construed Article 2, Section 17 in lockstep with the Fifth Amendment, as interpreted by the Supreme Court. Had it done so, Bailey surely would have lost. But the court reasoned that in choosing different language than the Fifth Amendment, the Arizona Constitution's framers intended to provide greater protection.[126]

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[118] U.S. Const. amend. V (Takings Clause).
[119] *See* 545 U.S. 469, 487–90 (2005).
[120] *See id.* at 494–505 (O'Connor, J., dissenting).
[121] *Id.* at 473–75 (majority opinion).
[122] *Id.*
[123] *See* Bailey v. Myers, 76 P.3d 898, 899–900 (Ariz. Ct. App. 2003).
[124] *Id.*
[125] Ariz. Const. art. II, § 17.
[126] *See Myers*, 76 P.3d at 903.

Concluding that the provision prohibits the use of eminent domain to effectuate transfers of property to private owners, the court ruled in favor of Bailey,[127] who continued to operate his business at the corner of Country Club and Main for many years.[128]

The vindication of state constitutions protects individual rights and constrains government excesses. Certainly not all state constitutional claims are meritorious; far from it. Nor do all of our constitutional protections necessarily exceed those protected by the federal constitution. But our system of federalism, and the central role of state courts within that system, require us to take state constitutional provisions seriously. Our frontier constitution is not mere verbiage. It provides a rich constitutional legacy to which every Arizonan is heir. It is our duty to protect that inheritance.

Other Views:

- Steven Twist & Len Munsil, *The Double Threat of Judicial Activism: Inventing New 'Rights' in State Constitutions*, 21 ARIZ. ST. L.J. 1005 (1989), *available at* https://heinonline.org/HOL/LandingPage?handle=hein.journals/arzjl21&div=48&id=&page=.
- Goodwin Liu, *State Courts and Constitutional Structure*, 128 YALE L.J. 1174 (2019), *available at* https://www.yalelawjournal.org/review/state-courts-and-constitutional-structure.
- Jason Mazzone, *Radical State Constitutionalism*, 2020 UNIV. ILL. L. REV. 1401 (2020), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3723699.
- Nick Ehli, *State constitutions vex conservatives' strategies for a post-Roe world*, MONTANA FREE PRESS, Feb. 17, 2022, https://montanafreepress.org/2022/02/17/state-constitutions-vex-conservatives-strategies-for-a-post-roe-world/.

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[127] *Id.* at 904–05.

[128] Bolick, *supra* note 8, at 509.

AGAINST LIVING COMMON GOODISM*

WILLIAM H. PRYOR JR.**

Today I want to discuss a new version of an old debate. In 1985, then-Attorney General Ed Meese delivered a famous address to the American Bar Association in which he advocated "a jurisprudence of original intention."[1] Meese argued that, in contrast with many modern decisions by the Supreme Court, the Founders expected that "[t]he text of the document and the original intention of those who framed it would be the judicial standard in giving effect to the Constitution."[2] He explained that judges should not "depart[] from the literal import of the words"[3] in the Constitution and argued, as Justice Story had two centuries earlier, that "[w]here the words admit of two senses, . . . that sense is to be adopted, which . . . best harmonizes with the nature and objects, the scope and design of the instrument."[4]

The backlash against Meese's speech was swift and fierce. At a law school symposium a few months later, Justice William Brennan lambasted originalism as "little more than arrogance cloaked as humility."[5] Justice Brennan instead promoted an approach whose results aligned with his personal moral vision. He argued that what mattered was what "the words of the text mean *in our time*."[6] And he maintained that the Constitution required judges to

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* Note from the Editor: The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. To join the debate, please email us at info@fedsoc.org. This article is adapted from a speech Judge Pryor delivered at the Federalist Society's 2022 Ohio Chapters Conference.

** Chief Judge, United States Court of Appeals for the Eleventh Circuit.

[1] Edwin Meese III, *Speech Before the American Bar Association*, *in* ORIGINALISM: A QUARTER-CENTURY OF DEBATE 47, 52 (Steven G. Calabresi ed., 2007).

[2] *Id.* at 48.

[3] *Id.* at 53.

[4] *Id.* at 53–54.

[5] William J. Brennan, Jr., *Speech to the Text and Teaching Symposium*, *in* ORIGINALISM: A QUARTER-CENTURY OF DEBATE 55, 58 (Steven G. Calabresi ed., 2007).

[6] *Id.* at 61 (emphasis added).

"striv[e] toward th[e] goal" of "human dignity."[7] Of course, it was not the *Founders'* conception of human dignity that Justice Brennan sought to advance. Justice Brennan made clear that it was a *particular* vision of human dignity that the Constitution should guarantee. For example, he argued that capital punishment was a violation of human dignity—and so unconstitutional—even though he acknowledged that most of his colleagues and most Americans disagreed.[8] I will let you decide, as between Justice Brennan's methodology and the methodology he condemned, which of the two is better described as "arrogance cloaked as humility."[9]

After the debate between Attorney General Meese and Justice Brennan, the proponents of originalism multiplied in politics, the bar, the academy, and the bench, thanks in no small part to the Federalist Society. Justice Antonin Scalia became the leading evangelist for originalism, and Justice Clarence Thomas became its leading practitioner. Four decades later, originalism has been restored as the primary interpretive philosophy of the judiciary. Today, most of the Justices of the Supreme Court are originalists—they maintain that the text of the Constitution has a fixed meaning, that the Constitution means now what it originally meant, and that the original meaning is binding on them as judges. And as the Justices have become less inclined toward living constitutionalism, so too has the Court's jurisprudence.

Consider the recent decision in *Bucklew v. Precythe*,[10] in which the Court stated that the Constitution "allows capital punishment" because of its original meaning.[11] As the Court explained, that fact "mean[s] that the judiciary bears no license to end a debate reserved for the people and their representatives."[12] And contrary to Justice Brennan's view, this Court acknowledges that a judge is powerless under our Constitution to abolish capital punishment even if he or she sincerely believes that capital punishment is against human dignity, the natural law, or the common good. Tellingly, the *Bucklew* Court ignored the formulation of the Warren Court that the Eighth

[7] *Id.* at 67.
[8] *Id.* at 68–69.
[9] *Id.* at 58.
[10] 139 S. Ct. 1112 (2019).
[11] *See id.* at 1122–23.
[12] *Id.* at 1123.

Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[13]

Despite that achievement, a few individuals on the right side of the political spectrum have recently condemned the current practice of originalism.[14] Some advocate for a new kind of originalism—so-called "common-good originalism"—that they say is "rooted in the teleology and *ratio legis* of" the Constitution[15] and that would allegedly secure conservative ends. Last year, in the Joseph Story Lecture at the Heritage Foundation, I explained the problems with this view,[16] and I will not rehearse them again here.

I want instead to address a kind of results-oriented jurisprudence that is indistinguishable in everything but name from Justice Brennan's living constitutionalism: Harvard Law Professor Adrian Vermeule's so-called common-good constitutionalism—a variant of what I call living common goodism. Vermeule's approach, in his words, "take[s] as its starting point substantive moral principles that conduce to the common good, principles that [judges] . . . should *read into* the majestic generalities and ambiguities of the written Constitution."[17] Replace "common good" with "human dignity" and Vermeule's living common goodism sounds a lot like Brennan's living constitutionalism. Indeed, the difference between Brennan's living constitutionalism and Vermeule's living common goodism consists mainly in their differing substantive moral beliefs; in practice, the methodologies are the same.

Although I disagree with Vermeule's view, it would be a mistake to dismiss it out of hand. To be sure, there is little evidence that many judges or lawyers have been persuaded by Vermeule but his view is being taken seriously by at least some law students. And because the history of the Federalist Society proves that minority views can become prevailing ones, we should take seriously even mistaken views like living common goodism. So I want to explain why Vermeule's view is mistaken.

The Constitution does not give judges the power to "read into" the text of the Constitution "substantive moral principles that conduce to the

[13] Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion).

[14] *E.g.*, Hadley Arkes et al., *A Better Originalism*, THE AMERICAN MIND (Mar. 18, 2021), https://americanmind.org/features/a-new-conservatism-must-emerge/a-better-originalism/.

[15] Josh Hammer, *Common Good Originalism: Our Tradition and Our Path Forward*, 44 HARV. J.L. & PUB. POL'Y 917, 942 (2021).

[16] *See* William Pryor Jr., *Politics and the Rule of Law*, HERITAGE FOUNDATION (Oct. 20, 2021), https://www.heritage.org/the-constitution/lecture/politics-and-the-rule-law.

[17] Adrian Vermeule, *Beyond Originalism*, THE ATLANTIC (Mar. 31, 2020), https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/ (emphasis added).

common good."[18] And fashioning that kind of jurisprudence would conflict with natural law. As Professor Robert George has explained, when courts exceed their jurisdiction and usurp "legislative authority," whether for good or bad causes, "they violate the rule of law by seizing power authoritatively allocated by the framers and ratifiers of the Constitution to other branches of government."[19]

Within the bounds of the constraints it imposes, the natural law is neutral about the kind of constitution that a people can establish to promote the common good. Like the ancient moral philosophers, the Founders understood that power corrupts. They gave the judiciary and other branches limited powers within separate domains for protecting the common good. They recognized, as Professor George put it, that "natural law itself does not settle the question . . . whether it falls ultimately to the legislature or the judiciary in any particular polity to insure that the positive law conforms to natural law and respects natural rights."[20] And as Professor Vermeule acknowledges, "the common good does not, by itself, entail any particular scheme of . . . judicial review of constitutional questions, or even any such scheme at all."[21]

The only question for judges is the scope of their power under *our* Constitution. As Professor Joel Alicea recently explained in his excellent article refuting living common goodism, an enacted text is morally binding according to the natural-law tradition "only insofar as it is both . . . substantively consistent with the natural law *and* . . . promulgated by a legitimate authority."[22] Judges committed to that tradition have already determined for themselves that the Constitution accords with natural law and has been promulgated by a legitimate authority, or else they would not have taken an oath to support it.[23] As far as I can tell, Vermeule is not advocating for a revolution of our constitutional order. So we must ask whether our Constitution gives

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[18] *Id.*

[19] Robert P. George, *Natural Law, the Constitution, and the Theory and Practice of Judicial Review*, 69 FORDHAM L. REV. 2269, 2282 (2001).

[20] *Id.* at 2279.

[21] ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM 10 (2022).

[22] J. Joel Alicea, *The Moral Authority of Original Meaning*, 98 NOTRE DAME L. REV. (forthcoming 2022) (manuscript at 6), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4049069&msclkid=356649d7ab8011ec93d2e720134bf1ed.

[23] *See* U.S. CONST. art. VI.

judges the power to "insure that the positive law conforms to the natural law"[24] by departing from original meaning; if it does not, then a judge who purports to exercise that power has transgressed the natural law by going "beyond the power committed to him."[25]

The nature of our written Constitution conflicts with living common goodism because, as Professor Chris Green points out, our Constitution refers to itself as a written text situated at a fixed time in history.[26] Consider just a few examples. The Preamble identifies our Constitution with the text: the People "ordain[ed] and establish[ed] *this* Constitution for the United States of America."[27] Article II declares that "[n]o Person except a natural born Citizen, or a Citizen of the United States, *at the time of the Adoption* of *this* Constitution, shall be eligible to the Office of President."[28] Article III extends the "judicial Power . . . to all Cases, in Law and Equity, arising under *this* Constitution,"[29] as distinguished from those arising under distinct bodies of law—federal statutory law and treaties. Article VI likewise distinguishes "*[t]his* Constitution" from the rest of the law that composes "the supreme Law of the Land."[30] And it requires that "judicial Officers" be "bound by Oath" to "support *this* Constitution."[31] So unlike Britain's unwritten constitution, our Constitution is a written text that expressed its meaning "at the time of [its] Adoption."[32]

Vermeule's failure to appreciate the nature of our Constitution causes him to misunderstand what originalism claims about it. Originalism does not, as Vermeule asserts, "simply equate[] law with positive enacted texts";[33] after all, the Constitution itself refers both to the "Law of Nations"[34] and to the common law.[35] Originalism instead acknowledges that our particular Constitution—novel when it was adopted—*is* the text with which it identifies *itself*.

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[24] George, *supra* note 19, at 2279.

[25] Alicea, *supra* note 22, at 14.

[26] Christopher R. Green, *"This Constitution": Constitutional Indexicals As a Basis for Textualist Semi-Originalism*, 84 NOTRE DAME L. REV. 1607, 1674 (2009) ("[T]he Constitution presents itself as a historically situated text—that is, a text whose meaning was attached to it at the time of the Founding.").

[27] U.S. CONST. pmbl.

[28] *Id.* art. II, § 1, c.5 (emphasis added).

[29] *Id.* art. III, § 2, cl. 1.

[30] *Id.* art. VI.

[31] *Id*.

[32] *Id.* art. II, § 1, c.5.

[33] VERMEULE, *supra* note 21, at 8.

[34] U.S. CONST. art. I, § 8, cl. 10.

[35] *Id.* amend. VII.

So Vermeule's view that "departing from the text is not the same as departing from the law"[36] may be true of *other* constitutions, but it is untrue of *our* Constitution, from which judges have no legal authority to depart.

The judicial oath obliges judges, as a moral duty, to support the written text that is our Constitution.[37] To be sure, an oath could be immoral. Professor Alicea imagines "a hypothetical constitution that, in express terms, mandated genocide."[38] It would be wrong to support that constitution even if one were—wrongly—to take an oath to support it. But as I have explained, judges have already determined for themselves that our Constitution, as amended, is morally legitimate. If we are right, then our oath morally binds us. The oath bridges the gap between *descriptive* facts about the meaning of the text that is our Constitution and the *normative* fact that judges are obliged to faithfully interpret what the text means.[39] So the oath squarely presents the question whether originalists have the correct account of interpretation; if so, judges are morally bound to original meaning.

On the mistaken living-common-goodist account, legal texts must always be read in the light of the natural law[40]—or, more accurately, what a judge believes is the natural law. That is, judges may "read into" the text the moral principles that, they believe, "conduce to the common good."[41] But the problem with that account is that there is no necessary connection between the meaning of a text and any particular conception of the common good.[42] One must know a text's meaning *before* one can know whether faithful application of its meaning would "conduce to the common good."[43] That fact is why we can know that a legal text serves an immoral end. For example, if we were to discover an ancient Roman edict, we would have to understand what the edict originally meant before we could form a belief about whether enforcing *it*—instead of something distinct to which we have superadded our own moral

[36] VERMEULE, *supra* note 21, at 75.

[37] *Cf.* Catechism of the Catholic Church ¶ 2150 (1994).

[38] Alicea, *supra* note 22, at 11.

[39] *See* C'zar Bernstein, *Originalism and the "Oath Theory"*, NAT'L REV. ONLINE (May 20, 2020), https://www.nationalreview.com/2020/05/constitution-originalism-what-critics-of-venerable-legal-philosophy-get-wrong/.

[40] *See* VERMEULE, *supra* note 21, at 3.

[41] Vermeule, *supra* note 17.

[42] *See* Bernstein, *supra* note 39.

[43] Vermeule, *supra* note 17.

principles—would have been consistent with the natural law. So whether the text bears a particular meaning is an independent, antecedent question for judges to answer, and going beyond that meaning would be going "beyond the power committed to [them]."[44]

A major theme of Vermeule's recent popular-level[45] polemic defending living common goodism is that it supposedly prevailed at the Founding.[46] He contends that living common goodism "*is* the original understanding" of the Constitution.[47] In his revisionist historical account, "the classical legal tradition structured and suffused our law" "[r]ight from the beginning, long before the Constitution of 1789."[48] And living common goodism "has since been displaced . . . by originalism,"[49] which he labels as a creature of the late 20th century. Rubbish!

To begin with, it is odd that Vermeule places so much emphasis on the alleged historical basis for his view. He emphatically states that he "do[es] not advocate a revival of the classical law *because* it is the original understanding,"[50] but then spends many pages attempting to convince readers of the historical pedigree of his view.[51] Vermeule does not make clear what role, if any, he believes his historical account plays in his overall argument, but surely it must play a key role. In the so-called classical tradition, law is "an ordinance of reason for the common good, promulgated by a [legitimate] public authority."[52] If living common goodism were not the prevailing view of the legitimate "public authority" at the Founding, then it would be implausible to suppose that its "ordinance of reason for the common good"[53]—that is, our Constitution—empowered judges to do what Vermeule would now have them do. So Vermeule's account of the Founding turns out to be critical to his case.

Vermeule's argument for that historical revisionism does not withstand scrutiny. He argues that three opinions—the first Justice Harlan's dissent in

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[44] Alicea, *supra* note 22, at 14.

[45] *See* VERMEULE, *supra* note 21, at 25.

[46] *Id.* at 58 ("The largest and simplest point may also be the most important: the classical view was central to our legal world (not exclusive, but central) during the founding era and through the nineteenth century.").

[47] *Id.* at 2.

[48] *Id.* at 53.

[49] *Id.*

[50] *Id.* at 2.

[51] *See id.* at 52–90.

[52] *Id.* at 3.

[53] *Id.*

Lochner v. New York,[54] the decision of the Supreme Court in *United States v. Curtiss-Wright*,[55] and the decision of a New York court in *Riggs v. Palmer*[56]—"illustrate how deeply the classical legal tradition has *always* infused our law."[57] Setting aside whether these decisions support Vermeule's methodology, it strains credulity to suppose that a dissenting opinion from 1905, a Supreme Court decision from 1936, and a state-court decision from 1889 could establish that living common goodism is deeply rooted in the American tradition: that it "structured and suffused our law" "[r]ight from the beginning, long before the Constitution of 1789 was written."[58] Vermeule's argument is about as persuasive as using *Roe v. Wade*[59] as evidence that living constitutionalism is deeply rooted in our legal tradition.

But even if we ignore the recency of the opinions he chose, Vermeule's argument still fails. Consider first *Riggs v. Palmer*, an 1889 decision of the Court of Appeals of New York. In that case, a grandson murdered his grandfather to inherit under the grandfather's will.[60] The grandson "claim[ed] the property, and the sole question for [the Court's] determination [was whether he] c[ould] . . . have it[.]"[61] The relevant statute stated that "'[n]o will in writing, . . . nor any part thereof, shall be revoked or altered otherwise'" except in circumstances not at issue in *Riggs*.[62] The *Riggs* court read into the governing statute an exception for murderous heirs and held that the grandson could not inherit.[63]

The *Riggs* court started with what Vermeule asserts is "a crucial proposition of"[64] living common goodism: "a thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the

[54] 198 U.S. 45 (1905).
[55] 299 U.S. 304 (1936).
[56] 115 N.Y. 506 (1889).
[57] VERMEULE, *supra* note 21, at 53 (emphasis added).
[58] *Id.*
[59] 410 U.S. 113 (1973).
[60] *Riggs*, 115 N.Y. at 508–09.
[61] *Id.* at 509.
[62] *Id.* at 517 (Gray, J., dissenting).
[63] *Id.* at 514–15.
[64] VERMEULE, *supra* note 21, at 80.

statute, unless it be within the intention of the makers."[65] The *Riggs* court appealed to Aristotle's authority to reason that "equitable construction[s]" can "restrain[] the letter of a statute"[66]—you can see why Vermeule likes this decision. And the court determined that it was not "much troubled by the general language contained in the laws" because it was "inconceivable" that the "legislative intention" was to allow the property to pass to the grandson.[67] So I agree that *Riggs* is an example of living common goodism.

The problem for Vermeule's argument is that most American courts of that era rejected *Riggs* in favor of the textualist approach he says was invented after the Second World War.[68] For example, in *Wall v. Pfanschmidt*,[69] the Supreme Court of Illinois in 1914 rejected the living common goodism of *Riggs*. It quoted Chief Justice Marshall's 1820 opinion in *United States v. Wiltberger*: "Where there is no ambiguity in the words [of a statute], there is no room for construction."[70] And it explained that, "[u]nder the rules for the interpretation of statutes the courts cannot read into a statute exceptions or limitations which depart from its plain meaning."[71] In 1892, the Supreme Court of Ohio affirmed a decision that expressly rejected *Riggs*'s approach as "legislation in disguise."[72] In that case, *Deem v. Millikin*, the court endorsed textualism: "when the legislature . . . speaks in clear language upon a question of policy, it becomes the judicial tribunals to remain silent."[73] And it derided the decision in *Riggs* as "the manifest assertion of a wisdom believed to be superior to that of the legislature upon a question of policy."[74]

The dominant textualist approach that rejected *Riggs* was nothing new. After all, Chief Justice Marshall had in 1819 endorsed a strong textualism with a narrow absurdity canon: "if, in any case, the plain meaning of a provision . . . is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity

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[65] *Riggs*, 115 N.Y. at 509.

[66] *Id.* at 510.

[67] *Id.* at 511.

[68] *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS § 8, at 99–100 & nn.29–31 (2012) (collecting decisions and reporting that "[m]ost cases agreed with the . . . murderer-can-inherit holding, which we believe is textually correct").

[69] 106 N.E. 785 (Ill. 1914).

[70] *Id.* at 788 (quoting United States v. Wiltberger, 18 U.S. 76, 95–96 (1820)).

[71] *Id.* at 789.

[72] Deem v. Millikin, 1892 WL 971, at *2 (Ohio Cir. Ct. May 1, 1892), *aff'd* Deem v. Millikin, 44 N.E. 1134 (Ohio 1895).

[73] *Id.*

[74] *Id.*

and injustice of applying the provision to the case, would be so monstrous, that *all* mankind would, without hesitation, unite in rejecting the application."[75] In *Reading Law*, Justice Scalia and Bryan Garner explain that "all states [now] have statutes that explicitly deal with" the problem of murderous heirs because most American courts rejected *Riggs* and applied even "unwise law[s] as written"[76]—the kind of textualism that prevails today.

Consider next Justice Harlan's dissent in *Lochner*. Although the outlier decision in *Riggs* was consistent with living common goodism, Harlan's dissent in *Lochner* was not. The *Lochner* Court held that a state law prohibiting bakers from "working . . . more than sixty hours in one week" violated the supposed liberty of contract protected by the Fourteenth Amendment.[77] Both the majority and Harlan agreed that the Fourteenth Amendment protects a right of contract "subject to such regulations as the state may reasonably prescribe for the common good and the well-being of society,"[78] but they disagreed about whether the maximum-hours law for bakers was a reasonable exercise of the state's police power.[79] Harlan argued that the state law "cannot

[75] Sturges v. Crowninshield, 17 U.S. 122, 202-03 (1819) (emphasis added). Vermeule places a lot of emphasis on Justice Scalia's endorsement of the absurdity canon and asserts that *Riggs* faithfully applied it, *see* VERMEULE, *supra* note 21, at 77, but as Chief Justice Marshall's statement of the canon makes clear, it was traditionally far narrower than Vermeule's description of it, *accord* SCALIA & GARNER, *supra* note 68, at § 37, at 237–38; 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 427, at 315 (Bos., Little, Brown, & Co. 1873) ("But if in any case the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded because we believe the framers of that instrument could not intend what they say, it must be one where the absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would, without hesitation, unite in rejecting the application."). As I have explained, most courts rejected its application in the context of murderous heirs. *See* SCALIA & GARNER, *supra* note 68, at § 8, at 99–100. And the outcome in *Riggs* was not so absurd and unjust "that all mankind would, without hesitation, unite in rejecting the application," *Sturges*, 17 U.S. at 203, because, as the dissent in *Riggs* illustrates, one could rationally suppose that a murderous heir should not suffer the "imposition of an additional punishment or penalty" that was not "provided by law for the punishment of [the] crime" of which he was convicted, *see Riggs*, 115 N.Y. at 519–20 (Gray, J., dissenting) (internal quotation marks omitted). The absurdity canon, properly understood, is part of textualism.

[76] SCALIA & GARNER, *supra* note 68, § 8, at 100.

[77] *Lochner*, 198 U.S. at 52–53.

[78] *Id.* at 68 (Harlan, J., dissenting).

[79] *See* Adair v. United States, 208 U.S. 161, 174 (1908) ("Although there was a difference of opinion in that case among the members of the court as to certain propositions, there was no

be held to be in conflict with the 14th Amendment, without enlarging the scope of the amendment far beyond its *original* purpose."[80] And other famous Harlan dissents confirm that he was an originalist. In the *Civil Rights Cases*, he explained that courts must follow "the familiar rule *requiring*, in the interpretation of constitutional provisions, that full effect be given to the intent with which they were adopted."[81] In *Hurtado v. California*, Harlan argued that the meaning of the words "due process of law" in the Fifth and Fourteenth Amendments "*must* receive the same interpretation they had at the common law from which they were derived."[82] And in *Plessy v. Ferguson*, he argued that the Thirteenth and Fourteenth Amendments should be "enforced according to their true intent and meaning."[83]

Finally, consider *Curtiss-Wright*. Contrary to Vermeule's account, *Curtiss-Wright* does not "illustrate how deeply the classical legal tradition has *always* infused our law."[84] In that decision, the Supreme Court held that a joint resolution of Congress permitting the President to prohibit the sale of arms in a foreign conflict was not an unconstitutional "delegation of the lawmaking power."[85] The Court reasoned that "[t]he Union existed before the Constitution," which, according to the constitutional text itself, was "ordained and established . . . to form 'a *more* perfect Union.'"[86] The Court explained that because sovereignty "immediately passed to the Union" from Britain,[87] the federal government possessed "powers of external sovereignty"—such as the power to declare war, to conclude peace, and to make treaties—that "did not depend upon the affirmative grants of the Constitution."[88] And the Court acknowledged that those powers "remained [in the Union] without change save in so far as the Constitution in express terms qualified [their] exercise."[89]

Vermeule asserts that *Curtiss-Wright* "stands as a direct and . . . flagrant affront to originalism, and to the positivism of which the currently reigning version of originalism is a species" because it endorsed "[t]he shockingly anti-

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disagreement as to the general proposition that there is a liberty of contract which cannot be unreasonably interfered with by legislation.").

[80] *Lochner*, 198 U.S. at 73 (Harlan, J., dissenting).

[81] Civil Rights Cases, 109 U.S. 3, 26 (1883) (Harlan, J., dissenting) (emphasis added).

[82] Hurtado v. California, 110 U.S. 516, 541 (1884) (Harlan, J., dissenting) (emphasis added).

[83] 163 U.S. 537, 555 (1896) (Harlan, J., dissenting).

[84] VERMEULE, *supra* note 21, at 53 (emphasis added).

[85] *Curtiss-Wright*, 299 U.S. at 315–317.

[86] *Id.* at 317 (emphasis added).

[87] *Id.*

[88] *Id.* at 318.

[89] *Id.* at 317.

originalist idea that '[t]he Union existed before the Constitution.'"[90] But Vermeule again attacks a straw man. Originalism does not assert that the Constitution created the Union or that there is no law outside the written text. Originalism asserts that our Constitution is a written text that was adopted as the supreme law[91] at a fixed point in time. And the Court in *Curtiss-Wright* agreed. The Court described the "establish[ment]" of the written Constitution by the Union as an "event" in time,[92] and it declared that the federal government retained the powers of sovereignty that pre-existed that event only "in so far as the Constitution in express terms [did not] qualif[y] [their] exercise."[93] The Court explained that presidential power, "like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution."[94] Because the Constitution is supreme, the Court considered whether the resolution was consistent with the Constitution. It based its ruling on "the unbroken legislative practice which has prevailed almost from the inception of the national government" by examining Acts of Congress from as early as 1794.[95] And it engaged in originalist reasoning by giving "unusual weight" to the "impressive array of legislation . . . enacted by nearly every Congress from the beginning of our national existence."[96] *Curtiss-Wright* is not an example of living common goodism.

A major theme of Vermeule's revisionism is that originalism was "initially developed in the 1970s and '80s,"[97] but that canard flouts a mountain of historical evidence. For example, James Madison could not have been clearer: "In the exposition of . . . Constitutions, . . . many important errors [would] be produced . . . if not controulable by a recurrence to the original and authentic meaning attached to" their words and phrases.[98] Scalia and Garner explain in *Reading Law* that, "[i]n the English-speaking nations, the earliest statute directed to statutory interpretation," enacted by the Scottish

[90] VERMEULE, *supra* note 21, at 85–86, 87 (quoting *Curtiss-Wright*, 299 U.S. at 317).
[91] *See* U.S. CONST. art. VI.
[92] *Curtiss-Wright*, 299 U.S. at 317.
[93] *Id.*
[94] *Id.* at 320.
[95] *Id.* at 322–28.
[96] *Id.* at 327.
[97] Vermeule, *supra* note 17.
[98] Letter from James Madison to Converse Sherman (Mar. 10, 1826), *in* 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 519 (J.B. Lippincott 1865).

Parliament in 1427, "made it a punishable offense for counsel to argue anything other than original understanding."[99]

Instead of interacting directly with the many historical examples that contradict his conspiracy theory that originalism was invented by the conservative legal movement in the "1970s and '80s,"[100] Vermeule broadly dismisses them. "*Of course*," he concedes, "it is true that more than zero instances of originalist-like utterances can be detected across the vast landscape of our legal history."[101] And he asserts that these examples "tend to speak of the framers' intentions rather than the original meaning as understood by the ratifiers," "embody[ing] a version of originalism that few currently defend."[102] But, strangely, Vermeule repeatedly relies on Professor Jeff Powell's 1985 article[103] refuting an original-intentions methodology for the proposition that originalism is "counter-originalist"[104]—apparently unaware that Powell's article established that the Founders were originalists in the modern sense.

Powell's article refutes Vermeule's invented history. Although Founding-era Americans *did* use the term "intent" in the context of constitutional interpretation, that usage, as Powell explained, tracked a long tradition of discerning intent "solely on the basis of the words of the law, and not by investigating any other source of information about the lawgiver's purposes."[105] "At common law," Powell explained, "the 'intent' of the maker of a legal document and the 'intent' of the document itself were one and the same; 'intent' did not depend upon the subjective purposes of the author."[106] And consistent with that tradition, Powell explained that the "Philadelphia framers' primary expectation regarding constitutional interpretation was that the Constitution, like any other legal document, would be interpreted in accord with its express language."[107]

Powell drew on a host of primary sources, but his discussion of the early debate about the "passage by the first Congress of a bill to establish a national

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[99] SCALIA & GARNER, *supra* note 68, § 7, at 79.

[100] Vermeule, *supra* note 17.

[101] VERMEULE, *supra* note 21, at 210–11 n.241 (emphasis added).

[102] *Id.* at 211 n.241.

[103] H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

[104] *See* VERMEULE, *supra* note 21, at 2, 186 n.4; Conor Casey & Adrian Vermeule, *Myths of Common Good Constitutionalism*, 45 HARV. J. L. & PUB. POL'Y 103, 130 n.83 (2022).

[105] Powell, *supra* note 103, at 895.

[106] *Id.* at 895.

[107] *Id.* at 903.

bank"[108] well illustrates the practice of originalism at the Founding. That bill "provoked an elaborate debate over constitutional interpretation within the executive branch" about the scope of Congress's power in which both sides relied on originalist interpretive methods.[109] Taking the expansive view, Hamilton argued that, "whatever may have been the intention of the framers of the constitution, or of a law, that intention is to be sought for in the instrument itself."[110] Hamilton "derived his knowledge of 'the intent of the convention' from the 'obvious [and] popular sense' of the constitutional expression under consideration."[111] Far from establishing, as Vermeule asserts, that the founders were not originalists, their debate about the national bank proves that they "did not in any way . . . reject[] the traditional common law understanding of 'intent' as the apparent 'meaning of the text.'"[112]

Early Justices too practiced originalism. Chief Justice Marshall clearly embraced originalism in *Ogden v. Saunders*.[113] There, Marshall identified the "principles of construction which ought to be applied to the constitution of the United States."[114] First, "that the intention of the instrument must prevail"; second, "that this intention *must* be collected from its words"; third, "that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended"; and finally, "that its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them, nor contemplated by its framers."[115] Vermeule cannot seriously dismiss Marshall's opinion as an "originalist-like utterance[]."[116]

We can go earlier still for rejections of living common goodism. Justice James Iredell wrote in *Calder v. Bull*[117] in 1798 that if Congress or any state legislature "shall pass a law, within the general scope of their constitutional

[108] *Id.* at 914.

[109] *Id.* ("Both Hamilton and Jefferson purported to rely on 'the usual & established rules of construction.'").

[110] *Id.* at 915 & n.153.

[111] *Id.* at 915.

[112] *Id.*

[113] 25 U.S. 213 (1827).

[114] *Id.* at 332.

[115] *Id.* (emphasis added).

[116] VERMEULE, *supra* note 21, at 210–11 n.241.

[117] 3 U.S. 386 (1798).

power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice."[118] As he explained, "The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject."[119] And he concluded that, "[A]ll that the Court could properly say, in such an event, would be, that the Legislature[,] []possessed of an equal right of opinion[,] had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice."[120] Vermeule asserts that this interpretation of Iredell's opinion is a "wild overreading";[121] I leave it to the literate reader of English to determine whether Justice Iredell's opinion fits more comfortably with living common goodism than with originalism.

Justice Iredell's observation that "the ablest and the purest men have differed upon" "principles of natural justice"[122] is why living common goodism in practice would be indistinguishable from living constitutionalism. Throughout Vermeule's work, the phrase "common good" evades concrete application except where the outcomes happen to align with his own worldview. Compare Vermeule's view of the Second Amendment with the view taken by Josh Hammer, who touts common-good originalism.[123] Vermeule complains that *District of Columbia v. Heller*[124] was "revolutionary" and "a startling break with the Court's long-standing precedents,"[125] but Hammer rightly praises it as "a sober analysis of the historical meaning of the" Second Amendment.[126] A Justice Vermeule—who says the common good requires reviewing for arbitrariness burdens on rights secured by the Bill of Rights[127]—would have evidently dissented in *Heller*. And if one were to put living common goodism in the mind of a Justice who disagrees with Vermeule about whether same-sex marriage is required by the common good, one would still get *Obergefell v. Hodges*.[128]

Vermeule asserts that "[i]t is irrelevant that there was, is[,] and will be disagreement between classical lawyers over the content of the common

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[118] *Id.* at 399 (opinion of Iredell, J.).
[119] *Id.*
[120] *Id.*
[121] VERMEULE, *supra* note 21, at 59.
[122] *Calder*, 3 U.S. at 399 (opinion of Iredell, J.).
[123] *See* Hammer, *supra* note 15, at 921.
[124] 554 U.S. 570 (2008).
[125] VERMEULE, *supra* note 21, at 93.
[126] Hammer, *supra* note 15, at 943 & n.100.
[127] *See* VERMEULE, *supra* note 21, at 126–28, 168.
[128] 576 U.S. 644 (2015).

good,"[129] but he conveniently applies a different standard to disagreements between originalists. When responding to Justice Brett Kavanaugh's point in dissent that the majority in *Bostock v. Clayton County*[130] misapplied originalism, Vermeule insists that "[i]f originalism is so difficult that one of its leading champions cannot apply it correctly, one might conclude instead that originalism is simply a dangerously unreliable technology, one that induces fatal rates of human error."[131] But Vermeule cannot have it both ways: he cannot forgive disagreement about the common good among classical lawyers while condemning originalism based on disagreements among its proponents.

I will close by quoting from Justice Benjamin Curtis's dissent in *Dred Scott v. Sandford*.[132] I do so because Vermeule repeatedly invokes the living-constitutionalist myth that *Dred Scott* is "the most clearly proto-originalist decision."[133] Justice Curtis, like the courts that later rejected *Riggs*, repudiated the approach that would allow judges to read unmentioned exceptions into unambiguous texts. When addressing whether the Supreme Court had the authority "to insert into . . . the Constitution an exception of the exclusion or allowance of slavery" to Congress's express "power to make *all* needful rules and regulations respecting" territories,[134] Curtis rejected Chief Justice Taney's majority opinion as anti-textualist:

> To engraft on [the Constitution] a substantive exception not found in it, . . . upon reasons purely political, renders its judicial interpretation impossible—because judicial tribunals, as such, cannot decide upon political considerations. Political reasons have not the requisite certainty to afford rules of judicial interpretation. They are different in different men. They are different in the same

[129] Casey & Vermeule, *supra* note 104, at 143.

[130] 140 S. Ct. 1731 (2020).

[131] VERMEULE, *supra* note 21, at 106.

[132] 60 U.S. (19 How.) 393 (1857).

[133] VERMEULE, *supra* note 21, at 210-11 n.241; *see also* Casey & Vermeule, *supra* note 104, at 131.

[134] *See Scott*, 60 U.S. at 620–21 (Curtis, J., dissenting); *see also* U.S. CONST. art. IV, § 3, cl.2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.").

> men at different times. And when a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean.[135]

Justice Curtis's textualist dissent in *Dred Scott* rejected living common goodism. So should you!

Other Views:

- Adrian Vermeule, *Beyond Originalism*, THE ATLANTIC (Mar. 31, 2020), https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/.
- Hadley Arkes et al., *A Better Originalism*, THE AMERICAN MIND (Mar. 18, 2021), https://americanmind.org/features/a-new-conservatism-must-emerge/a-better-originalism/.
- Josh Hammer, *Common Good Originalism: Our Tradition and Our Path Forward*, 44 HARV. J.L. & PUB. POL'Y 917, 942 (2021), *available at* https://www.harvard-jlpp.com/wp-content/uploads/sites/21/2021/06/Hammer-Common-Good-Originalism.pdf.
- ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (2022), *available at* https://www.politybooks.com/bookdetail?book_slug=common-good-constitutionalism--9781509548866.

[135] *Scott*, 60 U.S. at 620–21 (Curtis, J., dissenting).

Bargaining Rights Gone Wrong: How State Courts Invented a Constitutional Duty to Bargain and How It Harms Individual Workers*

Alexander MacDonald**

Constitutions often give you the right to do things. They give you the right to speak your mind, to petition the government, to "bear arms"—the list goes on. But do they also require other people to help you do those things? Do I have to help you exercise your constitutional rights?

Traditionally, the answer has been no. Constitutions usually bind only state actors,[1] and the state generally has no duty to help you exercise your rights.[2] It doesn't have to give you a platform for your speech.[3] It doesn't have to give you a gun to bear.[4] It doesn't even have to listen to your petitions.[5] It

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* Note from the Editor: The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. To join the debate, please email us at info@fedsoc.org.

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[1] John E. Nowak & Ronald D. Rotunda, Constitutional Law 595 (8th ed. 2010) ("Most of the protections for individual rights and liberties contained in the Constitution and its amendments apply only to the actions of government.").

[2] *See, e.g.*, Smith v. Ark. State Highway Emps., 441 U.S. 463, 465 (1979) ("The First Amendment right to associate and to advocate 'provides no guarantee that a speech will persuade or that it will be effective.'" (quoting Hanover Twp. Fed'n of Teachers v. Hanover Cmty. Sch. Corp., 457 F.2d 456 (7th Cir. 1972))); Webster v. Reproductive Health Servs., 492 U.S. 490, 510 (1989) (holding that state had no obligation to aid citizens in exercise of abortion rights recognized by Roe v. Wade, 410 U.S. 113 (1973)).

[3] *See* Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 358 (2009) ("While in some contexts the government must accommodate expression, it is not required to assist others in funding the expression of particular ideas, including political ones.").

[4] *See* Nowak & Rotunda, *supra* note 1, at 419–20 (observing that the Second Amendment has been interpreted to protect an individual right to bear arms, but that the right has been treated as a "narrow one" leaving room for government to regulate possession).

[5] *See Smith*, 441 U.S. at 465 (recognizing that the First Amendment guarantees the rights of speech, association, and petition, but "does not impose any affirmative obligation on the government to listen, to respond, or in this context, to recognize the [petitioner] and bargain with it"). *See also* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 36 (1973) (rejecting argument that

only has to refrain from interfering with your right to do the constitutionally protected thing.[6]

But that principle hasn't always held true for collective bargaining. In a few states, collective bargaining has been enshrined as a constitutional right.[7] Some courts have applied that right in the traditional way. They have protected it from interference, but not required others to facilitate it. They have safeguarded employees' right to form unions, join them, and demand recognition. But they have not forced employers—public or private—to bargain in return. For these courts, bargaining remains a matter of consent.[8]

Other courts, however, have gone further. Not only have they protected collective-bargaining rights from interference, but they have also ordered employers to bargain in return. That is, they have required employers to participate in and facilitate the exercise of their employees' rights.[9]

From a constitutional perspective, this was an unusual step.[10] Constitutions in the United States usually create negative rights, not positive ones.[11] But these courts justified it as a necessity. They reasoned that if they didn't require employers to bargain, bargaining rights would be meaningless. After all, bargaining takes two parties. If an employer has no enforceable duty, it can frustrate bargaining with "surface" negotiating tactics. Or worse, it can refuse to bargain in the first place. Employees are left with only the right to *demand* bargaining, which isn't much of a right at all. So, these courts reasoned, the right to bargain must include an implicit duty to bargain as well.[12]

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state had to afford citizens equal access to education so they could exercise other constitutional rights effectively) ("[W]e have never presumed to possess either the ability or the authority to guarantee to the citizenry the most effective speech or the most informed electoral choice.").

[6] *Cf.* DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 195 (1989) (describing the Due Process Clause as "a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security").

[7] *See, e.g.*, N.Y. CONST. art. I § 17; N.J. CONST. art. I § 19; MO. CONST. art. I § 29.

[8] *See* Univ. of Columbia v. Herzog, 269 App. Div. 24, 30 (N.Y. App. Div. 1945).

[9] *See, e.g.*, Johnson v. Christ Hosp., 45 N.J. 108, 112 (1965); Am. Fed'n of Teachers v. Ledbetter, 387 S.W.3d 360, 364 (Mo. 2012).

[10] *See Smith*, 441 U.S. at 466 (refusing to impose duty to recognize union as a matter of federal constitutional law) ("Far from taking steps to prohibit or discourage union membership or association, all that the Commission has done in its challenged conduct is simply to ignore the union. That it is free to do.").

[11] *But see* EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS 4 (2013) ("American rights are often thought to be negative rights, protecting citizens only from intrusive government by prohibiting government intervention.") (arguing that state constitutions sometimes do create positive rights).

[12] *See Ledbetter*, 87 S.W.3d at 364; Comite Organizador v. Molinelli, 114 N.J. 87, 97 (1989).

That rationale makes some intuitive sense. When a constitution guarantees the right to bargain, we might reasonably assume the right involves at least two parties. But the more we think about it, the more we can see the holes in that assumption. For one, constitutional bargaining rights can do a lot more than force one party to the table. They can protect people who engage in traditional labor activities, such as forming and joining unions.[13] They can prevent states from outlawing bargaining altogether, as some other states have done.[14] They can even guard against more subtle anti-labor tactics, such as "yellow dog" contracts.[15] What's more, they can do all those things without imposing any affirmative bargaining duty. So no, imposing that duty isn't necessary to give bargaining rights meaning. Bargaining rights have meaning all on their own. If courts want to impose a duty, they have to justify their decision on some other ground.

That point becomes especially clear when we look at the duty's collateral effects. Two of those effects deserve mention here. First, there is the problem of judicial administration. When courts announce a duty to bargain, they also have to explain how bargaining will work. And that explanation requires them to resolve dozens of mundane administrative issues. For example, what are the subjects of bargaining? Whom does bargaining cover? And what happens if the parties can't agree? Courts are ill-suited to decide these questions de novo. Without guidance, they have to make up the rules as they go along. And as they make up the rules, they slowly creep outside their comfort zones into areas where, from the perspective of institutional competence, we'd probably prefer they didn't go.[16]

That leads us to the second collateral effect. Among the problems courts have to solve is the risk of multiple unions. If the employer has to bargain

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[13] *See* Quinn v. Buchannan, 298 S.W.2d 413, 415–19 (Mo. 1957) (protecting employees from retaliation for forming labor union and demanding bargaining, but not imposing duty to bargain on employer).

[14] *See* N.C. GEN. STAT. §§ 95-98 (forbidding any agreement or contract between a public entity and a union).

[15] *See* Julius G. Getman & Thomas C. Kohler, *The Common Law, Labor Law, and Reality: A Response to Professor Epstein*, 92 YALE L.J. 1415, 1422–23 (1983) (describing pre-NLRA use of yellow-dog contracts).

[16] *See* Cornelius J. Peck, *Judicial Creativity and State Labor Law*, 40 WASH. L. REV. 743, 777 (1965) (criticizing judicial invention of constitutional bargaining duty, which inevitably entangled courts in routine administration of labor relations).

with every union chosen by an employee, the employer might easily find itself bargaining with two, three, or a dozen unions in the same workplace. That kind of bargaining isn't industrial democracy; it's industrial chaos. The natural solution is to require an employer to recognize only one union. Once a union gets support from a majority of employees, it represents all the employees, even the ones who don't want its services. It's a neat solution—one well established in federal law. The only problem is that it has no basis in state constitutional text or history. So to adopt it, courts had to effectively rewrite their constitutions.[17]

This not only oversteps the judicial role; it also affects individual rights. When courts impose exclusive representation, they necessarily deny some employees their choice. Some employees get the representative they want, but others have one foisted upon them. And that means some employees lose the only right guaranteed by the text—the right to bargain collectively. Ironically, by adopting an unwritten employer duty to bargain, courts subverted the written right guaranteed to workers.

None of this had to happen. Some courts avoided the conflict by interpreting their constitutions in the traditional way: They protected bargaining rights from interference, but imposed no new duties. They stayed mostly on the sidelines, leaving questions about bargaining duties to legislatures. And by proceeding in that way, they neither trampled on individual rights nor stretched themselves beyond their sphere of competence.[18]

This article argues that the traditional approach is the right one. It supports that position by tracking developments in three states: New York, New Jersey, and Missouri. New York courts followed the traditional approach, protecting employees from interference while leaving bargaining duties to the legislature. New Jersey and Missouri courts, by contrast, sidelined legislatures and read bargaining duties into their constitutions. And as a result, these courts ran straight into the practical and theoretical problems inherent in court-ordered bargaining.

Those problems deserve our attention. State labor law is a much-neglected practice area—practically a doctrinal backwater. It gets little attention from

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[17] *Cf. Ledbetter*, 387 S,W.3d at 368 (Fischer, J., dissenting) (criticizing majority for reading bargaining duty into constitution despite the absence of any textual or historical support).

[18] *See Herzog*, 269 App. Div. at 30 (refusing to import a duty to bargain into the constitution and leaving bargaining duties to the legislature's discretion).

the academy or press.[19] It almost always takes a back seat to its federal counterpart, which admittedly has a wider reach. But for millions of workers, state law is the only source of bargaining rights. So when state courts get the law wrong, their errors affect real people. We should study their decisions just as closely—and call out their errors just as vigorously—as we do with federal courts.

I. STATES' ROLE IN REGULATING COLLECTIVE BARGAINING

When modern lawyers think of collective bargaining, they usually think of federal law. For decades, bargaining in the United States has been governed by the National Labor Relations Act (NLRA).[20] The NLRA regulates labor relations from beginning to end: from elections to decertification, and everything in between.[21] Because the NLRA is so comprehensive, it casts a wide shadow over state law.[22] Any state law regulating the same subjects as the NLRA—or even subjects Congress meant to leave unregulated—is preempted.[23]

Given this state of affairs, one could reasonably wonder what role is left for states. If the NLRA already regulates labor relations from front to back, what can states add? How much does state labor law matter?

The answer is more than you might expect. Though the NLRA is broad, it's also full of holes. Probably the biggest hole includes government workers.[24] States and their political subdivisions, such as towns and counties, are

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[19] *Cf.* ROBERT J. HUME, JUDICIAL BEHAVIOR AND POLICYMAKING loc. 335 (2018) (ebook) (noting that state courts get less attention than federal ones even though the majority of criminal and civil litigation takes place in state courts).

[20] 29 U.S.C. §§ 151–169.

[21] *See* Wis. Dep't of Indus., Labor & Human Relations v. Gould, Inc., 475 U.S. 282, 287 (1986) (describing the NLRA as a "comprehensive regulation of labor relations").

[22] *See id.* (holding that NLRA preempted state law debarring contractors who violated NLRA three times in five years because it added remedies to those prescribed by Congress, and thus deviated from Congress's regulatory scheme).

[23] *See, e.g.*, San Diego Bldg. Trades Council v. Garmon, 346 U.S. 485, 498–99 (1953); Machinists v. Wis. Emp. Relations Comm'n, 427 U.S. 132, 148–51 (1976). *See also Doe v. Google*, No. A157097, slip op. at 8 (Cal. Ct. App. Sept. 21, 2020) (noting that "Congress intended the NLRA to serve as a comprehensive law governing labor relations").

[24] *See* 29 U.S.C. § 152(2) (excluding from the definition of *employer* any "State or political subdivision thereof"); NLRB v. Natural Gas Utility Dist. Of Hawkins Cnty., 402 U.S. 600, 604 (1971)

exempted from the NLRA's coverage.[25] As of 2019, more than 5 million people worked for state governments, plus another 14 million for local ones.[26] So all told, the NLRA's government exemption carves out nearly 20 million workers.[27]

The NLRA also exempts some private-sector workers. For example, the statute excludes agricultural workers,[28] domestic workers, supervisors, and independent contractors.[29] Courts have likewise carved out managers and "confidential personnel" workers.[30] Similarly, some workers are left out because the National Labor Relations Board has declined to regulate them. While this category can shift depending on the Board's views, it has at times included student athletes, teaching assistants, and racetrack employees.[31] And still other workers have been excluded on constitutional grounds. In one notable

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(explaining that Congress intended to "except from Board cognizance the labor relations of federal, state, and municipal governments").

[25] *See Hawkins Cnty.*, 402 U.S. at 604.

[26] Adam Grundy, *The 2019 Annual Survey of Public Employment and Payroll is Out*, U.S. CENSUS (Oct. 7, 2020), https://www.census.gov/library/stories/2020/10/2019-annual-survey-of-public-employment-and-payroll-is-out.html.

[27] *See id.* (reporting state and local employment figures for 2019).

[28] Some studies estimate that this group includes as many as 3 million workers. LANCE A. COMPRA, UNFAIR ADVANTAGE, WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS 173 (2000) (reporting that there are 3 million agricultural workers excluded from the NLRA's coverage). And that estimate may even understate the case. The NLRB's Division of Advice has recently interpreted the exemption broadly to cover even workers in nontraditional industries like the cannabis industry. *See* Memorandum, NLRB Div. of Advice, *Agri-Kind, LLC*, Case No. 04-CA-260089 (Dec. 30, 2020) (concluding that workers in cannabis growing operation were excluded as agricultural workers).

[29] 29 U.S.C. § 152(3).

[30] *See, e.g.*, NLRB v. Hendricks Cty. Rural Elec. Membership Corp., 454 U.S. 170, 176 (1981) (recognizing exception for confidential personnel workers with "labor nexus" in job duties); NLRB v. Yeshiva Univ., 444 U.S. 672, 682 (1980) (recognizing exception for managerial workers).

[31] *See, e.g.*, Prairie Meadows Racetrack & Casino, 324 N.L.R.B. 550, 550 (1997) ("Pursuant to Board precedent and Section 103.3 of the Board's Rules and Regulations, the Board has declined to assert jurisdiction over proceedings involving the horseracing industry."). The Board's position on some of these exemptions occasionally flips. *See, e.g.*, Brown Univ., 342 N.L.R.B. 483 (2004) (holding that student workers were not employees under the NLRA), *overruled by Columbia Univ.*, 364 N.L.R.B. No. 90, slip op. at 1 (Aug. 23, 2016) (holding that student workers were employees); *Northwestern Univ.*, 362 N.L.R.B. No. 167, slip op. at 1 (Aug. 17, 2015) (holding that "it would not effectuate the policies of the Act" to assert jurisdiction over student athletes); Jennifer Abruzzo, NLRB Office of the Gen. Counsel, Memorandum GC 21-08: Statutory Rights of Players at Academic Institutions (Student–Athletes) Under the National Labor Relations Act (Sept. 29, 2021) (taking the position that "certain [p]layers" at academic institutions are employees).

example, the Supreme Court carved out a First Amendment exception for religious schools.[32]

In each of these cases, the carved-out workers fall into a regulatory gap. Federal law does not apply to them, nor does the NLRA's broad preemptive effect.[33] And with no preemption, states are free to apply their own law.[34] For these workers, then, state law matters a great deal.

So it is meaningful when a state enshrines collective-bargaining rights in its constitution. For a large group of the state's workers, the state constitution serves as their primary, and maybe even only, source of bargaining rights.[35] Workers will look to the constitution to understand their rights and responsibilities.[36] And that means they will often look to courts.[37]

Courts, however, haven't always treated bargaining rights uniformly. Some courts have interpreted them modestly, leaving room for legislatures to design bargaining systems within constitutional boundaries. But others have taken it upon themselves to write the rules of bargaining, largely sidelining legislatures. We can see this divide play out in three states: New York, New Jersey, and Missouri. The former took the modest, traditional approach, while the latter two staked out more aggressive positions. The primary difference between them was how they treated a single issue: an employer's duty to bargain in good faith.

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[32] *See* NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 497 (1979) (interpreting NLRA to contain an exception for religious schools); Bethany College, 369 N.L.R.B. No. 98, slip op. at 1 (June 10, 2020) (recognizing exception announced in *Catholic Bishop*).

[33] *See, e.g.*, S. Jersey Catholic School Teachers v. St. Teresa, 150 N.J. 575, 584 (N.J. 1997) (applying state law to employees at religious school, which had been carved out from NLRA by *Catholic Bishop*).

[34] *See id. But see* Alexander MacDonald, *Religious Schools, Collective Bargaining & the Constitutional Legacy of* NLRB v. Catholic Bishop*,* 22 FEDERALIST SOC'Y REV. 134, 134 (2021) (arguing that states erred by applying their own law to schools exempted from coverage by the First Amendment).

[35] *See id.* (applying state constitutional right to bargain to religious school employees); *Molinelli*, 114 N.J. at 96 (applying state constitutional bargaining right to agricultural workers).

[36] *See, e.g.*, *Molinelli*, 114 N.J. at 96; *St. Teresa*, 150 N.J. at 584.

[37] *See Molinelli*, 114 N.J. at 97 (observing that while state legislature had never implemented state constitutional bargaining right through legislation, courts could fashion remedies to implement the right themselves).

II. From Employee Rights to Employer Duties: The Judicial Creation of Mandatory Bargaining

A. New York

In 1938, New York's voters approved a new constitution.[38] The new constitution included at least one provision that was the first of its kind: article I, section 17. That section guaranteed, as a matter of constitutional law, the right to bargain collectively:

> Labor of human beings is not a commodity nor an article of commerce and shall never be so considered or construed. . . . Employees shall have the right to organize and to bargain collectively through representatives of their own choosing.[39]

Though new as a matter of constitutional law, these two sentences would have sounded familiar to many voters. The first echoed the Norris–LaGuardia Act.[40] Passed by Congress only six years earlier, that act mostly barred federal courts from issuing injunctions in local labor disputes.[41] The second sentence, meanwhile, echoed the NLRA's section 7.[42] Section 7 had been adopted even more recently—only three years earlier. And it had used mostly the same words to guarantee bargaining rights. [43] But it did not contain an explicit duty to bargain.[44] Mirroring section 7, New York's new constitution was likewise silent on bargaining duties.[45]

That silence would prove meaningful. In 1945, in *Trustees of Columbia University v. Herzog*,[46] the New York Appellate Division held that section 17 created no affirmative bargaining duty. The case involved a dispute between the New York Labor Board and Columbia University. The Board wanted to

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[38] *See N.Y. Rights of Labor on Public Works Projects, Amendment 6 (1938)*, BALLOTPEDIA, https://ballotpedia.org/New_York_Rights_of_Labor_on_Public_Works_Projects,_Amendment_6_(1938) (last visited Oct. 13, 2021).

[39] N.Y. CONST. art. I § 17.

[40] *See* 29 U.S.C. § 101–115. *See also* Edward H. Miller & John B. Huffaker, *The Application of Anti-Trust Legislation to Labor Unions—Past, Present, and Proposed* 2 S. CAR. L. REV. 205, 206 (1950) (discussing historical context and development of Norris–LaGuardia Act).

[41] Miller & Huffaker, *supra* note 40, at 206.

[42] *See* 29 U.S.C. § 157.

[43] *See id.*

[44] *See id.*

[45] *Compare* 29 U.S.C. § 158(a)(5), *with* N.Y. CONST. art. I § 17.

[46] 269 App. Div. at 30.

force Columbia to bargain with a union.[47] At the time, a state statute required most employers to bargain.[48] But it exempted some employers, including educational institutions.[49] Columbia argued that, as an educational institution, it was exempt under the statute and so had no bargaining duty. The Board disagreed. It claimed that even if Columbia fell within the statutory exemption, the university was still covered by section 17. And section 17 imposed a duty on all employers, whether or not covered by the statute.[50]

The Appellate Division rejected that argument.[51] It pointed out that, if the board were correct, section 17 would effectively nullify all statutory exemptions.[52] Every employer, regardless of the exemptions, would have a duty to bargain.[53] And there was no evidence that section 17's drafters meant to override existing law. To the contrary, it appeared that they had wanted only to affirm "the right of labor to organize and bargain collectively which, in 1935, had found expression in the [statute]."[54]

The New York Court of Appeals affirmed without an opinion.[55] As a result, the Appellate Division's opinion has been the definitive word on the right to bargain in New York. It has been cited to show that while section 17 protects the right to organize and select a representative, it imposes no reciprocal duty on employers.[56] In other words, section 17 is a shield against interference, not a sword to enforce bargaining.[57]

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[47] *Id.*

[48] *Id.*

[49] *Id.* (citing N.Y. Lab. L. § 715)

[50] *See id.* (analyzing parties' arguments).

[51] *Id.*

[52] *Herzog*, 269 App. Div. at 30.

[53] *Id.*

[54] *Id.*

[55] *See* Herzog v. Univ. of Columbia, 295 N.Y. 605, 605 (1945).

[56] *See, e.g.*, Quill v. Eisenhower, 5 Misc. 2d 431, 433 (N.Y. Misc. 1952) ("It is evident that the constitutional provision guaranteeing employees the right to organize and bargain collectively through representatives of their own choosing does not cast upon all employers a correlative obligation."); McGovern v. Local 456, Intern. Broth. Teamsters, 107 F. Supp. 2d 311, 318–19 (S.D.N.Y. 2000) ("Section 17 was 'not intended to invalidate existing legislation which imposed a duty to bargain collectively with employees even though that obligation by reason of certain exemptions or exceptions was not in all respects coextensive with the rights of labor.'" (quoting *Herzog*)).

[57] *See Quill*, 5 Misc. 2d at 433 ("The constitutional provision was shaped as a shield; the union seeks to use it as a sword.").

B. New Jersey

Just to the south, courts followed a different path. New Jersey rewrote its constitution in 1947, about a decade after New York.[58] Like New York, it included a new provision, section 19, guaranteeing the right to bargain collectively:

> Persons in private employment shall have the right to organize and bargain collectively. Persons in public employment shall have the right to organize, present and make known to the State, or any of its political subdivisions or agencies, their grievances and proposals through representatives of their own choosing.[59]

Section 19 shared much with its northern predecessor. Both sections appeared in their respective bills of rights. They each gave private employees the right to "bargain collectively." And they each closely followed NLRA section 7, which framed bargaining rights in similar terms.[60] Given those similarities, one might have expected New Jersey's courts to read section 19 with the way New York courts read their section 17.[61] They might naturally have looked for guidance in New York's caselaw, including *Herzog*.[62] This would have led them to conclude that section 19 protected bargaining rights without also foisting new obligations on employers.[63]

But instead, New Jersey courts diverged. The split emerged in *Johnson v. Christ Hospital*. There, a union sought to represent a nonprofit hospital's employees. At the time, no statute required the hospital to bargain.[64] The only

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[58] *See generally New Jersey Constitutional Proceedings – 1947*, N.J. STATE LIBRARY, https://www.njstatelib.org/research_library/new_jersey_resources/highlights/constitutional_convention/ (last visited Oct. 13, 2021) [hereinafter New Jersey Debates]. For a summary of the convention's handiwork, see John E. Bebout & Joseph Harrison, *The Working of the New Jersey Constitution of 1947*, 10 WM. & MARY L. REV. 337 (1968).

[59] N.J. CONST. art. I § 19.

[60] *Compare id., with* N.Y. CONST. art. I § 17, *and* 29 U.S.C. § 157.

[61] *See* Peck, *supra* note 16, at 768 (observing that in *Johnson*, *infra*, the lower court expressly considered and rejected *Herzog*'s interpretation of section 17).

[62] *See id.*

[63] *Cf. Herzog*, 269 App. Div. at 30 (holding that section 17 created no new bargaining obligation for employers); *Quill*, 5 Misc. 2d at 433 (explaining that New York's section 17 operates as a shield, not a sword).

[64] At the time, the NLRA exempted nonprofit hospitals. The hospitals were covered in the original Wagner Act, but pulled out in the Taft–Hartley Act. They were added back in by a 1974 amendment. *See 1974 Health Care Amendments*, NAT'L LABOR RELATIONS BD., https://www.nlrb.gov/about-nlrb/who-we-are/our-history/1974-health-care-amendments (last visited Oct. 13, 2021).

possible source of a bargaining duty was the new constitution.[65] So when the hospital refused to recognize the union, the union sued under section 19.[66]

The Chancery Division[67] accepted the union's claim. It reasoned that although section 19 never mentioned a duty to bargain, it still implied one.[68] The constitution gave employees the right to bargain.[69] And for that right to mean anything, employers had to have a duty to bargain in return.[70] Any other interpretation would make the right to bargain "impotent."[71] So the court ordered the parties to hold an election.[72] If a majority of employees voted for the union, the union would become the employees' exclusive bargaining agent.[73] And the hospital would have a duty to bargain.[74]

The hospital appealed. Citing *Herzog*, it argued that section 19 protected the right to organize and bargain through a chosen representative.[75] But the constitution imposed no duty on an employer to recognize that representative, much less to sit down and bargain.[76]

The New Jersey Supreme Court rejected that argument. In a summary opinion, it affirmed the Chancery Division's order. It recognized that

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[65] *See Johnson II*, 45 N.J. at 112 (recognizing that no legislation governed a labor dispute between nonprofit hospital and union).

[66] *See* Johnson v. Christ Hosp. (*Johnson I*), 84 N.J. Super. 541, 544 (Ch. Div. 1964) (Chancery Division opinion) (setting out facts in more detail). *See also* Peck, *supra* note 16, at 766 (noting that because the N.J. Supreme Court issued only a memorandum opinion, we have to look at the Chancery Division opinion to understand the background).

[67] The Chancery Division is a trial court handling cases involving equitable relief (i.e., "cases where the person suing is asking for something other than money"). *About the Superior Court of New Jersey*, LSNJLAW.org, https://www.lsnjlaw.org/Courts/NJ-State-Courts/Superior-Court-of/Pages/About-Superior-Court-NJ.aspx#chancery (last visited Nov. 5, 2021).

[68] *Johnson I*, 84 N.J. Super. at 555.

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.* at 567.

[73] *Id.*

[74] *See id.* at 549, 567 (ordering election and accepting proposition that duly elected union becomes exclusive representative).

[75] *See id.* at 552 (outlining arguments made before superior court). *See also* Peck, *supra* note 16, at 766 ("Because the supreme court issued only a per curiam opinion affirming the superior court's judgment, resort must be made to the superior court's opinion for much of the reasoning supporting the decision.").

[76] *Id.*

imposing a bargaining duty was not a matter of simply applying the text.[77] Section 19 was not a comprehensive labor-relations statute; it cast bargaining rights only in "general terms."[78] The text offered no details on implementation and no mechanism for enforcement.[79] No cause of action appeared, nor did any remedies. Nowhere could the court find guidance on how to put meat on the new right's bones.[80] But even so, the court had a duty to enforce the constitution, whatever its ambiguities.[81] It would be "derelict" in that duty if it left the union without a remedy.[82] Section 19 left gaps, but someone had to fill them.[83] The Chancery Division had therefore been right to order an election and, if the union won, to order bargaining.[84]

In the same breath, however, the court recognized that judge-fashioned solutions were less than ideal in this space. Courts were not well suited to write day-to-day bargaining rules. The proper body to write those rules was the legislature. So the court called on the legislature to fill out section 19's skeletal structure:

> In the present state of the law the courts have the general power and the duty to determine justiciable labor disputes between nonprofit hospitals and their employees. At the same time we recognize that it is more expedient to have the day-to-day problems arising out of disputes concerning wages, hours and conditions of employment regulated by over-all legislation, than for the courts to set about the establishment of procedural and substantive precedents on a case-to-case basis.[85]

But the court's call went unheeded. In the years following *Johnson*, no general labor law was forthcoming. Nor did any other guidance emanate from the legislature. Section 19 remained elliptical, and key questions remained unanswered. Most important, with whom did the employer have a duty to bargain? The Chancery Division had embraced majority rule, with majority

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[77] *See Johnson II*, 45 N.J. at 111 n.1

[78] *Id.*

[79] *See id.*

[80] *See id.* (noting lack of legislative implementation and enforcement mechanism).

[81] *See id.* (reasoning that the court would be "derelict" in its duty if it failed to provide a remedy).

[82] *Id.*

[83] *See id.*

[84] *See id.*

[85] *Id.* at 112.

status determined by an election.[86] And by affirming, the supreme court seemed to endorse that approach.[87] But the question remained without a definitive answer. By getting support from a majority, did the union win the right to represent everyone? Or did dissenters keep some bargaining rights for themselves?

The New Jersey Supreme Court eventually answered that question, but again, only implicitly. In *Comite Organizador v. Molinelli*, the court considered a suit by a group of farmworkers and their union. A majority of the workers signed cards designating the union as their representative.[88] When the union presented the cards to the farm, the farm refused to bargain. Instead, it fired the whole group of workers.[89] The union sued, and the Chancery Division ordered an election.[90] The union won the election and again demanded bargaining. But the farm refused a second time, and the union sued again.[91] The Chancery Division again found that the farm had unlawfully failed to bargain and ordered it to recognize the union.[92] But again, rather than sit down with the union, the farm appealed. It argued that despite the outcome in *Johnson*, section 19 imposed no duty to bargain on employers.[93]

The supreme court disagreed. Section 19, it explained, gave all employees the right to bargain. That right would be "emasculated" if the employer had no duty to bargain in return.[94] A majority of the workers had twice chosen a representative, and the farm had twice refused to respect their choice.[95] So again, echoing *Johnson*, the court held that the Chancery Division had been right to order an election, and following the election, to order the farm to bargain.[96]

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[86] *See Johnson I*, 84 N.J. Super. at 549.
[87] *See Johnson II*, 45 N.J. at 110–11.
[88] *Molinelli*, 114 N.J. at 91.
[89] *Id.*
[90] *Id.* at 91–92.
[91] *Id.* at 92.
[92] *Id.*
[93] *See id.* at 97.
[94] *Id.*
[95] *Id.* at 91–92.
[96] *See id.* at 97–98.

Some of this reasoning may have been driven by bad facts. The farm explained its decision to fire the workers by saying that it had closed its operations.[97] But parts of those operations remained open, and the farm continued to employ other workers.[98] So its explanation carried more than a waft of mendacity. The farm had also failed to pay Social Security taxes on the workers' wages—a fact irrelevant to the issue at hand, but one that still made its way into the court's opinion.[99] And maybe worst of all, at least in the court's eyes, the farm had never asked to set aside the Chancery Division's original order.[100] It had simply ignored the order and continued to reject the union.[101] The supreme court could hardly stomach such brazen disregard for judicial authority.

Whatever role these facts played, the result was clear. Section 19 not only protected employees from interference, but also imposed an affirmative bargaining duty on employers.[102] And that duty attached to a single union, chosen by a majority vote.[103] The duty to bargain and exclusive representation had been lashed together.[104] As a unit, they had been firmly embedded in the state's constitutional law.

C. Missouri

Missouri would reach the same conclusion, if only belatedly. The state rewrote its constitution in 1945.[105] Among the new constitution's features was a right to bargain collectively.[106] The right appeared in article I, section 29, which read: "[E]mployees shall have the right to bargain collectively through representatives of their own choosing."[107]

Like New York's and New Jersey's constitutions, Missouri's new constitution mirrored section 7 of the NLRA. Like section 7, it guaranteed a right to bargain collectively through a chosen representative. Also like section 7, it said nothing about an employer's duty to bargain.

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[97] *Id.* at 92.
[98] *Id.*
[99] *See id.* at 94.
[100] *Id*. at 92.
[101] *See id.*
[102] *See id.* at 97.
[103] *See id.*
[104] *See id.*
[105] *See Missouri Constitution*, BALLOTPEDIA, https://ballotpedia.org/Missouri_Constitution (last visited Oct. 14, 2021).
[106] *See* MO. CONST. art. I § 29.
[107] *Id.*

That omission soon became important. In *Quinn v. Buchannan*, the Missouri Supreme Court held that section 29 created no new bargaining duties.[108] The case concerned a group of truckers, who had designated a local chapter of the Teamsters as their representative.[109] The Teamsters collected authorization cards from the truckers and presented the cards to the employer.[110] The employer responded by insisting that he would never have a union in his company.[111] He refused to recognize the Teamsters and, instead, fired the truckers.[112]

The truckers sued.[113] They argued that by firing them, the employer had violated their rights under section 29.[114] They sought damages, reinstatement, and an order forcing the employer to bargain.[115]

The Missouri Supreme Court agreed with them in part. It reasoned that section 29 gave the truckers a right to choose a bargaining representative.[116] That right implied the right to make an uncoerced choice.[117] And coercion was exactly what they had experienced: they had been fired for joining a union and demanding bargaining.[118] So section 29 entitled them to relief, including damages and reinstatement.[119] It did not, however, entitle them to a bargaining partner.[120] It said nothing about an employer's duty, and nothing in the records of the constitutional debates suggested that the drafters meant to create one.[121] The drafters had not written section 29 as a "labor relations

[108] 298 S.W.2d at 415.
[109] *Id.* at 416.
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Id.* at 416–17.
[114] *Id.*
[115] *Id.*
[116] *Id.* at 417.
[117] *Id.* at 417
[118] *Id.*
[119] *See id.*
[120] *Id.* at 419.
[121] *Id.*

act, specifying rights, duties, practices, and obligations."[122] If those obligations and duties were to exist, they would have to come from legislation.[123]

In this way, *Quinn* followed the *Herzog* model.[124] It found gaps in the constitutional language, but refused to fill them with judge-made solutions.[125] It instead applied the words as written and left legislators to fill in the rest.[126] It recognized that legislators, not courts, should decide whether and when to require bargaining.[127]

But unlike *Herzog*, *Quinn* would not stand the test of time. In 2012, some sixty years after *Quinn*, the Missouri Supreme Court reversed course. In a pair of decisions, it repudiated *Quinn* and held that section 29 did, in fact, create a duty to bargain.

The first decision came in *Eastern Missouri Coalition of Police v. City of Chesterfield*.[128] *Chesterfield* involved a drive to unionize police officers.[129] At the time, a Missouri statute gave bargaining rights to some state and local employees, but exempted police.[130] On the strength of that exemption, the city refused to recognize the officers' union.[131] The union responded by suing.[132] A trial court held that despite the exemption, the officers had a right to bargain under section 29—and that the city had a duty to bargain in return.[133]

On appeal, the supreme court affirmed. It announced that the city had a duty to "meet and confer" with the union—despite the contrary conclusion in *Quinn*.[134] *Quinn*, it said, rested on an unstated assumption: that constitutional rights were inherently negative.[135] But that assumption was not invariably true. Nothing in doctrine or structure prevented constitutions from

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[122] *Id.* at 418.

[123] *See id.* ("Thus implementation of the right to require any affirmative duties of an employer concerning [the right to bargain] is a matter for the Legislature.").

[124] *See id.* (citing *Herzog*, 53 N.Y.S.2d at 617)).

[125] *See id. See also* Peck, *supra* note 16, at 769 (contrasting *Quinn* with *Johnson*, the latter of which was an example of judicial invention).

[126] *See Quinn*, 298 S.W.2d at 418–19.

[127] *See id.* at 419.

[128] 386 S.W.3d 755 (Mo. 2012).

[129] *Id.* at 758.

[130] MO. REV. STAT. § 105.500 (exempting public-safety labor organizations from coverage).

[131] *See Chesterfield*, 386 S.W.3d at 758–59.

[132] *Id.* at 758.

[133] *Id.* at 758–59.

[134] *Id.* at 758.

[135] *Id.* at 761.

creating positive rights.[136] In fact, many other states had found positive rights in their constitutions. For example, Connecticut courts had found a positive constitutional right to an equal educational opportunity.[137] Montana courts had found a positive right to observe government meetings and inspect certain public documents.[138] Those decisions showed that constitutions could, in some cases, create positive rights. Nothing prevented section 29 from doing the same.[139] *Quinn*'s contrary assumption was flawed, and that flaw undermined the rest of its rationale.[140]

The court continued in this vein in a second case, *American Federation of Teachers v. Ledbetter*. *Ledbetter* involved negotiations between a teachers' union and a board of education.[141] Like police officers, teachers were exempted from Missouri's public-sector labor law.[142] Even so, the board voluntarily recognized the union and bargained with it for about a year.[143] The negotiators met nearly twenty times and came to a tentative agreement.[144] But when the deal was presented to the board, the board rejected it.[145] The board was particularly unhappy about the tentative deals on tenure and pay.[146] Because negotiations had carried on so long, there was little time to go back to the table; the next school year was fast approaching.[147] So rather than make a

[136] *See id.* at 762 (observing that there is no rule against placing affirmative rights in the constitution, as opposed to negative rights). *See also* ZACKIN, *supra* note 11, at loc. 158 (making the same point).

[137] *Chesterfield*, 386 S.W.3d at 762 (citing Sheff v. O'Neill, 678 A.2d 1267, 1284–85 (Conn. 1996)).

[138] *Id.* (citing Great Falls Tribune v. Mont. Pub. Serv. Comm'n, 82 P.3d 876, 886 (2003)).

[139] *See id.* ("Likewise article I, section 29 of the Missouri Constitution imposes on employers an affirmative duty to bargain collectively.").

[140] *See id.* (overruling *Quinn*). This characterization of *Quinn*'s rationale was tenuous. Overtly, *Quinn* rested its conclusion not on assumptions about constitutional structure, but on the constitutional text at issue. It pointed out that the text of section 29 "required no affirmative duties." *Quinn*, 298 S.W.2d at 419. It never said that constitutions could not create positive rights; it said only that section 29 did not create one. *See id.*

[141] *Ledbetter*, 387 S.W.3d at 362.

[142] *Id.* at 363 (citing MO. REV. STAT. § 105.510).

[143] *See id.* at 362.

[144] *Id.*

[145] *Id.* at 362.

[146] *See id.*

[147] *Id.*

counterproposal, the board announced new salaries and sent individual contracts to the teachers.[148]

The union sued.[149] It argued that by making individual offers, the board had failed to bargain in good faith.[150] It conceded that the teachers were excluded by the statute. Even so, it claimed that they had a right to bargain under section 29, and that the school board had a reciprocal duty to bargain.[151]

Relying on *Quinn*, a trial court rejected that argument.[152] But the supreme court reversed.[153] Building on *Chesterfield*, the court reasoned that section 29 gave every employee, public or private, the right to bargain collectively.[154] That right would be empty if the employer had no duty to bargain in good faith.[155] Were it otherwise, the employer could stymie bargaining by using "surface" negotiation tactics.[156] Or worse, it could refuse to bargain at all.[157] Employees would have no way to force the issue; their bargaining rights would mean little more than the right to present grievances.[158] And for public employees, that would make their bargaining rights no different from the right to petition the government—i.e., their employer—making their rights would be effectively redundant.[159] The drafters surely hadn't meant to duplicate existing rights.[160] They must have meant to give employees something meaningful. So the right to bargain must imply a reciprocal duty.[161]

To bolster that conclusion, the court looked to federal law.[162] It argued that while nothing in the constitutional debate records showed that the

[148] *Id.*

[149] *Id.* at 363.

[150] *Id.* at 361.

[151] *See id.*

[152] *Id.* at 362.

[153] *Id.* at 361.

[154] *See id.* at 363 ("When a procedural framework for bargaining is not codified, i.e., for excluded employees, the lack of a framework does not excuse the public employer from its constitutional duty to bargain collectively with public employees.").

[155] *Id.* at 364.

[156] *Id.*

[157] *Id.* at 364.

[158] *Id.*

[159] *See id.* ("In situations in which the employer is a government entity, that interpretation would make the right redundant because this goes no further than the limited right to petition the government already guaranteed by the First Amendment of the United States Constitution and article I, sections 8 and 9 of the Missouri Constitution.").

[160] *See id.* at 364.

[161] *See id.*

[162] *See id.* at 364–66 (examining federal authorities).

drafters meant to create an affirmative duty, contemporary federal authorities suggested that they may have assumed they were creating one anyway.[163] In the early 20th century, the War Labor Board,[164] the Railway Labor Board,[165] and the National Labor Board[166] had each concluded that the right to bargain collectively implied a reciprocal duty.[167] Section 29's drafters must have been aware of those decisions and would have known that "collective bargaining" had become a term of art.[168] So they likely knew they were creating a duty to bargain, even if they never acknowledged it.[169]

The court's decision was not unanimous. It drew a spirited dissent from Judge Zel M. Fischer, who accused the majority of reading new words into the constitution.[170] He pointed out that section 29 never mentioned a duty to bargain.[171] It used no words like duty, recognition, or good faith.[172] Instead, it simply gave employees a right to choose their bargaining representatives.[173] By expanding that right to include a reciprocal duty, he said, the majority was glossing the text with its own policy judgments.[174]

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[163] *See id.* at 364 n.4 ("[The debates] do not give any indication as to whether the right impose an affirmative duty, a sword that can compel employers to bargain, or whether it created only a negative duty, a shield that prohibits public and private employers from impeding the organization of labor unions.").

[164] *Id.* at 365 (citing *Amalgamated Meat Cutters & Butcher Workmen of Am. v. W. Cold Storage Co.*, Nat'l War Labor Bd. Docket No. 80 (1919)).

[165] *Id.* (citing *Int'l Ass'n of Machinists*, 2 R.L.B. 87, 89 (1921)).

[166] *Id.* (citing *Conn. Coke Co.*, 2 N.L.B. 88, 89 (1934)).

[167] For more background on these decisions and the development of the duty to bargain under federal law before 1935, see generally, Richard Miller, *The Enigma of Section 8(5) of the Wagner Act*, 18 ILR REV. 166 (1965).

[168] *See Ledbetter*, 387 S.W.3d at 365 (concluding that by "1945, when article I, section 29 was adopted . . . the words 'bargain collectively' were common usage for negotiations conducted in good faith and looking toward a collective agreement").

[169] *See id.*

[170] *See id.* at 373 (Fischer, J., dissenting) ("T]his Court still does not have the authority to read words into the Constitution and particularly to read words into the Constitution that drastically redefine the long established meaning of its actual words.").

[171] *Id.* at 368.

[172] *Id.*

[173] *Id.*

[174] *Id.* at 368.

Judge Fischer also found it odd that the majority put so much emphasis on federal law while ignoring what section 29's drafters actually said.[175] Looking to the convention debates, he found no evidence that the drafters meant to create a new bargaining duty.[176] Instead, by their own words, they were trying only to protect bargaining rights against legislative interference.[177] They said that section 29 would "preclude the possibility and the probability . . . [of] many bills being introduced seeking to destroy collective bargaining."[178] But they never said they wanted to expand bargaining beyond its current status under state law, much less adopt federal law in its entirety.[179]

He likewise disagreed that a duty was necessary to make bargaining rights meaningful. Even without a duty, section 29 would protect employees from interference.[180] For example, in *Quinn* itself, the court granted relief to employees fired for joining a union.[181] That kind of retaliation was illegal under section 29 and well within the court's power to remedy.[182] But it was not within the court's power to convert section 29 into a full-blown labor-relations act.[183] The court had no authority to impose a new duty, much less to create the rules that went along with it.[184] That kind of detailed rulemaking could be done only by the legislature.[185] By taking that task upon itself, the majority had overstepped its proper judicial role.[186]

III. The Textual, Historical, and Structural Flaws of Judicially Imposed Bargaining

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[175] *Id.* at 369.

[176] *Id.*

[177] *See id.* at 373 (Fischer, J., dissenting) ("[A]rticle I, section 29, was intended to protect from legislative or employer interference [with] the right of employees to organize and bargain through a representative of their own choosing.").

[178] *Id.* at 369 (quoting 8 Debates of the 1934–44 Constitutional Convention of Missouri 2517 (1943–44) [hereinafter Missouri Debates]).

[179] *See id.* at 373 (concluding that the affirmative duty to bargain collectively was "entirely a new creation by the principal opinion in this case").

[180] *Id.* at 372.

[181] *Id.* at 371–72 (citing *Quinn*, 298 S.W.2d at 420).

[182] *Id.*

[183] *Id.* at 372 (Fischer, J., dissenting).

[184] *See id.* (noting that section 29 did not enact a comprehensive labor-relations statute).

[185] *See id.* ("Perhaps modern industrial conditions make desirable more than that for best labor relations but that is a matter for the Legislature."(quoting *Quinn*, 298 S.W.2d at 420)).

[186] *See id.*

These decisions show how rights can develop in unexpected directions. In New York, courts read bargaining rights modestly and fit them into existing law.[187] Missouri courts did the same for nearly sixty years.[188] But later, Missouri courts abandoned that approach and imposed an unwritten bargaining duty. [189] And in New Jersey, courts took the duty-to-bargain approach from the beginning. [190]

What emerges is a lesson in unintended consequences. When planted in a governing document, even the barest of texts can sprout a tangle of judicial glosses.[191] And that kind of tangle can be hard to pull back from. Having waded into the thicket, courts struggle to extract themselves. Witness how New Jersey's and Missouri's courts took one step beyond the text—inferring an unwritten duty to bargain—and quickly found themselves straying even further. Lacking any statute or administrative system to fall back on, they reached for federal concepts—good faith, majority elections, and exclusive representation—rather than simply hewing to the plain text and the original meaning of their constitutions.[192]

A. Text

Nothing in the text of either Missouri's or New Jersey's constitution supported a duty to bargain. The relevant texts said that employees had the right to bargain collectively through representatives of their choosing.[193] But they said nothing about an employer's duty. They used no words like "duty to

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[187] *See Herzog*, 269 App. Div. at 30.

[188] *See Quinn*, 298 S.W.2d at 418.

[189] *See Ledbetter*, 387 S.W.3d at 363–65.

[190] *See Johnson*, 45 N.J. at 111–12.

[191] *See, e.g.*, *Chesterfield*, 386 S.W.3d at 761 (reversing *Quinn* after sixty years of unbroken interpretation of unchanged constitutional language). *See also* 8 Missouri Debates, *supra* note 178, at 310 (statement of Judge Robert Carey) (arguing that collective bargaining was so ill defined that the drafters wouldn't know what it meant until a court told them).

[192] *See, e.g.*, *Johnson II*, 45 N.J. at 111–12 (accepting Chancery Divisions decision to order an election to determine exclusive representative); *Johnson I*, 84 N.J. Super. at 459 (endorsing concept of exclusive representation, borrowed from federal law); *Ledbetter*, 387 S.W.3d at 363–65 (relying on federal authorities to read bargaining duty into state constitution).

[193] *See* N.J. CONST. art. I § 19; MO. CONST. art. I § 29.

bargain," "meet and confer," or "good faith." They offered no textual hook for an affirmative bargaining duty.[194]

Without such a hook, courts had to infer a duty. And to justify that inference, they had to borrow from federal law.[195] They pointed out that federal law required employers to bargain in good faith—i.e., with a genuine desire to make an agreement.[196] The state constitutional drafters were writing against the backdrop of federal law and surely would have been aware of it. So, they reasoned, the drafters must have assumed a similar requirement would apply under the state law provisions they were drafting.[197]

But that analysis glides over differences in the relevant texts. Both constitutions mirrored section 7 of the NLRA, which gave employees a right to bargain collectively.[198] Section 7 predated the two constitutions, so it was reasonable to assume that the drafters thought of it as a rough model. But that assumption doesn't lead us to a bargaining duty, because there is no bargaining duty in section 7. The federal bargaining duty comes from a different part of the NLRA—section 8(a)(5).[199] That section makes refusing to bargain an unfair labor practice.[200] Likewise, section 8(d) (added later) explains that the duty to bargain includes the duty to "meet at reasonable times and confer in good faith."[201] Both 8(a)(5) and 8(d) would be redundant if section 7 imposed a duty to bargain on its own.[202] They are necessary only because section 7's language doesn't do the job.

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[194] *See* Peck, *supra* note 16, at 729 (criticizing *Johnson* for going "beyond what is immediately suggested by a reading of the supporting texts" and engaging in "judicial creativity").

[195] *See, e.g.*, *Molinelli*, 114 N.J. at 97 (explaining that because section 19's scope was unclear, court looked to federal "experience and adjudications" to determine rights and remedies under state constitution); *Ledbetter*, 387 S.W.3d at 364–65 (looking at federal agency interpretations to determine scope of bargaining rights under state constitution). *See also* Lullo v. Int'l Ass'n of Fire Fighters, 55 N.J. 409, 422–23 (N.J. 1970) (citing federal agency interpretations to uphold exclusive-representation scheme under state public-sector labor law).

[196] *See Ledbetter*, 387 S.W.3d at 364–65. *See also Lullo*, 55 N.J. at 422–23.

[197] *Ledbetter*, 387 S.W.3d at 364–65; *Johnson I*, 84 N.J. Super. at 459.

[198] *See* 29 U.S.C. § 157.

[199] *See id.* § 158(a)(5). When Missouri and New Jersey rewrote their constitutions, section 8(a)(5) was numbered 8(5). *See* Miller, *supra* note 167, at 168–78 (discussing development of duty to bargain before and after passage of section 8(5)).

[200] 29 U.S.C. § 158(a)(5).

[201] *Id.* § 8(d).

[202] *See* Miller, *supra* note 167, at 180 (explaining that Senate added section 8(5) because duty to bargain was not clear in section 7 alone).

At least, that's how the NLRA's drafters saw it. When the NLRA was first proposed, some in Congress wanted to let section 7 stand alone.[203] Chief among them was the statute's sponsor, Senator Robert Wagner.[204] Wagner told various Senate committees that section 7 implicitly required employers to bargain in good faith.[205] But the broader Senate rejected that interpretation.[206] Several senators observed that, without a clear textual hook in section 7, employers might have no enforceable duties.[207] So they added section 8(5), and later section 8(d), to spell the duty out explicitly.[208]

No similar additions were made in Missouri or New Jersey. The drafters gave employees the right to bargain collectively, but they said nothing about an employer's duty. Had they wanted to create such a duty, they could easily have done so. They only had to look at what the U.S. Senate had done with section 8(5). But they chose not to do that. Instead, they adopted language mirroring section 7—and only section 7.

Sound constitutional interpretation should treat that choice as meaningful.[209] As Judge Fisher observed in his *Chesterfield* dissent, courts have no power to amend constitutional text.[210] They cannot add words simply because they think the text would work better with a little embellishment. They must apply the text as written. And as written, sections 19 and 29 impose no duty on employers.[211]

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[203] *See id.* (describing position of Sen. Wagner).

[204] *See id.*

[205] *Id.*

[206] *See id.* (describing committee reactions and quoting from legislative history).

[207] *See id*. at 173 (quoting NAT'L LABOR RELATIONS BD., LEGISLATION HISTORY OF THE NATIONAL LABOR RELATIONS ACT OF 1935 38 (Washington: GPO 1949)).

[208] *See id.* at 180.

[209] *See Ledbetter*, 387 S.W.3d at 368–69 (Fischer, J., dissenting) (arguing that a court must undertake to ascribe to the words of a constitutional provision the meaning that the people understood them to have when the provision was adopted").

[210] *See id.* at 373 ("T]his Court still does not have the authority to read words into the Constitution and particularly to read words into the Constitution that drastically redefine the long established meaning of its actual words.").

[211] *See id.* at 368 (pointing out that section 29's plain language creates no duty to bargain).

B. History

If the mandatory-bargaining approach makes little sense as a matter of text, it makes even less sense as a matter of history. To understand why, we have to start with the common-law baseline. At common law, a party had no duty to bargain.[212] She was free to bargain or not bargain with whomever she chose.[213] The concept of "good faith" came into play in only limited circumstances. A party could not entice another person into a contract through fraud, nor could she deny a contract when she had induced the other party to rely on her representations. But outside those situations, no "good faith" obligation attached. No one had to negotiate with a genuine desire to make an agreement. If a party didn't want an agreement, she could walk away—or never bargain to begin with.[214]

These same principles applied to bargaining between employers and unions.[215] The common law recognized no duty for either party to bargain, much less bargain in good faith.[216] Instead, the law respected an employee's right to choose a bargaining representative, typically a union.[217] It then left the union with the normal tools for extracting an agreement. The union could approach the employer through persuasion, protests, or displays of

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[212] *See, e.g.*, Local 47 v. Hospital, 11 Ohio Misc. 218, 226 (Ohio Com. Pleas 1967) ("There is not a word in Ohio's common-law rule book that says an employer must, against his will, bargain collectively."); Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357, 1364 (1983) (explaining the common-law default: "Every person owns his own person and can possess, use and dispose of his labor on whatever terms he sees fit."). *Cf.* Getman & Kohler, *supra* note 15, at 1421 (observing that Congress judged the common-law method too limited to address industrial society's emerging labor issues, and so enacted a "new" bargaining paradigm with the NLRA).

[213] *See* Epstein, *supra* note 212, at 1395 (explaining that under common law, courts did not force parties to bargain; they merely enforced agreements voluntarily made).

[214] *See id.* ("Limited in this way, the principle of 'good faith' clearly has no bite in the area of labor relations, as employers can easily avoid the twin pitfalls of precontractual reliance and misrepresentation.").

[215] *See id.* at 1365–69 (explaining that early common law allowed formation of unions, but did not dictate outcome of labor disputes; it left the parties to determine their own agreements.)

[216] *See* Petri Cleaners v. Auto. Emp., Etc., Local No. 88, 53 Cal.2d 455, 470 (Cal. 1960) (Traynor, J.) (explaining that there was no duty to bargain collectively at common law; the employer's decision to bargain was left to the "free interaction of economic forces").

[217] *See* Epstein, *supra* note 212, at 1365, 1394 (noting that formation of labor unions and collective bargaining were fully consistent with common law; just as one employee was free to bargain for the terms under which she would sell her labor, so was a group of employees).

economic strength.[218] It could use skill or tact or weight of numbers.[219] But it could not sue to force the employer to the table.[220] Likewise, the employer could respond with its own economic weapons, such as hiring replacements. Or it could take a less drastic approach and bargain voluntarily.[221] But it had no legal right to dictate the union's bargaining behavior.

The NLRA, of course, changed all that.[222] It deliberately departed from the common law and imposed a duty to bargain on both parties.[223] That mandate marked a sea-change in the law of labor relations, and it still colors our views of bargaining today.[224] But in the 1940s, when their constitutions were drafted and passed, neither Missouri nor New Jersey had anything like the NLRA. They had no general statute imposing a duty to bargain.[225] So for them, the relevant baseline was still the common law.[226]

The constitutional drafters had no intent to upset that baseline. In the contemporary debates, supporters of both provisions assured their

[218] *See Petri Cleaners*, 53 Cal.2d at 470 (finding no duty to bargain collectively absent statute departing from common law).

[219] *See id. See also Local 47*, 11 Ohio Misc. at 226 (surveying cases from multiple jurisdictions refusing to recognize a common-law duty to bargain).

[220] *See Local 47*, 11 Ohio Misc. at 224 (rejecting union's attempt to force bargaining because the union failed to show that the employer had a "clear duty" to bargain under the common law). *See also* Peters v. S. Chicago Cmty. Hosp., 235 N.E.2d 842, 846 (Ill. App. Ct. 1968) ("Courts may not formulate labor rules or policies when the legislature has failed to do so."); Tate v. Phila. Transportation Co., 410 Pa. 490, 499 (1963) (recognizing that absent legislation, a court cannot require collective bargaining).

[221] *See Petri Cleaners*, 53 Cal.2d at 470 (explaining that the common law left bargaining decisions to the free interaction of economic forces).

[222] Epstein, *supra* note 212, at 1394–95 (observing that Wagner Act marked a dramatic departure from common-law baseline). *See also* Peck, *supra* note 16, at 753–54 (observing that after the Norris-LaGuardia Act removed the threat of injunctions, labor and management were on equal footing, and each could support their positions with shows of economic strength).

[223] *See* 29 U.S.C. § 158(a)(5), (d). *See also* Labor Bd. v. Laughlin, 301 U.S. 1, 31 (1937) (observing that charge under the NLRA is "not a suit at common law or in the nature of such a suit. The proceeding is one unknown to the common law. It is a statutory proceeding").

[224] *See* Epstein, *supra* note 212, at 1394–95 (discussing how Wagner Act changed the common-law baseline).

[225] *See Johnson II*, 45 N.J. at 112 (lamenting absence of legislation to manage day-to-day labor relations); *Quinn*, 298 S.W.2d at 417 (noting absence of legislation providing for enforcement of section 29).

[226] *See* Epstein, *supra* note 212, at 1395 (arguing that the appropriate baseline on which to judge the changes wrought by the NLRA is the common law).

convention colleagues that they were creating no new rights.[227] They did not mean to give any special privileges to labor.[228] Instead, they were trying to do only two things: (1) recognize employees' preexisting right to bargain collectively through their chosen representatives; and (2) protect that right from legislative and judicial erosion.[229]

In New Jersey, this position was articulated by multiple delegates. Frank Eggers, the mayor of Jersey City, insisted that section 19 gave nothing "special" to unions.[230] It was "merely declarative" of employees' "inherent right" to bargain collectively.[231] Likewise, Spencer Miller, an NYU professor of industrial relations, said that section 19 would protect employees' rights to "unite" and "exert influence" on their employers.[232] It would allow them to "withhold[] their labor of economic value" and force the employers to "pay them what they thought it was worth."[233] Such a right would not be new—it had already existed for "nearly a hundred years."[234]

Reacting to these arguments, some delegates questioned section 19's utility. If it would create no new rights, why put it in the constitution?[235] In response, supporters pointed to hostile legislators.[236] True, the supporters said, the right to bargain already existed; it was inherent and longstanding.[237] But that hadn't stopped it from coming under constant attack.[238] Lawmakers—federal and state—had shown they could not be trusted to leave

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[227] *See* 8 Missouri Debates, *supra* note 178, at 2509 (statement of Mr. Wood) ("Of course by this simple line in our Constitution we do not establish the rights of labor. Those rights already exist."); 3 New Jersey Debates, *supra* note 58, at 239 (statement of Mr. Parsonnet) (conceding that labor already had the rights guaranteed by section 19).

[228] *See* 8 Missouri Debates, *supra* note 178, at 2513 (stating that "members of organized labor are not asking any special privileges"); 1 New Jersey Debates, *supra* note 58, at 325 (statement of Mr. Eggers) (denying that labor was seeking "something special" with its proposed amendment).

[229] *See* 8 Missouri Debates, *supra* note 178, at 2513 (arguing that the provision was necessary to combat legislation hostile to labor rights); 1 New Jersey Debates, *supra* note 58, at 325 (arguing that recent history had shown that the legislature could not be trusted to protect labor rights in the future).

[230] 1 New Jersey Debates, *supra* note 58, at 325.

[231] *Id.* at 325.

[232] *Id.* at 317.

[233] *Id.*

[234] *Id.*

[235] *See* 3 New Jersey Debates, *supra* note 58, at 128 (statement of Mr. Holderman), 239 (exchange between Judge Carey and Mr. Parsonnet).

[236] *See id.* at 317 (statement of Mr. Miller), 325 (statement of Mr. Eggers).

[237] *See id.* at 314 (statement of Mr. Park), 321 (statement of Mr. Berry).

[238] *See id.* at 129 (pointing to "restrictive legislation" recently passed in Congress).

bargaining rights untouched.[239] Section 19 would forever put bargaining rights beyond their reach. It was intended, in short, to prevent legislative backsliding.[240]

The same position was taken by supporters in Missouri. Section 29's chief advocate, R.T. Wood, explained that by enshrining bargaining rights in the constitution, labor was not gaining anything new.[241] It already had the right to bargain collectively. Section 29 would merely recognize labor's rights and elevate them to constitutional status.[242]

As in New Jersey, skeptics pounced on this line of reasoning. If employees already had the right to bargain collectively, the skeptics asked, what would section 29 do?[243] Why put it in the constitution at all? In response, Wood gave a now familiar answer:

> *Mr. Darmon:* Mr. Wood, does the labor [sic] now have the right to organize and bargain collectively in this state?
>
> *Mr. Wood (of Greene):* Oh yes. Everyone knows that. That's true.
>
> *Mr. Darmon:* What rights or powers if any, do you seek to obtain by this proposal that you do not now have?
>
> *Mr. Wood (of Greene):* Well, Mr. Darmon, if it is in our state constitution we will preclude the possibility as has happened in the past, in future sessions of the Legislature, many bills being introduced seeking to destroy collective bargaining.[244]

This exchange shows that section 29 was supposed to protect existing bargaining rights from legislative sabotage.[245] It created no new rights, but rather "recognized" that "the members of organized labor [had] the same right to organize and bargain collectively in [their] own interest as every other organization and every other group."[246]

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[239] *See id.* at 128, 325.
[240] *See id.* at 325.
[241] 8 Missouri Debates, *supra* note 178, at 2509.
[242] *See id.*
[243] *See id.* at 2517 (questioning by Mr. Darmon).
[244] *Id.* at 2518.
[245] *See id*. (response of Mr. Wood).
[246] *Id.*

On the flip side, neither Wood nor any other supporter said that section 29 would force employers to bargain.[247] And if they had meant to force employers to bargain—a dramatic departure from the common-law baseline—one would have expected them at least mention it.[248] That no one did is a strong indication that we should take them at their word: they really did mean to preserve the status quo.[249]

It may come as a surprise that the drafters saw their handiwork in such modest terms. After all, they were inscribing rights into their fundamental organizing documents. Surely, they meant those rights to be meaningful. But their accomplishments seem modest only if we view them through a modern lens. We now have nearly a century's worth of experience with the NLRA; given that experience, we take bargaining rights for granted. The duty to bargain is baked into modern labor law. It is as natural to us as the common-law standard was to our predecessors. But to convention delegates in the mid-1940s, bargaining rights seemed far less secure. The delegates had only a few years' experience with the NLRA, and they could still remember a time when bargaining rights seemed quite precarious. Indeed, it was not so long before that labor unions faced threats to their very existence.

The most acute threat had come from the aggressive use of labor injunctions.[250] The injunction was an ancient remedy with deep roots in the common law.[251] Courts originally used it to prevent irreparable injuries to land.[252] But they gradually expanded it over time to cover other kinds of property, including business interests.[253] In the late 1800s, some courts started using it to tamp down labor disputes.[254] They reasoned that labor disputes posed serious threats to business interests, and so could be enjoined when paired with an "unlawful" motive—e.g., the intent to harm another person's property.[255]

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[247] *See id.* (explanation of Mr. Wood regarding the provision's purpose, given that workers already had the right to bargain collectively).

[248] *See Ledbetter*, 387 S.W.3d at 368 (Fischer, J., dissenting) (noting that section 29's supporters described it only as a "protective measure" against future legislation).

[249] *See id.* (asserting that the constitutional provision was necessary to protect rights against future legislative erosion).

[250] For a general overview of the labor injunction and its place in the history of the labor movement, see Robert M. Debevec, *The Labor Injunction—Weapon or Tool*, 4 CLEV.-MARSHALL L. REV. 102 (1955).

[251] *See id.* at 104 (tracing origins to remedies issued by British Chancery courts).

[252] *Id.*

[253] *Id.*

[254] *Id.* at 105 (citing Johnston Harvester Co. v. Meinhardt, 60 How. Pr. 168 (N.Y. 1880)).

[255] *See id.*

With an injunction came potentially heavy penalties, including criminal contempt.[256] If labor leaders violated one, they could go to jail.[257]

Though rare at first, labor injunctions expanded over the century.[258] And more and more, they were used to shut down union activities.[259] They became particularly effective when the U.S. Supreme Court coupled them with antitrust law. In a series of decisions, the Court permitted legal attacks against unions under section 1 of the Sherman Act.[260] Under that act,[261] any group formed to restrain trade was an illegal combination.[262] Unions, of course, existed to control a particular kind of trade: the sale of labor.[263] So like other combinations in restraint of trade, they faced potential dissolution.[264] Antitrust law had thus become a dagger aimed squarely at their collective heart.[265]

Nor were labor injunctions the only threat facing unions. Another prime example was the "yellow dog" contract.[266] Yellow-dog contracts were common early in the 20th century. They required workers to agree, as a condition of employment, not to join a union.[267] They presented obvious obstacles to unionization, and they were a key union-avoidance tool for much of the early

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[256] *See id.* (noting that Eugene Debs and other labor leaders were arrested and jailed for violating a labor injunction during the Pullman strike in the late 19th century).

[257] *See* Debevec, *supra* note 250, at 105.

[258] *See* Getman & Kohler, *supra* note 15, at 1427 (observing that while there were no labor injunctions in the United States before 1880, there were 1,845 between 1880 and 1930, and an additional 921 from 1920 to 1930).

[259] *See id.*

[260] *See In re Debs*, 158 U.S. 564, 591 (1895) (affirming power of federal courts to enjoin labor disputes interfering with the free flow of interstate commerce); Loewe v. Lawlor, 208 U.S. 274, 297 (1908) (holding that labor boycotts could be enjoined under Sherman Act); Amer. Foundries v. Tri-City Council, 257 U.S. 184 (1921) (interpreting Clayton Act narrowly to allow courts to continue issue injunctions in many labor disputes).

[261] 15 U.S.C. §§ 1–38.

[262] *See* Miller & Huffaker, *supra* note 40, at 209 (citing Standard Oil Co. v. United States, 221 U.S. 1 (1911)). *See also* ERIC POSNER, HOW ANTITRUST FAILED WORKERS 30–31 (2021) (describing courts' pre-Clayton Act treatment of labor unions).

[263] *See* POSNER, *supra* note 262, at 40 ("Unions are themselves cartels of workers.").

[264] Miller & Huffaker, *supra* note 40, at 209.

[265] *See id.* (discussing existential threat *Standard Oil* posed to labor unions).

[266] *See, e.g.*, JOHN J. DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION 288 (2016) (explaining that early efforts to put labor rights into state constitutions involved bans on yellow-dog contracts).

[267] Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 534–35 (1949) (describing yellow-dog contracts and history of efforts to outlaw them at the federal level).

labor movement.[268] The constitutional drafters knew them well and cited them as a threat to bargaining rights.[269] They clearly expected sections 19 and 29 to abolish them.[270]

Unions eventually beat back these threats with the help of Congress. In 1914, Congress passed the Clayton Act,[271] which declared that labor unions were not illegal combinations in restraint of trade.[272] In 1932, Congress passed the Norris–LaGuardia Act,[273] which both stripped federal courts of much of their power to enjoin labor disputes and outlawed yellow-dog contracts.[274] These laws effectively neutralized the threat of labor injunctions in federal court.[275] They also spurred states to pass copycat laws, which put state courts on the sidelines as well.[276]

The Norris-LaGuardia Act took effect about fifteen years before Missouri and New Jersey convened their constitutional conventions. But in both states, the drafters could still remember the bad old days. They cited this history of judicial hostility as a reason for elevating bargaining rights to constitutional status.[277] They knew what it was like to feel the full force of judicial pressure and to wonder whether unions were lawful at all.[278] So to them, protecting the right to form unions and demand recognition would not have seemed so

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[268] *See id.*

[269] *See* 1 New Jersey Debates, *supra* note 58, at 318–19 (statement of Mr. Rafferty) (listing yellow-dog contracts as an example of efforts to undermine labor rights).

[270] *See id.*

[271] Pub. L. 63-212, 49 Stat. 1526 (1915) (codified as amended 15 U.S.C. §§ 12–27).

[272] *See* 15 U.S.C. § 17 (stating that the "labor of a human being is not a commodity or article of commerce" and that labor organizations are not "illegal combinations or conspiracies in restraint of trade").

[273] Pub. L. 98-620, 47 Stat. 70 (1932) (codified at 29 U.S.C. §§ 101–115).

[274] *See* 29 U.S.C. §§ 101 (stating that no "court of the United States . . . shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute" except in accordance with the Act's provisions), 103 (declaring yellow-dog contracts "contrary to public policy" and unenforceable).

[275] *See* Miller & Huffaker, *supra* note 40, at 211–13 (tracking the development of labor's exemption from federal antitrust laws).

[276] *See, e.g.*, WASH. REV. CODE § 49.32.011 (copying Norris-LaGuardia and stripping Washington courts of power to issue injunctions in labor disputes except under certain conditions); Jack Perlman, *The Little Norris-LaGuardia Act and the New York Courts*, 25 N.Y.U. L. REV. 315, 315–17 (1950) (discussing New York's adoption of state version of Act).

[277] *See* 1 New Jersey Debates, *supra* note 58, at 317 (pointing to the Supreme Court's *Tri-City Central Trades* decision as evidence of judicial hostility to labor rights).

[278] *See id.*

modest an accomplishment. It would have seemed instead like an epochal moment in the history of labor.[279]

C. Structure

The duty-to-bargain approach necessarily imbeds judges in overseeing day-to-day bargaining, in part because the relevant texts are so sparse. Neither section 19 nor section 29 mentions a duty to bargain, much less says how to implement one. So when courts declare that a duty exists, they have no choice but to define it as well.[280] And that kind of definitional work pulls them far outside their comfort zones.[281]

It's one thing for courts to protect the right to engage in specified conduct. They have a lot of experience doing that. Every year, they handle thousands of claims under federal and state antidiscrimination laws.[282] Among other things, those laws protect employees who oppose discrimination.[283] Similarly, courts adjudicate claims under laws protecting free speech in the workplace and whistleblowing activity.[284] Courts have well-worn tools for adjudicating

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[279] *See id.* at 124–25 (statement of Mr. Holderman) (tracking history of struggle for labor rights, despite their status as "natural rights"). *See also* ZACKIN, *supra* note 11, at loc. 623 (concluding that specific state provisions adopted in the first half of the 20th century, including labor provisions, often reflected national anxieties and trends).

[280] *See* Peck, *supra* note 16, at 773–78 (discussing various practical and administrative questions a court must determine to implement a bargaining obligation without legislative guidance).

[281] *See id.* at 778 (arguing that courts lack institutional expertise to delineate rules for practical administration of bargaining).

[282] *See also* 42 U.S.C. § 2000e–5(f) (providing for private lawsuit following administrative exhaustion); *EEOC Litigation Statistics, FY 1997 through 2020*, EEOC, https://www.eeoc.gov/statistics/eeoc-litigation-statistics-fy-1997-through-fy-2020 (last visited Nov. 1, 2021) (showing that the EEOC alone typically files more than a hundred merits lawsuits each year); Teri Gerstein, *Forced Arbitration: A Losing Proposition for Workers*, *in* INEQUALITY AND THE LABOR MARKET 179, 182 (Sharon Block & Benjamin Harris, eds. 2021) (reporting that in 2015 and 2016, discrimination suits by private plaintiffs exceeded those of the EEOC by a factor of 48).

[283] *See, e.g.*, 42 U.S.C. § 2000e–3(a) (forbidding retaliation against employees who oppose unlawful practices or participate in certain investigations or proceedings under federal antidiscrimination law); CAL. LABOR CODE § 12940(h) (forbidding interference with the same types of activities under California law).

[284] *See generally* Eugene Volokh, *Private Employees' Speech and Political Activity: Statutory Protection Against Employer Retaliation*, 16 TEX. REV. OF L. & POLITICS 295 (2012) (surveying state laws protecting speech and political activity of private employees); *Statutes*, U.S. DEP'T OF LABOR, OSHA, https://www.whistleblowers.gov/statutes (listing twenty-five separate statutes with protections for whistleblowers enforced by OSHA); *Laws that Prohibit Retaliation and Discrimination*,

these claims and safeguarding protected conduct. They can muster a range of remedies, including reinstatement, backpay, and attorneys' fees.[285] They are comfortable with these remedies and more than competent to deploy them.[286]

But courts have no similar toolkit to enforce an affirmative bargaining duty.[287] To start, they can't award any remedy until they figure out what the duty entails. What subjects does it cover?[288] Where and when does bargaining take place?[289] With whom does the employer bargain?[290] Can the employer declare an impasse at some point, or does it have to bargain in perpetuity?[291] And if the parties reach an agreement, does the agreement satisfy the duty? Or do the parties have to keep bargaining even after they sign a contract?[292]

The problems don't stop there. Once courts sketch out the duty's contours, they still have to police it.[293] And that requires them to resolve yet another set of issues. For example, can an employer demand proof that the

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CAL. DEP'T OF INDUS. RELATIONS, https://www.dir.ca.gov/dlse/howtofilelinkcodesections.htm (last visited Oct. 20, 2021) (cataloguing more than thirty laws prohibiting retaliation for various protected activities in California alone).

[285] *See* 42 U.S.C. § 2000e–5(g)(1) (allowing court to award appropriate remedies, including backpay and reinstatement). *See also* Peck, *supra* note 16, at 772 (observing that courts have successfully supplemented statutory schemes with traditional remedies); *Molinelli*, 114 N.J. at 97–98, 106–07 (recognizing that court could supplement article 19 with additional remedies and directing the employer to reinstate harmed employees and award backpay).

[286] *See Molinelli*, 114 N.J. at 107 (awarding monetary damages to both deter employers from interfering with bargaining rights and encourage employees to exercise those rights).

[287] *See* Peck, *supra* note 16, at 777 (observing trial judges' lack of experience with administrative issues like defining appropriate bargaining units or deciding whether to allow new elections while a contract is in place).

[288] *Cf.* 29 U.S.C. § 158(d) (requiring bargaining over "wages, hours, and other terms and conditions of employment").

[289] *Cf. id.* (requiring bargaining at "reasonable times").

[290] *Cf. id.* § 159(a) (requiring bargaining with a representative selected by a majority of the bargaining unit).

[291] *Cf.* Comau, Inc. v. NLRB, No. 10-1406, slip op. at 8–9 (D.C. Cir. Jan. 17, 2012) (surveying the law governing bargaining impasse and unilateral implementation, as developed by the NLRB over decades). *See also* 29 U.S.C. § 158(d) (setting out notice requirements as precondition to contract termination or modification).

[292] *See* Peck, *supra* note 16, at 777 (criticizing *Johnson* for failing to appreciate the administrative difficulties it was burdening courts with) ("Trial judges sitting in the courts of first instance throughout a state are unlikely to have the interest or background for making such determinations, but they will be called upon to do so in New Jersey.").

[293] *See id.* at 772–73 (observing that when courts take a creative role in elaborating collective-bargaining rights, they enter an arena with no "convenient conceptual limitations," and the result is "confusion and uncertainty").

union represents the employees? If so, what kind of proof is enough?[294] Can the union use signed authorization cards? Or does it have to ask for an election?[295] If it needs an election, who supervises the voting? Who is eligible to vote? Who counts the ballots?[296] What should the court do about misconduct during a campaign? What happens if someone intimidates voters? Is the election voidable, or is it void? And more fundamentally, where is the line between intimidation and good-old-fashioned hard campaigning?[297]

Even if a court can work all these issues out, it still has to circle back to the remedy question. And there, it will find no clear answers. How does one remedy a failure to bargain? Yes, the court could order the employer to back to the table. But that's no better than ordering the employer to follow the law. It creates no real penalties for noncompliance, and so leaves the bargaining duty with no teeth.[298] So the court could instead award damages. But how does it measure damages in this context? What loss does the union suffer from a refusal? The union possibly suffers a delay in getting an agreement; but the costs of delay are hard to measure. The court has to reconstruct a counterfactual scenario with multiple variables; its conclusion is almost inherently speculative.[299] And in any event, no one is entitled to an agreement. The duty to bargain in good faith does not include the duty to accept any particular proposal, or to reach an agreement at all.[300] So there's no basis for awarding damages in the expectation that the union would eventually get an agreement. Taken together, these problems make the remedy hard to pin down. At the

[294] *See id.* at 768 (noting that the court in *Johnson I* resolved these questions by ordering an election within 60 days—a solution with no clear basis in the constitutional text).

[295] *See id.*

[296] *See Johnson I*, 84 N.J. Super at 567 (reasoning that the "only alternative which can lead to the accuracy desired, is a representation election under the supervision of this court").

[297] *Cf.* THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT ch. 9 (7th ed. 2017) (surveying the decades of caselaw courts and the Board have developed to answer these election-related questions under federal law).

[298] *See* Ellen Dannin, *Finding the Workers' Law*, 8 GREEN BAG 2d 19, 27 (2004) ("Many have rightly criticized the NLRA's remedies as weak, especially the remedies for bad faith bargaining. The standard remedy is an order to bargain in good faith.").

[299] *See* Henderson v. Bluefield Hosp. Co., LLC, 208 F. Supp. 3d 763, 771 (S.D.W. Va. 2016) (observing that connection between bargaining delay and union's alleged loss of support among employees was "purely speculative").

[300] *See* 29 U.S.C. § 158(d) (specifying that under federal law, the duty to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession").

federal level, the NLRB has struggled with remedies for decades.[301] State courts are unlikely to find them any easier.

On the bright side, the exact answer is somewhat irrelevant. As with all these questions, the answers are less about abstract principles than they are about arbitrary line-drawing. It's more important that the questions are settled than that they're settled right.[302] But that doesn't mean courts can just make the answers up. Courts aren't supposed to be arbitrary line drawers.[303] They're supposed to apply abstract legal principles in concrete cases.[304] And while they of course develop some rules through their decisions, those rules grow over time, case by case, through the slow accretion of precedent.[305]

That's a hardly the best way to create a bargaining system. In an ideal world, the system's rules would be announced in advance.[306] The parties would review the rules and conform their behavior accordingly.[307] But court decisions don't work like that. They announce rules only after the parties have fallen into dispute. And disputes by definition involve contestable questions. So parties often won't know they've violated a rule until a court tells them they have.[308]

There is, of course, a way to lay down rules ahead of time: legislation. Unlike courts, legislators can address issues comprehensively and in advance. Over a period of months or years, they can study problems, hold hearings, solicit public input, and craft solutions. They can carve out exceptions and assign administrators to oversee new processes. They can allocate resources to make sure the job gets done. And even better, when their solutions don't

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[301] *See* Patricia A. Renovich, *Status of the Make-Whole Remedy in Refusal-to-Bargain Cases*, 2 FLA. ST. U. L. REV. 153, 154 (1974) (noting that the Board and the courts have agreed on the need for remedies in refusal-to-bargain cases, but have disagreed over what the remedy should be).

[302] *Cf.* Burnet v. Coronado Oil Gas Co., 285 U.S. 393, 406 (1932) (observing that in some cases "it is more important that the applicable rule of law be settled than that it be settled right").

[303] *See* Peck, *supra* note 16, at 773 (observing that while courts in some sense make law through their decisions, they are not well suited to this kind of arbitrary line-drawing).

[304] *See id.*

[305] *See id.* ("In the same way, effectuation of a broad and abstract principle, such as a right to organize and bargain collectively or a right to select representatives for the purpose of negotiating terms and conditions of employment, involves an undertaking without clearly marked limits.").

[306] *See* Cass Sunstein, *The Problem with Predictability*, AMERICAN PROSPECT (July 8, 2005), https://prospect.org/article/problem-predictability/ ("In the law, predictability is usually important. People need to know the rules, and they cannot plan their lives unless they know the law in advance.").

[307] *See id.*

[308] *See* Peck, *supra* note 16, at 772–73 (noting the inherent limitations in an approach that explicates bargaining rules through judicial decision).

work, they can try different ones. Unlike courts, they owe no deference to doctrinal consistency.[309]

But when courts constitutionalize an issue, they take it out of legislators' hands.[310] They prevent the kind of advance line-drawing you need to make a bargaining system work.[311] They replace political compromise with judicial artifice—an artifice constructed on the fly, with no foundation in the democratic process.[312]

Courts in New Jersey and Missouri, lacking any legislative guidance, looked to federal law.[313] Federal law was the obvious gap-filler; over the decades, the NLRA had collected an immense body of caselaw.[314] Federal courts and the NLRB had decided most, if not all, of the issues state courts were likely to face.[315] So federal law offered state courts a ready-made repository of solutions.[316] State courts could use federal law to reduce their decisional loads and, at the same time, keep their caselaw consistent with national norms.[317]

But those benefits came with two major drawbacks. First, federal law could not answer the threshold question: whether employers had a duty to

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[309] *See id.* at 778 ("In short, courts unlike legislatures cannot act in the somewhat arbitrary manner of legislatures by limiting the application of principles on the basis of expediency or other pragmatic considerations.").

[310] *See, e.g.*, Jack Wade Nowlin, Roe v. Wade *Inverted: How the Supreme Court Might have Privileged Fetal Rights Over Reproductive Freedoms*, 63 MERCER L. REV. 639, 642 (2012) (examining criticism of *Roe v. Wade*, which some say removed abortion questions from political process and caused a public backlash); ANTONIN SCALIA, THE ESSENTIAL SCALIA: ON THE CONSTITUTION, THE COURTS, AND THE RULE OF LAW 19 (eds. Sutton & Whelan 2020) (arguing that when courts elevate rules to a constitutional level, "all flexibility is gone").

[311] *See* Scalia, *supra* note 310, at 19 (arguing that constitutionalizing questions reduces legislative flexibility).

[312] *See id.*

[313] *See, e.g.*, *Molinelli*, 114 N.J. at 97 (looking to federal law to build out doctrine under state constitution); *Ledbetter*, 387 S.W.3d at 364–65 (looking at federal agency interpretations to determine scope of bargaining rights under state constitution); *Lullo*, 55 N.J. at 422–23 (citing federal agency interpretations).

[314] *See generally* DEVELOPING LABOR LAW, *supra* note 297 (collecting and explaining decades of judicial and agency interpretations of NLRA); ROBERT GORMAN ET AL., LABOR LAW: ANALYSIS AND ADVOCACY (2013) (same).

[315] *See Molinelli*, 114 N.J. at 97 (explaining that New Jersey courts rely on federal experience to explicate rights under the state constitution).

[316] *See id.*

[317] *See id.* (borrowing federal concepts to help define state bargaining law); *Lullo*, 55 N.J. at 422–23 (same).

bargain. In fact, to the extent federal law even suggested an answer, it seemed to be no.[318]

The second downside was a loss of state autonomy. By importing federal precedent, state courts sacrificed the independence of state law.[319] The genius of the American system is that we have fifty-one different sovereigns.[320] Each sovereign is free to experiment in its own sphere and develop its own solutions.[321] That flexibility spurs competition and innovation. When states try different things, they sometimes land on good policies. Those policies then get picked up and spread through the marketplace of ideas.[322] But states can't generate new ideas if they interpret their laws in lockstep with federal law.[323] If they merely parrot federal principles, they make themselves junior partners in what is supposed to be a system of co-sovereigns.[324] They abdicate their duty to develop state law as an independent source of rights and protections.[325]

In fact, federal law itself recognizes the value of state independence in this field. When Congress wrote the NLRA, it carved out large swaths of the American workforce.[326] It excluded agricultural and domestic workers because it thought federal bargaining standards were too onerous for their

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[318] *See* discussion, *supra* pp. 61-62.

[319] *See* JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW loc. 174 (2018) (ebook) (arguing that lock-stepping state law to federal law threatens the independence of state courts).

[320] *See id.* at 77 (arguing that rights are often better developed at the state level, where courts can tailor solutions to local interests and decrease national blowback and resistance). *See also* Estes v. Texas, 381 U.S. 532, 587 (1965) (Harlan, J., concurring) (describing the ability of states to pursue "procedural experimentation" as "one of the valued attributes of our federalism").

[321] *See* SUTTON, *supra* note 319, at 77.

[322] *See id.* at 175 (arguing that independence gives states freedom to try bold ideas); Az. State Legislature v. Az. Indep. Redistricting Comm'n, 576 U.S. 787, 817 (2015) ("This Court has 'long recognized the role of the States as laboratories for devising solutions to difficult legal problems.'" (quoting Oregon v. Ice, 555 U.S. 160, 171 (2009))).

[323] *See* SUTTON, *supra* note 319, at 175.

[324] *Id.* at 187–88 (arguing that more independent state law would have higher prestige and receive more attention from advocates and courts—a result leading to healthy federalism).

[325] *See id.* at 178 (arguing that state courts should prioritize questions of state law over federal law to build overlapping bulwarks of rights). *See also* Hume, *supra* note 19, at loc. 335 (noting that state courts sometimes precede their federal counterparts in the development of constitutional rights, such as in marriage cases arising out of California and Massachusetts).

[326] *See* 29 U.S.C. § 152(2) (excluding agricultural and domestic workers, among others, from definition of *employee*).

employers, who tended to be small enterprises or even individual people.[327] Likewise, it excluded public employees because it didn't want to interfere with state law, which usually denied employees the right to strike.[328] Those carveouts would have been meaningless if Congress had wanted states to simply copy the federal framework.[329] Yet by importing federal standards, Missouri's and New Jersey's courts did just that. They effectively erased the NLRA's carveouts and nullified Congress's judgment.[330]

Admittedly, none of these downsides would matter if the Missouri and New Jersey constitutions explicitly created a duty to bargain. Had the drafters written a duty into sections 19 or 29, courts would have had no choice but to enforce that language.[331] But the drafters didn't do that. Instead, they left bargaining rights open-ended and undefined. Courts could have read the language modestly and left space for legislative solutions, as New York's courts did.[332] Or they could have read the text broadly, expanding bargaining rights to encompass unwritten duties as well.[333]

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[327] *See* Michael H. LeRoy & Wallace Hendricks, *Should "Agricultural Laborers" Continue to Be Excluded from the National Labor Relations Act?*, 48 EMORY L.J. 489, 506 (1999) (discussing legislative history of agricultural- and domestic-worker exemptions).

[328] *See Hawkins Cty.*, 402 U.S. at 604 ("The legislative history does reveal, however, that Congress enacted the s 2(2) exemption to except from Board cognizance the labor relations of federal, state, and municipal governments, since governmental employees did not usually enjoy the right to strike.").

[329] *Cf.* SUTTON, *supra* note 319, at 174 (arguing that there is no reason to suppose in a vacuum that independent sovereigns meant the same words to apply in the same way).

[330] *See* ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS loc. 2664 (2012) (ebook) (explaining the well-settled canon that courts should not read legal texts in a way that nullifies any words of the text).

[331] *See id.* loc. 1068 ("The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means.").

[332] *See Herzog*, 269 App. Div. at 30 (reading New York's constitution not to impose a bargaining obligation). *See also Chesterfield*, 387 S.W.3d at 368 (Fischer, J., dissenting) (arguing that imposing a duty to bargain was inconsistent with the constitutional text); Peck, *supra* note 16, at 771–72 (noting that while courts inevitably "make" law when they decide cases, they have a choice about what kind of law they make, and other courts faced with the same question had declined to create a new bargaining obligation (citing *Petri Cleaners*, 53 Cal.2d at 474–75))

[333] *See Ledbetter*, 387 S.W.3d at 364 (concluding that it was necessary to infer an obligation to bargain in good faith because otherwise, employers could frustrate bargaining by engaging in surface bargaining); *Molinelli*, 114 N.J. at 97 (reasoning that it had to infer a bargaining obligation to prevent rights from being emasculated).

Missouri's and New Jersey's courts chose the second path. They thought it was the only way to protect bargaining rights.[334] But as we've already seen, that line of reasoning was too facile. Even if bargaining rights meant only the right to demand bargaining, they would still be meaningful. They would still embody a "no interference" principle, which would include protection from retaliation.[335] We can see such a principle at work in *Herzog* and *Quinn*, where courts respected employees' right to bargain collectively without also imposing a duty to bargain.[336]

But rather than adopt a no-interference principle, New Jersey and Missouri instead chose a "duty to bargain" principle.[337] Courts in those states chose the latter principle, they said, because it was the only way to protect employees' rights.[338] But ironically, that approach led them to weaken employees' rights. It made them overvalue group rights and undervalue individual ones. And it left individual employees with fewer rights than when they started. We now turn to that consequence.

IV. The Consequences of Court-Mandated Bargaining

Labor disputes often devolve into fights between unions and management. In the popular mind, these two sides are the yin and yang of labor relations. The history of the labor movement can be told as a Manichean tug of war between them.[339] But what gets lost in the telling are the very people whose rights are at stake: individual employees. After all, labor law doesn't exist to protect unions or management; it exists to protect workers.[340] It is the

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[334] *See Ledbetter*, 387 S.W.3d at 364 (concluding that it was necessary to infer an obligation to bargain in good faith because otherwise, employers could frustrate bargaining by engaging in surface bargaining); *Molinelli*, 114 N.J. at 97 (reasoning that it had to infer a bargaining obligation to prevent rights from being emasculated). *See also* discussion, *supra* pp. 53, 57–58.

[335] *See, e.g.*, *Molinelli*, 114 N.J. at 107 (affirming order to reinstate employees fired for demanding bargaining); *Quinn*, 298 S.W.2d at 417 (reasoning that the right to bargain collectively includes the right to demand bargaining without interference).

[336] *See Quinn*, 298 S.W.2d at 417; *Herzog*, 53 N.Y.S.2d at 617.

[337] *See Molinelli*, 114 N.J. at 97; *Ledbetter*, 387 S.W.3d at 366–67.

[338] *See* discussion, *supra* pp. 53, 57–58.

[339] *See, e.g.*, *Labor vs. Management*, USHISTORY.ORG, https://www.ushistory.org/us/37b.asp (last visited October 23, 2021); DEVELOPING LABOR LAW, *supra* note 297, at ch. 1 (describing multiple national policies toward labor relations, including one "regarding it as necessary to a regime of industrial peace based upon a balanced bargaining relationship between employers wielding the combined power of capital wealth and unions wielding the power of organized labor").

[340] *See* 29 U.S.C. § 151 (declaring a national labor policy of protecting the right of "employees" to organize and bargain through representatives of their choosing). *See also* N.J. CONST. art. I § 19

choices of workers, not management or unions, that labor law is supposed to respect.[341]

When imposing a constitutional duty to bargain, courts paid lip service to that principle. They said that bargaining rights belonged to employees; and for those rights to mean anything, the employer must have a duty to bargain in return.[342] To them, a bargaining duty was the only way to respect employees' rights.[343]

But that conclusion led them to another one—one far less solicitous of individual employees. In both Missouri and New Jersey, courts concluded that for a bargaining duty to work, the employees must have only one representative.[344] In other words, courts adopted the principle of exclusive representation. They reasoned that without exclusivity, the employer might have to bargain with multiple representatives in the same workplace.[345] And with multiple representatives, mandatory bargaining would be little better than industrial anarchy.

That conclusion made some intuitive sense. It's easy to see how multiple representation would devolve into chaos. Imagine that two unions represent employees on the same assembly line. Let's even say the employees work on the same crew. One union wants to eliminate overtime. Its members want to work less because they value leisure time or time with their families. But the other union wants to expand overtime. Its members put more value on premium rates and higher take-home pay. These competing demands put the employer in a bind. The demands are mutually exclusive: the employer cannot run the line with half a crew. So if it mandates overtime for some, it has to mandate overtime for all. It therefore has to make a choice. But if it chooses

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(giving "employees" bargaining rights); MO. CONST. art. I § 29 (same); N.Y. CONST. art. I § 17 (same). *But cf. Johnson I*, 84 N.J. Super at 546–47 (rejecting argument that union had no standing to sue because section 19 protected only employee rights; rights under state constitution were inherently collective and could be asserted by collective representative).

[341] *See* 29 U.S.C. §§ 151, 157.

[342] *See Ledbetter*, 387 S.W.3d at 366–67; *Molinelli*, 114 N.J. at 97.

[343] *See Johnson I*, 84 N.J. Super. at 555 (concluding that any interpretation without a duty to bargain would render the employees' right "impotent").

[344] *See id.* at 549 (recognizing exclusivity of representation).

[345] *See Lullo*, 55 N.J. at 424–27 (describing disadvantages of multiple representation in a single workplace).

to accept one union's demand, it still has to bargain with the other.[346] And how can it bargain in good faith with the second union when it has already committed itself to the first? Isn't bargaining with the second union futile? The employer might discuss the second union's demands, but it cannot accept them. So it has no real expectation of an agreement. And doesn't that kind of pro forma bargaining violate the duty?[347]

Exclusive representation solves this problem.[348] It gives one union the right to represent employees in the bargaining unit.[349] The union only has to gain support from more than half of the employees.[350] From there, it represents all the employees, not just the ones who support it.[351] The employer must bargain with this union, but it has no duty to bargain with other representatives; in fact, it cannot do so.[352] Bargaining with other representatives—or the employees themselves—would violate the good-faith requirement.[353]

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[346] *Cf.* 29 U.S.C. § 158(d) (requiring employer to bargain with employees' representative in good faith about wages, hours, and working conditions). *See also Lullo*, 55 N.J. at 428–29 (reasoning that multiple representation would diffuse negotiating strength and foster rivalries between competing unions; purpose of exclusivity was to create a "single compact with terms which reflect the strength, negotiating power and welfare of the group").

[347] *See, e.g.*, H.J. Heinz Co. v. NLRB, 311 U.S. 514, 526 (1941) (adopting Board's good-faith standard, which requires parties to bargain with a genuine intent to reach an agreement); Highland Park Mfg. Co. v. NLRB, 110 F.2d 632, 637 (4th Cir. 1940) (surveying early caselaw and explaining good-faith standard). *See also Ledbetter*, 387 S.W.3d at 364 (adopting a duty to bargain in good faith under state constitution in part to prevent employers from frustrating bargaining rights by engaging in surface bargaining); Atlanta Hilton & Tower, 271 N.L.R.B. 1600, 1603 (1984) (explaining that an employer violates its duty to bargain in good faith by, among other things, designating a bargaining representative with no authority to make agreement).

[348] *See Johnson I*, 84 N.J. Super. at 549 (adopting principle of exclusive bargaining under state law); *Lullo*, 55 N.J. at 426–34 (justifying exclusivity principle as necessary to give full effect to bargaining rights and avoid "multiplicity" of workplace representatives). *Cf. also* W. Cent. Mo. Region Lodge No. 50 v. City of Grandview, 460 S.W.3d 425, 446–47 (W.D. Mo. 2015) (stating that constitution leaves some role for public employers to shape election procedure, but implicitly recognizing that the procedure will result in the selection of a single representative).

[349] *See Johnson I*, 84 N.J. Super. at 549.

[350] *See City of Grandview*, 460 S.W.3d at 434–36 (holding that employer had duty to recognize union when record showed that a majority of employees in the bargaining unit supported the union).

[351] *See id.* at 343–36 (implicitly accepting principle of exclusive representation); *Johnson I*, 84 N.J. Super. at 549 (borrowing exclusivity concept from federal law).

[352] *See* DEVELOPING LABOR LAW, *supra* note 297, at 13 VIII.A (explaining that under "conventional doctrine, . . . an employer would be guilty of an unfair labor practice by extending recognition to a minority union" (citing Ladies' Garment Workers (Bernhard-Altmann Tex. Corp.) v. NLRB, 366 U.S. 731 (1961))).

[353] *See id.*

But therein lies a new problem. Sections 19 and 29 give *each* employee the right to bargain through a chosen representative.[354] Exclusive representation respects that right for some employees, but not for others.[355] If a bare majority of employees selects a union, that union bargains for everyone.[356] Any employee who wants a different representative—or no representative at all—is stuck. She has a representative foisted upon her. For her, the right to select a representative is less than meaningless; it is reversed. She cannot even bargain for herself. Her rights are subordinated to the group's preference.[357]

She is also at much greater risk of coercion. Consider the process for gaining majority status. Neither Missouri nor New Jersey has a statute covering bargaining for private-sector employees. So there is no clear procedure for establishing majority status.[358] A union might gain that status by winning an election.[359] But it might also do it by collecting authorization cards.[360] Employees sign these cards in private, but not anonymously: the union knows who signs the cards because it collects them in person.[361] And these in-person interactions come with a lot of pressure and potential confusion.[362] When

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[354] *See* N.J. CONST. art. I § 19; MO. CONST. art. I § 29.

[355] *Cf.* RICHARD EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT 30 (2019) [hereinafter EMPLOYEE FREE CHOICE], *available at* https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1493&context=law_and_economics (pointing out the irony of a process that ostensibly protects employee choice while denying a voice to dissenting workers).

[356] *See City of Grandview*, 460 S.W.3d at 443 (recognizing principle of majority choice under state constitution); *Johnson I*, 84 N.J. Super at 549 (same). *See also* 29 U.S.C. § 159(a) (designating any union chosen by a majority of employees in the unit as the exclusive bargaining representative).

[357] *Cf.* Civil Serv. Forum v. N.Y.C. Trans. Auth, 4 A.D.2d 117, 127–28 (N.Y. App. Div. 1957) (rejecting constitutional challenge to agreement allegedly limiting employee's right to present her own grievances because nothing in the agreement itself contained that limitation, but suggesting that a challenge could be brought against an agreement that did contain such a limitation).

[358] *See Johnson I*, 84 N.J. Super. at 553, 569 (ordering an election under procedures fashioned by the court itself in the absence of legislative guidance); *Quinn*, 298 S.W.2d at 419 (noting the absence of a legislative bargaining scheme and declining to adopt a judicial one in its place).

[359] *See Johnson I*, 84 N.J. Super. at 553 (ordering election to determine union's majority status).

[360] *See Chesterfield*, 386 S.W.3d at 763 (holding that trial court erred by ordering election when record showed that union had collected signed authorization cards from majority of bargaining unit).

[361] *See* EMPLOYEE FREE CHOICE, *supra* note 355, at 31–32 (describing card-check campaigns and the threat they pose to worker choice).

[362] *See id.* at 30 (observing that card-check campaigns expose "workers to multiple forms of intimidation and direct coercion"), 42 ("There are countless contexts in which the threat of coercion

approached, an employee may feel social pressure to sign a card, even if she has no desire to join. She may be told that others have signed, and she will be the odd one out if she refuses. She may want to feel like a team player. Or she may sign only to get the organizer to leave her alone. Even worse, she may sign under the mistaken impression that eventually, she will get a chance to cast a secret ballot. But in fact, she may have no opportunity to vote, much less to revoke her card if she changes her mind.[363]

What's more, she may be surprised when, months later, she finds the union suddenly ensconced as her representative. The union does not have to set a deadline for presenting cards to the employer.[364] It can collect cards over weeks, months, or even years. It can then ambush the employer with cards from 51% of the workforce. Its support may have risen and fallen over the signature-collecting drive. It may never have enjoyed support from more than half the workforce at any one time. But as long as it has those cards, it's locked in.[365] And the 49% of employees who never signed cards? They never had their voices heard, much less their wishes respected.[366]

By inventing a bargaining duty, courts were forced to adopt exclusive representation. And by adopting exclusive representation, they trampled on individual rights. They took a right given to each employee and subordinated it to popular rule.[367] That rule may work for employees in the majority, who get to impose their preferences on their coworkers. And it may likewise work for employers, who don't have to deal with a cacophony of divergent demands. But it does nothing for employees in the minority. Those employees not only lose their right to choose a representative, but also the right to bargain for themselves. Their constitutional rights have been reversed.

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can be implicit, powerful, and unreported. The fear of revenge from a successful union is not something that many workers can look on with indifference.").

[363] *See id.* at 31–32 (describing pressures workers face in card-check drives) ("These workers could now prefer to capitulate to a union they oppose if the alternative is to be on record against the union when it wins anyhow."), 43 (noting that there is no "effective mechanism that allows employees to revoke or withdraw their authorization cards, once signed").

[364] *See id.* at 11, 42 (noting that the card-check process is largely "unregulated"; the union need not announce its campaign in advance).

[365] *See* EMPLOYEE FREE CHOICE, *supra* note 355, at 43 (observing that union can collect cards in secret over span of time, and under current law, the cards are considered "irrevocable").

[366] *See id.* at 11 (discussing the effect of the proposed Employee Free Choice Act, a law that would have codified card-check campaigns at the federal level) ("For some workers at least, [card-check campaigns] would leave them with no choice at all if they are not approached during the campaign.").

[367] *See Lullo*, 55 N.J. at 418, 421 (rejecting challenge to exclusivity under state public-sector bargaining law because multiple representation would be "undesirable").

V. CONCLUSION: A PATH FORWARD?

Interpreting broad constitutional language often requires a degree of judgment. Answers rarely come with mathematical precision.[368] But while the edges may blur, we can identify guideposts to help us reach better results. We can produce faithful interpretations if we focus on the things we know.[369]

And when it comes to bargaining rights, we do know three things. First, we know that courts have interpreted bargaining language two ways: the no-interference approach and the duty-to-bargain approach. Second, we know that the latter approach was based on a policy judgment about the best way to protect bargaining rights. And third, we know that this interpretation contradicted text, history, and constitutional structure.

What we don't know is whether there's any way to move from the second approach to the first. Having inserted themselves into everyday bargaining, can courts find their way out? Having read rights maximally, can they revert to a more traditional position?

The answer is probably yes, but it will be difficult. Rights are like entitlement programs: once extended, they are hard to roll back.[370] The obstacles to a rollback are likely easier to overcome in Missouri, where courts at least have a history of reading bargaining rights modestly. Their turn toward a maximal interpretation is relatively recent, and so they can frame their return to the traditional position as a reversion to historical norms. But in New Jersey, courts have taken the maximal approach since the very beginning, so they cannot revert to a previous position. Courts, of course, are creatures of precedent: they like nothing less than undisguised innovation. So any reversal of bargaining duties would likely come through the people themselves—either with a new constitution or a political sea change. Neither path seems likely,

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[368] *See* Hume, *supra* note 19, at loc. 445 ("When confronted with vague or general language in an authoritative legal text, judges need to make choices about how to apply the law.").

[369] *See id.* (conceding that many legal texts are ambiguous, but arguing that such ambiguity is precisely why we employ people as judges instead of computers).

[370] *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 439–40 (2000) (Rehnquist, J.) (rejecting attempt by Congress to roll back Fifth Amendment-based right to *Miranda* warnings); Adrian Moore, *Survey Shows Path to Entitlement Reform*, REASON.COM (Oct. 12, 2011), https://reason.org/commentary/survey-shows-path-to-entitlement-re/ (observing that rolling back entitlements "is politically very difficult").

but neither do they seem impossible. For either, the first step will be to bring attention to the problem. We have to see the wrinkles in our doctrine before we can start ironing them out.

That has been the modest goal of this article. Its aim has been to shed light on a much-overlooked corner of the law—one that could use a bit of sunshine. While most lawyers think of labor law in strictly federal terms, for millions of workers, the only source of rights is state law. So when state courts get things wrong, their errors matter in the real world for real people. Real people can lose their rights, including their right to choose a bargaining representative. The effect is the same whether the loss stems from an error in federal court or one in state court. The loss matters just as much—for workers, for courts, and for the rational development of the law.

Other Views:

- Emily Zackin, Looking for Rights in All the Wrong Places: Why State Constitutions Contain America's Positive Rights (2013), *available at* https://press.princeton.edu/books/paperback/9780691155784/looking-for-rights-in-all-the-wrong-places.
- American Federation of Teachers v. Ledbetter, 387 S.W.3d 360 (Mo. 2012), *available at* https://cite.case.law/sw3d/387/360/.
- Comite Organizador v. Molinelli, 114 N.J. 87 (1989), *available at* https://law.justia.com/cases/new-jersey/supreme-court/1989/114-n-j-87-1.html.

Gender Identity Policy Under the Biden Administration*

Rachel N. Morrison**

On the campaign trail, President Joe Biden said one of his top legislative priorities for the first 100 days of his presidency was to amend the 1964 Civil Rights Act to explicitly prohibit discrimination based on sexual orientation and gender identity.[1] The Biden-endorsed Equality Act is the primary legislative proposal for embedding sexual orientation and gender identity as protected classes in federal law. It defines "gender identity" as "gender-related identity, appearance, mannerisms, or other gender-related characteristics of an individual, regardless of the individual's designated sex at birth."[2] This definition does not require a clinical diagnosis of gender dysphoria, hormonal or surgical interventions, or retrospective changes to the sex listed on a birth certificate. While the Trump administration viewed sex as an objective, fixed, biological binary based ultimately on genetics,[3] the Biden administration (like the Obama administration) views sex as including "gender identity," which it defines as "[o]ne's internal sense of self as man, woman, both or neither."[4]

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* Note from the Editor: The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. To join the debate, please email us at info@fedsoc.org.

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[1] *The Biden Plan to Advance LGBTQ+ Equality in America and Around the World*, Joe Biden for President: Official Campaign Website, https://joebiden.com/lgbtq-policy/.

[2] Equality Act, H.R. 5, 117th Cong. § 9(2) (2021); Equality Act, S. 393, 117th Cong. § 9(2) (2021). At the time of this article's publication, the Equality Act has passed in the House, but faces an uncertain future in the Senate.

[3] *See, e.g.*, 85 Fed. Reg. 37,189 (June 19, 2020).

[4] *See, e.g.*, Office of Population Affairs, U.S. Dep't of Health & Human Servs., Gender-Affirming Care and Young People (Mar. 2022), https://opa.hhs.gov/sites/default/files/2022-03/gender-affirming-care-young-people-march-2022.pdf. *Cf.* 81 Fed. Reg. 31,375, 31,467 (May 18, 2016) ("*Gender identity* means an individual's internal sense of gender, which may be male, female, neither, or a combination of male and female, and which may be different from an individual's sex assigned at birth.").

Some critics of the Equality Act call it well-intentioned but misguided,[5] while others deem it "at war with reality."[6] They point to ways the Act would infringe on women's rights and discriminate against people and institutions of faith. For example, the Act would expand the number of private businesses that would be classified as "public accommodations" subject to its nondiscrimination provisions—explicitly including health care establishments, shelters, and adoption and foster care providers.[7] In practice, this would penalize health care professionals who decline, based on their medical judgment or ethical convictions, to participate in gender transition services, such as "sex reassignment" surgeries or hormonal treatments, including for minor children; require shelters for women experiencing domestic and sexual abuse to admit into those safe spaces biological males who identify as female; and force faith-based adoption and foster care agencies to choose between violating their religious beliefs about marriage, human embodiment, and sexuality, or shutting down. The Act would also override women's and girls' rights to privacy, safety, and fair achievement by requiring that they share their restrooms, locker rooms, and female athletic competitions with biological males.

Further, the Act would for the first time in history prohibit the Religious Freedom Restoration Act of 1993 (RFRA) from applying to a federal law.[8] RFRA, passed with overwhelming bipartisan support and signed into law by President Bill Clinton, "prohibits the federal government from substantially burdening a person's exercise of religion unless it demonstrates that doing so both furthers a compelling governmental interest and represents the least restrictive means of furthering that interest."[9] RFRA restored federal protections for religious liberty after the Supreme Court reduced the First Amendment's Free Exercise Clause protections in the 1990 case *Employment Division v. Smith*.[10] The Equality Act, however, would explicitly exclude those protections where sexual orientation and gender identity are concerned. As law professor and religious liberty expert Douglas Laycock put it: "[The Equality

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[5] *See, e.g.*, *Truth About the Equality Act*, U.S. CONFERENCE OF CATHOLIC BISHOPS, https://www.usccb.org/equality-act.

[6] Margaret Harper McCarthy, *The Equality Act Is at War With Reality*, WALL ST. J. (Mar. 30, 2021), https://www.wsj.com/articles/the-equality-act-is-at-war-with-reality-11617143549.

[7] H.R. 5 §§ 2(a)(3), 3(a)(2)(C).

[8] *Id.* § 9(2) ("The Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb et seq.) shall not provide a claim concerning, or a defense to a claim under, a covered title, or provide a basis for challenging the application or enforcement of a covered title.").

[9] Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1754 (2020) (citing 42 U.S.C. § 2000bb-1).

[10] 494 U.S. 872 (1990).

Act] protects the rights of one side, but attempts to destroy the rights of the other side."[11]

With the Equality Act facing difficult odds in the Senate, the Biden administration has imposed its gender identity policies through its regulatory and enforcement powers. These policies largely ignore competing interests or rights of women, children, and religious organizations and persons.

This article analyzes the Biden administration's gender identity policies to date. It begins with a discussion of the U.S. Supreme Court's latest word on transgender discrimination in *Bostock v. Clayton County*. It then reviews Biden's executive actions and orders establishing his administration's gender identity policies, contrasting them with the Trump administration's policies. Finally, the article examines the implications of the Biden administration's gender identity policies for employment, health care, education, and athletics, with a focus on their impact on women's rights, children's interests, and religious liberty.

I. *BOSTOCK*

In June 2020, the U.S. Supreme Court held in *Bostock v. Clayton County* that "an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual 'because of such individual's sex.'"[12]

Bostock was a set of three consolidated cases involving employee terminations, two allegedly based on homosexuality and the third allegedly based on transgender status.[13] The question in *Bostock* was "whether an employer who fires someone simply for being homosexual or transgender" violates Title VII of the Civil Rights Act of 1964[14]—the federal law that makes it unlawful for certain employers to "discriminate against" an employee because of the employee's "race, color, religion, sex, or national origin."[15] The Court, in a 6-3

[11] Danielle Kurtzleben, *House Passes the Equality Act: Here's What it Would Do*, NPR (updated Feb. 25, 2021, 4:39 PM), https://www.npr.org/2021/02/24/969591569/house-to-vote-on-equality-act-heres-what-the-law-would-do.

[12] 140 S. Ct. at 1753.

[13] *Id*. at 1737.

[14] *Id*. at 1753.

[15] 42 U.S.C. § 2000e–2(a)(1).

decision authored by Justice Neil Gorsuch and joined by Chief Justice John Roberts and Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan, answered this question in the affirmative.[16] The majority assumed that "sex" refers only to the "biological distinctions between male and female," but it went on to explain that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[17] Thus in all three cases, the employer violated Title VII by intentionally firing its employee based in part on sex (i.e., homosexuality and transgender status).[18] Notably, the majority did not adopt gender identity as a protected category, stating that its decision did not turn on whether the definition of sex "captur[ed] more than anatomy" or "reach[ed] at least some norms concerning gender identity and sexual orientation."[19]

The Court acknowledged concerns from the employers that its decision would make sex-specific bathrooms, locker rooms, and dress codes "unsustainable" under Title VII and "sweep beyond Title VII to other federal or state laws that prohibit sex discrimination."[20] But the majority simply stated that such questions were for "future cases" and that the Court would not prejudge any such questions because those were issues for another day.[21]

The Court also acknowledged the employers' concerns that Title VII "may require some employers to violate their religious convictions," but it likewise left those concerns for "future cases."[22] The Court, however, stated that it is "deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution"—a "guarantee" that "lies at the heart of our pluralistic society"—and flagged three doctrines protecting religious liberty it thought relevant to the question:[23]

1. Title VII's religious organization exemption, which allows religious organizations to employ individuals "of a particular religion";[24]

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[16] *See* 140 S. Ct. at 1737. Justices Clarence Thomas, Samuel Alito, and Brett Kavanaugh dissented.

[17] *Id.* at 1739, 1741.

[18] *Id.* at 1754.

[19] *Id.* at 1739.

[20] *Id.* at 1753.

[21] *Id.*

[22] *Id.* at 1753–54.

[23] *Id.* at 1754.

[24] 42 U.S.C. § 2000e-1(a). Title VII defines "religion" as "all aspects of religious observance and practice, as well as belief." *Id.* § 2000e(j).

2. The ministerial exception under the First Amendment, which "can bar the application of employment discrimination laws 'to claims concerning the employment relationship between a religious institution and its ministers'";[25] and

3. RFRA, which the Court described as a "super statute" that "might supersede Title VII's commands in appropriate cases."[26]

The Court's attempt to cabin, or at least postpone, *Bostock*'s application to contexts outside hiring and firing did not work. Advocates, courts, and the Biden administration are applying *Bostock*'s reasoning in expansive ways.

II. GENDER IDENTITY POLICY UNDER THE BIDEN ADMINISTRATION

During the Trump administration, the federal government took the position that discrimination on the basis of sex referred to biological sex and did not extend to sexual orientation or gender identity. This position was a departure from that of the Obama administration with respect to gender identity, but not with respect to sexual orientation.[27] While signaling a willingness to entertain sex stereotyping claims that may overlap with sexual orientation, the Obama administration, to the surprise of many, did not recognize sexual orientation as a stand-alone category of discrimination because, as it put it, "no Federal appellate court has concluded to date that Title IX's prohibition of discrimination 'on the basis of sex'—or Federal laws prohibiting sex discrimination more generally—prohibits sexual orientation discrimination."[28] At the same time, the Obama administration urged legislatures and courts to change the law to prohibit both sexual orientation and gender identity discrimination.

The Trump Department of Justice (DOJ) argued against interpreting sex discrimination to encompass discrimination on the basis of sexual orientation

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[25] *Bostock*, 140 S. Ct. at 1754 (quoting Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188 (2012)).

[26] *Id.* (citing 42 U.S.C. § 2000bb-3).

[27] *See, e.g.*, 81 Fed. Reg. 31,375, 31,390 (May 18, 2016) ("[The Office for Civil Rights at the U.S. Department of Health and Human Services] has decided not to resolve in this rule whether discrimination on the basis of an individual's sexual orientation status alone is a form of sex discrimination under Section 1557.").

[28] *Id.* at 31,389 (internal quotation marks omitted).

and gender identity in *Bostock* and its two companion cases, *Altitude Express, Inc. v. Zarda* and *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*.[29] The Equal Employment Opportunity Commission (EEOC)—the federal agency charged with preventing and remedying illegal employment discrimination, including under Title VII—originally brought the lawsuit against Harris Funeral Homes on behalf of a transgender employee during the Obama administration.[30] After losing in the district court, the EEOC appealed to the Sixth Circuit, and Donald Trump became president soon thereafter. The EEOC, however, continued with its appeal and argued the case before the Sixth Circuit. The same day as the oral argument, DOJ (which handles EEOC cases at the Supreme Court) issued a memo concluding that "Title VII does not prohibit discrimination based on gender identity *per se*."[31] After the Sixth Circuit ruled in favor of the employee, the Trump DOJ abandoned the EEOC's former position on certiorari to the Supreme Court.[32]

In a stark contrast to the Trump administration's policies, hours after Biden was sworn in as President of the United States on January 20, 2021, he issued a sweeping executive order on discrimination on the basis of gender identity and sexual orientation.[33] The executive order lays out the Biden administration's priorities: "It is the policy of my Administration to prevent and combat discrimination on the basis of gender identity or sexual orientation, and to fully enforce Title VII and other laws that prohibit discrimination on the basis of gender identity or sexual orientation."[34] Despite the Supreme Court's disclaimer in *Bostock* that it was not addressing sex discrimination outside the Title VII hiring and firing context, the executive order relies on *Bostock*, claiming that "[u]nder *Bostock*'s reasoning, laws that prohibit sex

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[29] Brief for the United States as Amicus Curiae Supporting Affirmance in No. 17-1618 and Reversal in No. 17-1623, Bostock v. Clayton Cnty., Nos. 17-1618 & 17-1623 (U.S. Aug. 23, 2019); Brief for the Federal Respondent Supporting Reversal, R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Emp't Opportunity Comm'n, No. 18-107 (U.S. Aug. 16, 2019).

[30] Equal Emp't Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018), *aff'd sub nom. Bostock*, 140 S. Ct. 1731.

[31] Memorandum from the Attorney General, Dep't of Justice, to United States Attorneys and Heads of Department Components on Revised Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964 1 (Oct. 4, 2017), https://assets.documentcloud.org/documents/4067383/Attachment-2.pdf.

[32] *See supra* note 29.

[33] Exec. Order No. 13,988, 86 Fed. Reg. 7023 (Jan. 20, 2021) (Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation).

[34] *Id.*

discrimination . . . prohibit discrimination on the basis of gender identity or sexual orientation, so long as the laws do not contain sufficient indications to the contrary."[35] The order calls on the heads of federal agencies to consider whether to revise, suspend, rescind, or promulgate agency "orders, regulations, guidance documents, policies, programs, or other agency actions . . . as necessary to fully implement" federal statutes that prohibit sex discrimination and the administration's policy set forth in the order.[36]

This order was hailed by the Human Rights Campaign, a leading LGBTQ advocacy organization, as "the most substantive, wide-ranging executive order concerning sexual orientation and gender identity ever issued by a United States president," and one that would impact employment, health care, education, and "other key areas of life."[37] The executive order has been cited repeatedly in subsequent agency regulations proposed under the Biden administration.

Biden signed another executive order a few days later on January 25 regarding transgender persons in the military: "It is my conviction as Commander in Chief of the Armed Forces that gender identity should not be a bar to military service."[38] The order reversed the Trump administration's rule preventing transgender persons (in most circumstances) "from joining the Armed Forces and from being able to take steps to transition gender while serving."[39] In response to Biden's order, the U.S. Department of Defense revised its transgender policies to allow military service as "one's self-identify [sic] gender, provided all appropriate standards are met" and allow those serving "medical treatment, gender transition and recognition in one's self-

[35] *Id.*

[36] *Id.* at 7023–24.

[37] HRC Staff, *President Biden Issues Most Substantive, Wide-Ranging LGBTQ Executive Order in U.S. History*, HUMAN RIGHTS CAMPAIGN (Jan. 20, 2021), https://www.hrc.org/press-releases/president-biden-issues-most-substantive-wide-ranging-lgbtq-executive-order-in-u-s-history (quoting Human Rights Campaign President Alphonso David).

[38] Exec. Order No. 14,004, 86 Fed. Reg. 7471, 7471 (Jan. 25, 2021) (Enabling All Qualified Americans to Serve Their Country in Uniform).

[39] *Id.*

identify [sic] gender."[40] The Biden Department of Veterans Affairs has since moved to offer sex reassignment surgeries to transgender veterans.[41]

Adding to his record number of presidential executive orders within the first weeks of a presidency, Biden issued two more orders elaborating on his administration's gender identity policy on March 8, 2021. One outlines that his administration's policy is "to establish and pursue a comprehensive approach to ensure that the Federal Government is working to advance equal rights and opportunities, regardless of gender or gender identity, in advancing domestic and foreign policy—including by promoting workplace diversity, fairness, and inclusion across the Federal workforce and military."[42] The order established a White House Gender Policy Council within the Executive Office of the President to coordinate federal government efforts to "advance gender equity and equality."[43] "Equity" is defined as "the consistent and systematic fair, just, and impartial treatment of all individuals."[44] The order provides a list of the individuals this includes:

> women and girls; Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders, and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality.[45]

The other order focuses on education: "It is the policy of my Administration that all students should be guaranteed an educational environment free from discrimination on the basis of sex, including discrimination in the form of sexual harassment, which encompasses sexual violence, and including discrimination on the basis of sexual orientation or gender identity."[46] The order

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[40] Terri Moon Cronk, *DOD Revises Transgender Policies to Align with White House*, DOD NEWS (Mar. 31, 2021), https://www.defense.gov/Explore/News/Article/Article/2557118/dod-revises-transgender-policies-to-align-with-white-house/.

[41] Leo Shane III, *VA to Offer Gender Surgery to Transgender Vets for the First Time*, MILITARY TIMES (June 19, 2021), https://www.militarytimes.com/veterans/2021/06/19/va-to-offer-gender-surgery-to-transgender-vets-for-the-first-time/.

[42] Exec. Order No. 14,020, 86 Fed. Reg. 13,797, 13,797 (Mar. 8, 2021) (Establishment of the White House Gender Policy Council).

[43] *Id.* at 13,797–98.

[44] *Id.* at 13,800.

[45] *Id.*

[46] Exec. Order No. 14,021, 86 Fed. Reg. 13,803, 13,803 (Mar. 8, 2021) (Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity).

calls on the Secretary of Education to review and implement regulations consistent with the policy.[47]

On June 25, 2021, Biden issued yet another executive order, this time on "diversity, equity, inclusion, and accessibility in the federal workforce."[48] Section 11 on "advancing equity for LGBTQ+ employees" states that federal employees "should be able to openly express their sexual orientation, gender identity, and gender expression, and have these identities affirmed and respected, without fear of discrimination, retribution, or disadvantage."[49] Federal agencies are directed to provide health care coverage for "comprehensive gender-affirming care," use "non-binary" gender markers and pronouns, and explore opportunities to expand availability of "gender non-binary facilities and restrooms."[50]

In both 2021 and 2022, Biden proclaimed March 31 "Transgender Day of Visibility."[51] On March 31, 2022, he issued a video message stating his entire administration is "committed to advancing transgender equality in the classroom, on the playing field, at work, in our military, in our housing and health care systems—everywhere. Simply everywhere."[52] Biden reiterated his promise to expand federal nondiscrimination protections to cover gender identity and his call on Congress to pass the Equality Act.[53] The White House issued a fact sheet announcing new actions and documenting the series of

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[47] *Id.*

[48] Exec. Order No. 14,035, 86 Fed. Reg. 34,593 (June 25, 2021) (Diversity, Equity, Inclusion, and Accessibility in the Federal Workforce).

[49] *Id.* at 34,600.

[50] *Id.* at 34,600–01.

[51] Joseph. R. Biden Jr., A Proclamation on Transgender Day of Visibility, 2021, White House (Mar. 31, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/03/31/a-proclamation-on-transgender-day-of-visibility-2021/; Joseph. R. Biden Jr., A Proclamation on Transgender Day of Visibility, 2022, White House (Mar. 30, 2022), https://www.whitehouse.gov/briefing-room/presidential-actions/2022/03/30/a-proclamation-on-transgender-day-of-visibility-2022/.

[52] President Biden (@POTUS), Twitter (Mar. 31, 2022, 10:04 AM), https://twitter.com/POTUS/status/1509532210495254528.

[53] *Id.*; Biden Proclamation on Transgender Day of Visibility 2022, *supra* note 51.

actions already taken by the Biden administration in support of its gender identity policies.[54]

While Biden's gender identity executive orders and policies touch on many contexts, this article focuses specifically on how they affect employment, health care, education, and athletics.

A. Employment

In the employment context, the Supreme Court in *Bostock* decided that sex discrimination under Title VII includes discrimination on the basis of homosexuality and transgender status. Apart from an unlikely superseding Supreme Court decision or an even more unlikely intervention by Congress, *Bostock*'s protections for homosexual and transgender employees with respect to status-based hiring and firing decisions are here to stay. A few days after the Court issued its decision in June 2020, the Republican-controlled EEOC indicated its adoption of the Supreme Court's interpretation in updated, non-binding "technical assistance."

Although the Commission retains a Republican majority until July 2022 when the five-year term of one of three Republican-appointed Commissioners expires, a Democrat Commissioner became Chair when Biden became president. The Chair controls the "administrative operations of the Commission," such as deciding what business the Commission votes on and issuing technical assistance that, unlike guidance, does not require a vote of the full Commission.[55]

On the first anniversary of *Bostock*, June 15, 2021, the Chair issued a "technical assistance document" on "what the *Bostock* decision means for LGBTQ+ workers (and all covered workers) and for employers across the country."[56] The document purported to "briefly explain[] the Supreme Court's decision in *Bostock v. Clayton County* and the EEOC's established legal positions on sexual-orientation- and gender-identity-related workplace discrimination issues."[57] It stated employees have a right to dress and use sex-

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[54] Fact Sheet, The White House, FACT SHEET: Biden-Harris Administration Advances Equality and Visibility for Transgender Americans (Mar. 31, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/31/fact-sheet-biden-harris-administration-advances-equality-and-visibility-for-transgender-americans/.

[55] 42 U.S.C. § 2000e-4(a).

[56] EEOC, Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity (June 15, 2021), https://www.eeoc.gov/protections-against-employment-discrimination-based-sexual-orientation-or-gender-identity.

[57] *Id.*

specific bathrooms, locker rooms, and showers consistent with their gender identity, and that the "misuse" of preferred names or pronouns could constitute unlawful harassment.[58] It further implied employers in the *private* sector are bound by pre-*Bostock federal* sector Commission decisions that extended sexual orientation and gender identity discrimination prohibitions to the federal workplace.[59]

The document, however, was only "issued upon approval of the Chair" of the EEOC and explicitly acknowledged that it "does not have the force and effect of law and is not meant to bind the public in any way."[60] The document was challenged in court, including by a group of twenty states that argued "*Bostock* did not identify any of the following EEOC-defined forms of 'discrimination' as discrimination under Title VII": sex-specific dress codes; single-sex bathrooms, locker rooms, and showers; preferred names and pronouns; and customer or client references.[61] Despite the document "purport[ing] to represent the EEOC's interpretation of what Title VII demands of employers subject to Title VII," the states allege that this cannot be true, since the full five-member Commission did not vote on or approve the contents or the issuance of the document as is required to establish official EEOC policy or positions.[62]

On Transgender Day of Visibility in 2022, the EEOC announced that it was adding the "nonbinary" gender marker "X" and the prefix "Mx." as part of its intake process for charges of employment discrimination.[63] The press release stated that the EEOC "recogniz[es] that the binary construction of

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] Complaint ¶¶ 81–85, Tennessee v. U.S. Dep't of Educ., No. 3:21-cv-00308 (E.D. Tenn. Aug. 30, 2021) [hereinafter Twenty States Complaint] (raising Administrative Procedure Act (APA), separation of powers, sovereign immunity, and Tenth Amendment claims). The twenty states are Tennessee, Alabama, Alaska, Arizona, Arkansas, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, and West Virginia. *Id.* Texas filed its own lawsuit challenging the document. Complaint, Texas v. Equal Emp't Opportunity Comm'n, No. 2:21-cv-00194-Z (N.D. Tex. Sept. 20, 2021) (amended Mar. 9, 2022).

[62] Twenty States Complaint ¶¶ 88–92.

[63] Press Release, EEOC, EEOC to Add Non-Binary Gender Option to Discrimination Charge Intake Process (Mar. 31, 2022), https://www.eeoc.gov/newsroom/eeoc-add-non-binary-gender-option-discrimination-charge-intake-process.

gender as either 'male' or 'female' does not reflect the full range of gender identities."[64] This move departs significantly from the Supreme Court's decision in *Bostock*, which assumed that "sex" refers only to the "biological distinctions between male and female."[65]

The exact implications of *Bostock* in the employment context are still an open question, particularly as it relates to religious liberty. Title VII prohibits both sex discrimination and discrimination on the basis of religion. Title VII defines "religion" to include "all aspects of religious observance and practice, as well as belief" and requires employers to "reasonably accommodate" employees' religious observances and practices when such accommodations do not impose "undue hardship on the conduct of the employer's business."[66] Generally, if providing an accommodation to an employee would subject another employee to a hostile work environment, that accommodation would constitute an undue hardship.[67] Under Title VII, unlawful harassment occurs when the conduct is unwelcome and "severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive."[68] Apart from Title VII, employees raising gender identity or religious discrimination claims may rely on other federal or state human rights or nondiscrimination laws to advance their workplace claims.[69]

There is ongoing litigation involving the denial of employees' religious accommodation requests to not participate in any work activity affirming or celebrating a view of sex or gender contrary to their sincerely held religious beliefs.[70] One major unresolved issue is whether Title VII requires use of a

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[64] *Id.*

[65] 140 S. Ct. 1731, 1739 (2020).

[66] 42 U.S.C. § 2000e(j).

[67] *See* EEOC, Compliance Manual on Religion Discrimination § 12-IV-B-4 (2021), https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination.

[68] EEOC, *Harassment*, https://www.eeoc.gov/harassment.

[69] *See, e.g.*, Hobby Lobby Stores, Inc. v. Sommerville, No. 2-19-0362, 2021 IL App (2d) 190362 (Ill. App. Ct. Aug. 13, 2021) (awarding $220,000 in damages against employer for violating Illinois Human Rights Act prohibition against gender identity discrimination by refusing transgender identifying employee use of women's restroom); *see also infra* note 72 (listing cases raising non-Title VII claims).

[70] *See, e.g.*, Equal Emp't Opportunity Comm'n v. Kroger Ltd. P'ship I, No. 4:20-cv-01099 (E.D. Ark.) (involving Title VII failure to accommodate claims by two grocery store employees who requested religious accommodations to avoid wearing an apron with a visible rainbow-colored heart emblem on the bib that they believed endorsed LGBT values in violation of their religious beliefs); Brennan v. Deluxe Corp., No. 1:18-cv-02119 (D. Md.) (involving Title VII failure to accommodate claim by employee who was disciplined and fired for not completing employer's online ethics and

transgender person's preferred pronouns in the workplace. Some argue that refusal to use a person's preferred name and pronouns is harassment and discriminatory.[71] Others are litigating over whether employees who have religious objections to using pronouns that do not correspond to a person's biological sex are entitled to a religious accommodation or protection under Title VII, RFRA, the First Amendment, or various state laws. With increasing numbers of children identifying as transgender, this issue is becoming prevalent in the school context; multiple teachers have been fired over their refusal, based on their religious beliefs, to use preferred names or pronouns in violation of school policy (even in cases where they opt to not use pronouns altogether to avoid unintentionally giving offense).[72]

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compliance course because the "correct" answer to a multiple-choice question about gender identity issues conflicted with his religious beliefs).

[71] *See generally* Chan Tov McNamarah, *Misgendering as Misconduct*, 68 UCLA L. REV. DISCOURSE 40 (2020) (arguing that "misgendering" is "objectively offensive conduct" and should be considered harassment or discrimination).

[72] *See, e.g.*, Vlaming v. W. Point Sch. Bd., 10 F.4th 300 (4th Cir. 2021) (affirming rejection of federal court removal of claims under the Virginia constitution and state statutes by high school French teacher who was fired for not abiding by school nondiscrimination policy that required him to use student's preferred pronouns in violation of his religious beliefs); Meriwether v. Hartop, 992 F.3d 492 (6th Cir. 2021) (reversing dismissal of First Amendment free speech and free exercise claims by professor disciplined by university for not following university's gender identity nondiscrimination policy when he refused to address transgender identifying student by student's preferred title and pronouns and instead used only student's last name), *settled & voluntarily dismissed sub nom.* Meriwether v. Trustees of Shawnee State Univ., No. 1:18-cv-00753 (S.D. Ohio Apr. 14, 2022), *press release available at* https://adfmedia.org/case/meriwether-v-trustees-shawnee-state-university (university agreed to pay teacher $400,000 plus attorneys' fees, and agreed teacher has a right to choose when to use, or avoid using, titles or pronouns when referring to or addressing students, including when student requests preferred pronouns); Kluge v. Brownsburg Cmty. Sch. Corp., 1:19-cv-2462 (S.D. Ind. July 12, 2021) (granting summary judgment for school on Title VII failure to accommodate and retaliation claims by Christian music teacher who was allegedly forced to resign for not complying with school name policy requiring use of students' preferred names and pronouns in violation of his religious beliefs after school revoked accommodation to use last names only for all students); *see also* Cross v. Loudoun Cnty. Sch. Bd., No. CL21-3254 (Va. Dec. 1, 2021) (affirming parties' agreement to permanently enjoin school in case raising free speech and free exercise claims by elementary school teacher who was placed on administrative leave after speaking out against proposed preferred pronoun policy at public school board meeting); Ricard v. USD 475 Geary Cnty. Schs. Sch. Bd. Members, No. 5:22-cv-04015 (D. Kan.) (involving First Amendment free speech and free exercise of religion, unconstitutional conditions, Fourteenth Amendment due process and equal protection, and breach of contract claims by middle school teacher who was

On the employer side, a qualifying religious organization is generally able to "assert as a defense to a Title VII claim of discrimination or retaliation that it made the challenged employment decision on the basis of religion."[73] But there is also ongoing litigation over whether Title VII's religious organization exemption or other laws, such as the First Amendment or RFRA, permit religious organizations, including churches, to fire or otherwise discipline employees who do not align with their doctrines on matters of marriage, gender, and sexuality.[74] If the Equality Act passes and effectively removes RFRA protections from Title VII claims, religious organizations would have to qualify for an exemption under Title VII, the First Amendment, or another law.

On a related issued, even before *Bostock*, the EEOC took the position that Title VII requires employers to provide health insurance coverage for gender transition services if they provide coverage for similar services for other reasons.[75] After *Bostock*, the EEOC was preemptively sued by a number of

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suspended and reprimanded for harassment and bullying for not using students' preferred name and denied religious accommodation from using preferred pronouns).

[73] EEOC, Compliance Manual, *supra* note 67, at § 12-I-C-1.

[74] *See, e.g.*, Demkovich v. St. Andrew Apostle Parish, 3 F.4th 968 (7th Cir. 2021) (en banc) (holding First Amendment ministerial exception applies to and bars hostile work environment claim of parish music director who was fired by priest for entering into same-sex marriage in violation of Church teaching); Bear Creek Bible Church & Braidwood Mgmt. v. Equal Emp't Opportunity Comm'n, No. 4:18-cv-00824 (N.D. Tex. Nov. 22, 2021) (holding church and similar church-type employers qualify for Title VII's religious organization exemption for their religious hiring decisions, while religious business-type employers do not, but are protected under RFRA and the First Amendment); Billard v. Charlotte Catholic High Sch., 3:17-cv-00011 (W.D.N.C. Sept. 3, 2021) (granting summary judgment on Title VII sex discrimination claim in favor of substitute drama teacher who was fired by Catholic school after announcing same-sex engagement and finding claim not barred by Title VII religious organization exemption, RFRA, or the First Amendment); Starkey v. Roman Catholic Archdiocese of Indianapolis, Inc., No. 1:19-cv-03153 (S.D. Ind. Aug. 11, 2021) (holding ministerial exception bars claims of discrimination, retaliation, and hostile work environment under Title VII, and violations of state tort law by guidance counselor whose employment contract was not renewed by Catholic school for entering into same-sex marriage in violation of contract and church teaching), *appealed*, No. 21-2524 (7th Cir.); Fitzgerald v. Roncalli High Sch., Inc., No. 1:19-cv-04291 (S.D. Ind.) (involving religious defenses under Title VII and the First Amendment to claims of discrimination, retaliation, and hostile work environment under Title VII and violations of state tort law by guidance counselor whose employment contract was not renewed by Catholic school for entering into same-sex civil union in violation of contract and church teaching); DeWeese-Boyd v. Gordon Coll., No. 1777CV01367 (Mass. Supp. Ct.) (involving application of ministerial exception to state law claims of associate professor of social work who disagreed with college's religious beliefs and policies on human sexuality and whose application for promotion to full professorship was declined allegedly because of her poor performance).

[75] *See, e.g.*, Amicus Br. of the Equal Emp't Opportunity Comm'n in Supp. of Pl. and in Opp'n to Def.'s Mot. to Dismiss, Robinson v. Dignity Health, No. 4:16-cv-03035 (N.D. Cal. Aug. 22,

Catholic-affiliated health care and health insurance entities and several Catholic employers seeking an injunction barring enforcement of a requirement to provide gender transition services or insurance coverage for such services (that would violate their sincerely held religious beliefs). The agency declined to say it would refrain from enforcing such a requirement against those religious organizations.[76] The district court concluded that the enforcement of such a requirement would violate plaintiffs' exercise of religion rights under RFRA.[77] Similarly, the Christian Employers Alliance sued the EEOC over its interpretation that Title VII's sex discrimination prohibition requires religious non-profit and for-profit employers to provide and pay for insurance coverage of gender transition services in violation of the employers' religious beliefs.[78]

In another lawsuit brought by a Christian church and Christian-owned business, a district court held that after *Bostock* employer policies denying

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2016) (arguing hospital's categorical exclusion of coverage for gender transition treatments in its employee health plan, while providing coverage of "medically necessary" treatment for other serious health conditions, stated plausible Title VII sex discrimination claim); Consent Decree ¶ 30, Equal Emp't Opportunity Comm'n v. Deluxe Financial Servs., Inc., No. 15-cv-02646 (D. Minn. Jan. 20, 2016) (entering into three-year consent decree, which provided, inter alia: "As of January 1, 2016, Defendant's national health benefits plan does not and will not include partial or categorical exclusions for otherwise medically necessary care solely on the basis of sex (including transgender status) and gender dysphoria. For example, if the health benefits plan covers exogenous hormone therapy for non-transgender enrollees who demonstrate medical necessity for treatment, the plan cannot exclude exogenous hormone therapy for transgender enrollees or persons diagnosed with gender dysphoria where medical necessity for treatment is also demonstrated."); Julie Moreau, *Walmart Subsidiary Discriminated Against Transgender Worker, EEOC Finds*, NBC NEWS (Aug. 8, 2017, 10:33 AM), https://www.nbcnews.com/feature/nbc-out/walmart-subsidiary-discriminated-against-transgender-worker-eeoc-finds-n790696 (reporting EEOC letter of determination found that Sam's Club (a Walmart subsidiary) violated Title VII, maintaining: "Robison was denied medical coverage because she is transgender, and that Walmart's health care policy 'categorically excluded coverage of any services for "transgender treatment/sex therapy," denying [Robison] medically necessary care that would have been covered if not for her transgender status.'" (alteration in original)).

[76] Religious Sisters of Mercy v. Azar, 513 F. Supp. 3d 1113, 1142 (D.N.D. 2021) ("The EEOC has never disavowed an intent to enforce Title VII's prohibition on gender-transition exclusions in health plans against the CBA or its members. At the same time, the EEOC has enforced that very interpretation against other employers."), *appealed sub nom.* Religious Sisters of Mercy v. Becerra, No. 21-1890 (8th Cir.) (oral argument held December 15, 2021).

[77] *Id.* at 1149.

[78] Complaint ¶ 3, Christian Emp'rs Alliance v. U.S. Equal Emp't Opportunity Comm'n, No. 1:21-cv-00195 (D.N.D. Oct. 18, 2021).

coverage of sex reassignment surgeries and cross-sex hormones violate Title VII since "these policies would *only* function to discriminate against individuals with gender dysphoria."[79] The court, however, held that workplace policies regarding sexual conduct, dress codes, and sex-specific restrooms did *not* violate Title VII because they "do not treat one sex worse than the other."[80]

Apart from Title VII, employers may also be required to provide insurance coverage for gender transition services under Biden administration health insurance regulations, discussed below.

B. Health Care

In the health care context, several groups are seeking to force insurance plans to cover and hospitals and medical professionals to provide the full range of gender transition services, including for minor children. Litigation is ongoing over whether and to what extent insurance coverage for and provision of such services is required by law and whether there are any exemptions when the services conflict with medical judgments, conscience, or religious beliefs.

1. Section 1557 Regulations

<u>2016 Rule.</u> In the wake of the passage of the Patient Protection and Affordable Care Act (the ACA),[81] the U.S. Department of Health and Human Services (HHS) under the Obama administration issued a slew of regulations, including one in 2016 implementing Section 1557 of the ACA (the "2016 Rule").[82] Section 1557 guarantees that no individual can be denied benefits in a federally run or federally funded health program because of their race, color, national origin, sex, age, or disability—all well-established categories of civil rights law.[83] It does so by incorporating the "ground[s] prohibited under" and the enforcement mechanisms from four existing federal civil rights laws, including the prohibition against discrimination "on the basis of

[79] *Bear Creek Bible Church & Braidwood Mgmt.*, No. 4:18-cv-00824, at 68.

[80] *Id.* at 62–69.

[81] Pub. L. 111-148, 124 Stat. 119 (2010) as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152, 124 Stat. 1029 (codified in scattered sections of U.S.C.).

[82] Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,375 (May 18, 2016) (codified at 45 C.F.R. § 92).

[83] 42 U.S.C. § 18116.

sex" in Title IX of the Education Amendments of 1972.[84] As Ryan Anderson and Roger Severino noted in 2016, "Section 1557 of the ACA does not create special privileges for new classes of people or require insurers and physicians to cover or provide specific procedures or treatments."[85]

The Obama administration's 2016 Rule, however, redefined discrimination "on the basis of sex" to include discrimination based on "termination of pregnancy," "sex stereotyping," and "gender identity," which was defined as "an individual's internal sense of gender, which may be male, female, neither, or a combination of male and female, and which may be different from an individual's sex assigned at birth."[86] HHS explicitly chose not to include "sexual orientation" as part of the definition.[87] Under the Rule, "[a] provider specializing in gynecological services that previously declined to provide a medically necessary hysterectomy for a transgender man would have to revise its policy to provide the procedure for transgender individuals in the same manner it provides the procedure for other individuals."[88] ("Medically necessary" treatments, as used by the Obama and Biden administrations and gender identity advocates, describe medical interventions and alterations that attempt to ameliorate a person's internal psychological distress that arises from having a biological sex that differs from their stated internal gender identity by physically altering the person's body. At the same time, any therapies designed to help such people accept their biological sex are deemed not medically necessary.) HHS's rule also required private employers, individuals, and taxpayers to fund health insurance coverage for these procedures, irrespective

[84] *Id.* § 18116(a) (citing Title IX, 20 U.S.C. § 1681 et seq.). Title IX contains a religious exemption, which provides that Title IX does not apply to a covered entity controlled by a religious organization if its application would be inconsistent with the religious tenets of the organization, 20 U.S.C. § 1681(a)(3), and an abortion neutrality provision. 20 U.S.C. § 1688.

[85] ROGER SEVERINO & RYAN T. ANDERSON, PROPOSED OBAMACARE GENDER IDENTITY MANDATE THREATENS FREEDOM OF CONSCIENCE AND THE INDEPENDENCE OF PHYSICIANS, HERITAGE FOUND. BACKGROUNDER NO. 3089 2 (Jan. 8, 2016), https://www.heritage.org/health-care-reform/report/proposed-obamacare-gender-identity-mandate-threatens-freedom-conscience.

[86] 81 Fed. Reg. 31,375, 31,467.

[87] *Id.* at 31,390 ("OCR has decided not to resolve in this rule whether discrimination on the basis of an individual's sexual orientation status alone is a form of sex discrimination under Section 1557.").

[88] *Id.* at 31,455.

of whether it conflicts with their medical judgments or consciences[89] and despite HHS's 2016 national coverage determination that its own Medicare program need not cover sex reassignment surgeries due to insufficient scientific evidence of medical necessity.[90] The 2016 Rule, however, did not just *allow* gender transition services, including sex reassignment surgery, but effectively *required* them despite their controversial nature.

The question of the proper treatment of gender dysphoria—the clinical diagnosis that requires treatment—is unsettled, and respected physicians have raised serious concerns about the propriety of prescribing progressively irreversible and sterilizing cross-sex hormones, sex reassignment surgeries, and other gender transition treatments, particularly for children.[91] Nevertheless, under the 2016 Rule, if physicians administered treatments or performed surgeries that *could* further gender transitions (such as mastectomies on biological females to treat cancer), they were *required* to provide such services for gender transition purposes, including for minors. If they failed to comply, they faced severe consequences such as loss of federal funding for their practices or for their employers (which would likely result in job loss).

Along with ignoring the medical judgment of those who believe transition is not the proper treatment of gender dysphoria, especially for minor children, the Rule's transgender mandate created serious conflicts of conscience for many health care professionals. In the Rule, HHS declined to adopt the exemption for religious institutions required under Title IX (which is otherwise

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[89] *See id.* at 31,378–80.

[90] *See* U.S. Ctrs. for Medicare & Medicaid Servs., Decision Memo for Gender Dysphoria and Gender Reassignment Surgery (CAG-00446N) (Aug. 30, 2016) (stating the agency "is not issuing a National Coverage Determination (NCD) at this time on gender reassignment surgery for Medicare beneficiaries with gender dysphoria because the clinical evidence is inconclusive for the Medicare population"), https://www.cms.gov/medicare-coverage-database/details/nca-decision-memo.aspx?NCAId=282&CoverageSelection=National&KeyWord=gender+reassignment+surgery&KeyWordLookUp=Title&KeyWordSearchType=And&bc=gAAAACAACAAAAA==&.

[91] *See generally* Ethics & Pub. Pol'y Ctr., EPPC Scholars Comment Opposing Proposed Rule "Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2023," RIN 0938-AU65 (Jan. 27. 2022), https://eppc.org/wp-content/uploads/2022/01/EPPC-Scholars-Comment-Opposing-SOGI-Insurance-Mandate.pdf (discussing the unsettled nature of the proper treatment of gender dysphoria, as well as the harms and risks of transition treatments, especially for minors); RYAN T. ANDERSON, WHEN HARRY BECAME SALLY: RESPONDING TO THE TRANSGENDER MOMENT (2018) (same); ABIGAIL SHRIER, IRREVERSIBLE DAMAGE: THE TRANSGENDER CRAZE SEDUCING OUR DAUGHTERS (2020) (exploring the "trans" epidemic sweeping teenage girls and the push for "life-changing interventions on young girls—including medically unnecessary double mastectomies and puberty blockers that can cause permanent infertility").

incorporated by Section 1557).[92] Instead, HHS called it "a blanket religious exemption," refused to apply it, and claimed that other laws such as RFRA and provider conscience statutes "appropriately address[]" any religious concerns.[93] But by prohibiting differential treatment on the basis of gender identity in health services, the rule targeted health care professionals and organizations that, as a matter of professional medical judgment, conscience, or religious faith, "believe that maleness and femaleness are biological realities to be respected and affirmed, not altered or treated as diseases."[94]

The 2016 Rule's redefinition of sex discrimination was challenged in two different federal district courts by nine states, several religious organizations, and an association of over 19,000 health care professionals.[95] On December 31, 2016, one federal district court preliminarily enjoined nationwide the challenged provisions, concluding that they violated the Administrative Procedure Act (APA) by "contradicting existing law and exceeding statutory authority," and also likely violated RFRA.[96] The second federal district court agreed.[97] On October 15, 2019, the first court issued a final judgment, vacating the rule because its attempt to prohibit discrimination on the basis of "gender identity" and "termination of pregnancy" violated both the APA and RFRA.[98] These rulings bind HHS from enforcing those provisions. HHS

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[92] *Cf.* 81 Fed. Reg. 31,375, 31,380 ("We decline to adopt commenters' suggestion that we import Title IX's blanket religious exemption into Section 1557. Section 1557 itself contains no religious exemption."), *with* 42 U.S.C. § 18116(a) ("an individual shall not, *on the ground prohibited under* . . . title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under . . ." and "[t]he enforcement mechanisms provided for and available under such . . . title IX . . . shall apply for purposes of violations of this subsection").

[93] 81 Fed. Reg. 31,375, 31,435.

[94] SEVERINO & ANDERSON, *supra* note 85, at 1–2.

[95] *See* Franciscan Alliance, Inc. v. Burwell, 227 F. Supp. 3d 660 (N.D. Tex. 2016); Religious Sisters of Mercy v. Burwell, No. 3:16-cv-00386 (D.N.D.), *appealed sub nom. Religious Sisters of Mercy*, No. 21-1890; Catholic Benefits Assoc. v. Burwell, No. 3:16-cr-00432 (D.N.D.) (later consolidated with *Religious Sisters of Mercy*), *appealed sub nom. Religious Sisters of Mercy*, No. 21-1890.

[96] *Franciscan Alliance*, 227 F. Supp. 3d at 670.

[97] *Religious Sisters of Mercy*, Nos. 3:16-cv-00386 & 3:16-cr-00432, at 2–3 (D.N.D. Jan. 23, 2017) (staying enforcement of 2016 Rule's "prohibitions against discrimination on the bases of gender identity and termination of pregnancy" as to plaintiffs in both cases), *appealed*, No. 21-1890 (8th Cir.).

[98] Franciscan Alliance, Inc. v. Azar, 414 F. Supp. 3d 928, 947 (N.D. Tex. 2019).

appealed both rulings, not disputing the RFRA analysis, but arguing that the plaintiffs failed to demonstrate standing, ripeness, and irreparable harm.[99]

2020 Rule. HHS under the Trump administration rescinded the 2016 Rule (with some exceptions not relevant here) and issued a new rule in 2020.[100]

After substantial review, including consideration of hundreds of thousands of public comments, HHS under Trump publicly unveiled the final rule on June 12, 2020 (coincidentally a few days before the *Bostock* decision), and sent it to the federal register for publication.[101] The 2020 rule explicitly eliminated the 2016 rule's inclusion of "gender identity" within the definition of discrimination "on the basis of sex" in health care under Section 1557. Instead, the 2020 rule did not define sex, but stated that sex discrimination under Section 1557 should be understood per its ordinary original public meaning of the exclusive "biological binary of male and female."[102] In anticipating the potential effect of the *Bostock* decision (which was issued while the rule's publication in the Federal Register was pending), HHS stated, "the binary biological character of sex (which is ultimately grounded in genetics) takes on special importance in the health context. Those implications might not be fully addressed by future Title VII rulings even if courts were to deem the categories of sexual orientation or gender identity to be encompassed by the prohibition on sex discrimination in Title VII."[103]

The 2020 Rule maintained "vigorous enforcement of federal civil rights laws on the basis of race, color, national origin, disability, age, and sex," but it restored "the rule of law by revising certain provisions" in the 2016 Rule that exceeded the scope of the authority Congress delegated in Section 1557.[104] Specifically, HHS said it would thereafter treat "sex discrimination"

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[99] *Religious Sisters of Mercy*, No. 21-1890 (oral argument held December 15, 2021).

[100] Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 85 Fed. Reg. 37,160 (June 19, 2020).

[101] Press Release, U.S. Dep't of Health & Human Servs., HHS Finalizes Rule on Section 1557 Protecting Civil Rights in Healthcare, Restoring the Rule of Law, and Relieving Americans of Billions in Excessive Costs (June 12, 2020), https://www.hhs.gov/guidance/document/hhs-finalizes-rule-section-1557-protecting-civil-rights-healthcare-restoring-rule-law-and. The rule was officially published in the federal register on June 19, 2020. *See* 85 Fed. Reg. 37,160.

[102] 85 Fed. Reg. 37,160, 37,178.

[103] *Id.* at 37,168.

[104] HHS Finalizes Rule on Section 1557, *supra* note 101.

"according to the plain meaning of the word 'sex' as male or female and as determined by biology."[105]

The 2020 Rule was challenged in multiple federal district courts,[106] resulting in several of its provisions being enjoined.[107] One court said the agency should have halted publication of the rule to consider *Bostock*'s implications,[108] while another court held that the rule is "contrary to *Bostock*."[109] Neither court addressed the fact that the Supreme Court premised its *Bostock* decision on the assumption that "sex" refers only to the "biological distinctions between male and female"[110] and did not adopt "gender identity" as a protected class, only "transgender status."[111]

<u>2021 Biden "Notification."</u> On May 10, 2021, Biden's HHS issued a "notification of interpretation and enforcement," stating, "Consistent with the Supreme Court's decision in *Bostock* and Title IX, beginning today, [the Office for Civil Rights (OCR)] will interpret and enforce Section 1557's prohibition on discrimination on the basis of sex to include: (1) discrimination

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[105] *Id.* Both the 2016 Rule and the 2020 Rule declined to recognize sexual orientation as a protected category under Section 1557.

[106] *See* Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Human Servs., 485 F. Supp. 3d 1 (D.D.C. 2020); Asapansa-Johnson Walker v. Azar, 480 F. Supp. 3d 417 (E.D.N.Y. 2020); Washington v. U.S. Dep't of Health & Human Servs., 482 F. Supp. 3d 1104 (W.D. Wash. 2020); Bos. All. Of Gay, Lesbian, Bisexual & Transgender Youth v. U.S. Dep't of Health & Human Servs., No. 1:20-cv-11297 (D. Mass.); New York v. U.S. Dep't of Health & Human Servs., No. 1:20-cv-05583 (S.D.N.Y.).

[107] *Whitman-Walker Clinic*, 485 F. Supp. 3d 1 (preliminarily enjoining HHS from enforcing portions of the 2020 Rule); *Asapansa-Johnson Walker*, 480 F. Supp. 3d 417 (staying portions of the 2020 Rule's repeal of portions of the 2016 Rule and preliminarily enjoining HHS from enforcing the repeal of those provisions); *Asapansa-Johnson Walker*, No. 1:20-cv-02834 (E.D.N.Y. Oct. 29, 2020) (staying/enjoining additional portions of the 2020 Rule's repeal of portions of the 2016 rule). *But see Washington*, 482 F. Supp. 3d 1104 (denying motion for preliminary injunction because Washington State lacked Article III standing).

[108] *Whitman-Walker Clinic*, 485 F. Supp. 3d at 42 ("It is sufficient for the Court to determine that *Bostock*, at the very least, has significant implications for the meaning of Title IX's prohibition on sex discrimination, and that it was arbitrary and capricious for HHS to eliminate the 2016 Rule's explication of that prohibition without even acknowledging—let alone considering—the Supreme Court's reasoning or holding.").

[109] *Asapansa-Johnson Walker*, 480 F. Supp. 3d at 420 ("[T]he Court concludes that the proposed rules are, indeed, contrary to *Bostock* and, in addition, that HHS did act arbitrarily and capriciously in enacting them.").

[110] 140 S. Ct. at 1739.

[111] *Id.* at 1746–47.

on the basis of sexual orientation; and (2) discrimination on the basis of gender identity."[112] The notification acknowledged that HHS is bound to comply with RFRA and "all other legal requirements" and "all applicable court orders," but it gave no indication as to how any of those obligations applied to it.[113]

The notification has been challenged in several lawsuits, including under the APA, RFRA, and the First Amendment's protections of free speech, free association, and free exercise of religion.[114] In one case brought by a Catholic hospital and a Christian health care professional association, the court permanently enjoined HHS's interpretation and enforcement of Section 1557 and any regulations that would require the plaintiffs to perform or provide insurance coverage for gender transition services (or abortions).[115] The court called HHS's "notification" an act of "administrative fiat," raising doubt about the agency's power to issue such commands outside the public rulemaking process,[116] which both the Obama and Trump administrations followed with the 2016 and 2020 rules. HHS has since announced it was planning to propose a new Section 1557 rule in April 2022 (though at the time this article was published in May, the rule has not yet been proposed), which is anticipated to formally adopt regulations consistent with its May 2021 notification.[117]

On March 2, 2022, HHS released another "notice and guidance" document on "gender affirming care, civil rights, and patient privacy."[118] The document reiterated that OCR is investigating and enforcing Section 1557 cases

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[112] U.S. Dep't of Health & Human Servs., Notification of Interpretation and Enforcement of Section 1557 of the Affordable Care Act and Title IX of the Education Amendments of 1972 3 (May 10, 2021), https://www.hhs.gov/sites/default/files/ocr-bostock-notification.pdf.

[113] *Id.*

[114] *See* Am. Coll. of Pediatricians v. Becerra, No. 1:21-cv-00195 (E.D. Tenn.) (involving APA, RFRA, constitutional structural federalism and lack of enumerated powers, and First Amendment religion, speech, and association claims by two medical associations that together represent 3,000 physicians and health professionals); Neese v. Becerra, No. 2:21-cv-00163 (N.D. Tex.) (involving APA claim by class action of health-care providers subject to section 1557); *Christian Emp'rs Alliance*, No. 1:21-cv-00195 (involving APA, RFRA, and First Amendment free exercise and free speech claims by religious employers alliance).

[115] Franciscan Alliance, Inc. v. Becerra, No. 7:16-cv-00108, at 21 (N.D. Tex. Aug. 9, 2021).

[116] *Id.* at 8.

[117] 87 Fed. Reg. 5002, 5060 (Jan. 31, 2022) (Introduction to the Unified Agenda of Federal Regulatory and Deregulatory Actions-Fall 2021).

[118] Office for Civil Rights, U.S. Dep't of Health & Human Servs., HHS Notice and Guidance on Gender Affirming Care, Civil Rights, and Patient Privacy (Mar. 2, 2022), https://www.hhs.gov/sites/default/files/hhs-ocr-notice-and-guidance-gender-affirming-care.pdf.

involving discrimination on the basis of sexual orientation and gender identify.[119] It elaborated:

> Categorically refusing to provide treatment to an individual based on their gender identity is prohibited discrimination. Similarly, federally-funded covered entities restricting an individual's ability to receive medically necessary care, including gender-affirming care, from their health care provider solely on the basis of their sex assigned at birth or gender identity likely violates Section 1557.[120]

This guidance document was issued by HHS in response[121] to a February 2022 Texas Attorney General opinion letter, which stated that sterilizing treatments and other permanent "sex-change procedures" "can constitute child abuse when performed on minor children."[122] These treatments and procedures include: "(1) puberty-suppression or puberty-blocking drugs; (2) supraphysiologic doses of testosterone to females; and (3) supraphysiologic doses of estrogen to males," as well as "(1) sterilization through castration, vasectomy, hysterectomy, oophorectomy, metoidioplasty, orchiectomy, penectomy, phalloplasty, and vaginoplasty; (2) mastectomies; and (3) removing from children otherwise healthy or non-diseased body parts or tissue."[123] Texas's governor subsequently directed the Texas Department of Family and Protective Services (DFPS) to "conduct a prompt and thorough investigation of any reported instances of these abusive procedures in the State of Texas."[124]

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[119] *Id.* at 1.

[120] *Id.* at 2.

[121] Press Statement, U.S. Dep't of Health & Human Servs., Statement by HHS Secretary Xavier Becerra Reaffirming HHS Support and Protection for LGBTQI+ Children and Youth (Mar. 2, 2022), https://www.hhs.gov/about/news/2022/03/02/statement-hhs-secretary-xavier-becerra-reaffirming-hhs-support-and-protection-for-lgbtqi-children-and-youth.html.

[122] Tex. Att'y Gen. Op. Letter No. KP-0401, from Ken Paxton, Attorney General, to Matt Krause, Chair, House Committee on General Investigating, Texas House of Representatives 1–2 (Feb. 18, 2022), https://www.texasattorneygeneral.gov/sites/default/files/opinion-files/opinion/2022/ kp-0401.pdf.

[123] *Id.* at 1.

[124] Letter from Greg Abbott, Governor, State of Texas, to Jaime Masters, Commissioner, Texas Department of Family and Protective Services (Feb. 22, 2022), https://gov.texas.gov/uploads/files/press/O-MastersJaime202202221358.pdf. Texan parents of a child who identifies as transgender and a Texas DFPS doctor sued Texas over its actions. Doe v. Abbott, No. D-1-G -22-000977 (Tex. Jud. D.).

In addition to the guidance document, HHS Secretary Xavier Becerra issued a press statement opposing Texas' actions, stating, "The Texas government's attacks against transgender youth and those who love and care for them are discriminatory and unconscionable. These actions are clearly dangerous to the health of transgender youth in Texas."[125] Becerra stated HHS "is closely monitoring the situation in Texas, and will use every tool at [its] disposal to keep Texans safe," and he encouraged those investigated by Texas for child abuse to contact HHS's Office for Civil Rights "to report their experience."[126] Texas responded by challenging HHS's targeting and the March 2 guidance in court.[127]

Concurrent with litigation over HHS's Section 1557 regulations and interpretations, transgender patients and employees are bringing Section 1557 sex discrimination claims against, respectively, religious hospitals (for not providing gender transition surgeries or treatments) and their employers (for not providing insurance coverage of those services).[128] One federal district court held that RFRA did not bar such a claim because the federal government was not a party to the litigation.[129]

2. Transgender Insurance Mandates

HHS has never formally determined that gender transition treatments are medically necessary care, and its most recent national coverage determination on the matter went the other way.[130] Indeed, none of the drugs used to block puberty and induce cross-sex masculine or feminine features are approved as safe or effective for such uses by the U.S. Food and Drug Administration.

Nevertheless, in addition to Section 1557's nondiscrimination provision, HHS is taking steps to require insurance coverage of gender transition

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[125] Becerra Reaffirming HHS Support and Protection for LGBTQI+ Children and Youth, *supra* note 121.

[126] *Id.*

[127] First Amended Complaint, *Texas v. EEOC*, No. 2:21-cv-00194-Z.

[128] *See, e.g.*, Hammons v. Univ. of Md. Med. Sys. Corp., No. 1:20-cv-02088 (D. Md. July 28, 2021) (relying on *Bostock* to deny motion to dismiss on Section 1557 sex discrimination claim against Catholic hospital that refused based on its religious beliefs and Catholic Directives to perform a hysterectomy on a biological female with gender dysphoria).

[129] *See* C.P. v. Blue Cross Blue Shield of Ill., 536 F. Supp. 3d 791 (W.D. Wash. 2021) (denying motion to dismiss). *But see* Rachel N. Morrison, *Does the EEOC Really Get to Decide Whether RFRA Applies in Employment-Discrimination Lawsuits?*, NAT'L REV. (Sept. 21, 2021, 4:09 PM) ("RFRA should be available 'in all cases' as a defense whenever the government substantially burdens religious exercise through 'all Federal law, and the implementation of that law'—regardless of whether the government is a party to the lawsuit.").

[130] *See supra* note 90.

services by recognizing such services as a new "essential health benefit."[131] In October 2021, HHS's Centers for Medicare & Medicaid Services (CMS) approved Colorado's essential health benefits benchmark plan for individual markets and small groups (fewer than 51 employees) to require insurance coverage for "gender affirming" services, meaning services affirming only a person's identification of gender that is *inconsistent* with the person's biological sex.[132] These services would include, "at minimum": puberty blockers for children (with no stated age minimum); cross-sex hormones; genital and non-genital surgical procedures (hysterectomy, penectomy, mastectomy); blepharoplasty (eye and lid modification); face/forehead and/or neck tightening; facial bone remodeling for facial feminization; genioplasty (chin width reduction); rhytidectomy (cheek, chin, and neck); cheek, chin, and nose implants; lip lift/augmentation; mandibular angle augmentation/creation/reduction (jaw); orbital recontouring; rhinoplasty (nose reshaping); laser or electrolysis hair removal; and breast/chest augmentation, reduction, construction.[133] Biden-appointed CMS Administrator Chiquita Brooks-LaSure said Colorado was a "model for other states to follow and we invite other states to follow suit."[134]

But instead of waiting for other states to copy Colorado, in January 2022, CMS issued a proposed rule that would have required all insurers of individual market and small group plans across the country to cover the same gender transition services covered under Colorado's plan.[135] The proposal would also

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[131] Fact Sheet, *supra* note 54 (listing approval of state's addition of "gender-affirming care as an essential health benefit" as part of the "historic work" supporting the Biden administration's gender identity policies).

[132] Press Release, Ctrs. For Medicare & Medicaid Servs., U.S. Dep't of Health & Human Servs., Biden-Harris Administration Greenlights Coverage of LGBTQ+ Care as an Essential Health Benefit in Colorado (Oct. 12, 2021), https://www.cms.gov/newsroom/press-releases/biden-harris-administration-greenlights-coverage-lgbtq-care-essential-health-benefit-colorado. There is no provision of coverage for mental health or any other service to affirm a person's biological sex.

[133] DIV. OF INSURANCE, COLO. DEP'T OF REGULATORY AGENCIES, BENEFITS FOR HEALTH CARE COVERAGE: COLORADO BENCHMARK PLAN 38 (May 7, 2021), *available at* https://doi.colorado.gov/insurance-products/health-insurance/aca-information/aca-benchmark-health-insurance-plan-selection (click on "Benchmark plan changes – submission documents" and open document titled "Colorado Benchmark plan for 2023.pdf").

[134] Administration Greenlights Coverage of LGBTQ+ Care as an Essential Health Benefit in Colorado, *supra* note 132.

[135] 87 Fed. Reg. 584, 597.

have amended benefit design requirements in fully-insured large group plans (more than 50 employees) so that excluding coverage of treatments for gender dysphoria could be considered "presumptively discriminatory."[136] These new requirements would have resulted from the proposal to add "sexual orientation and gender identity" nondiscrimination provisions to several federal insurance regulations.[137] Because CMS specifically disclaimed that it was relying on Section 1557 as authority to issue its proposed non-discrimination regulations (instead relying on other provisions), the proposal would have acted as an end-run around the injunctions in Section 1557 litigation.

To the surprise of many, when CMS finalized the rule at the end of April 2022, it did so without the proposed sexual orientation and gender identity nondiscrimination provisions.[138] CMS explained that because the impending Section 1557 rule will address issues related to sex discrimination, "HHS is of the view that it would be most prudent to address the nondiscrimination proposals related to sexual orientation and gender identity in the [CMS] proposed rule at a later time, to ensure that they are consistent with the policies and requirements that will be included in the section 1557 rulemaking."[139]

3. Gender Transition Treatments for Minors

None of the Biden administration's gender identity policies exclude treatments for minor children under the administration's unidirectional affirmation model. This policy position is advocated by HHS's Assistant Secretary of Health, pediatrician Rachel Levine (formerly Richard Levine).[140] Levine, who identifies as transgender, advocates for transgender identifying children being administered puberty blockers and cross-sex hormones, and

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[136] *Id.* at 595–97, 667.

[137] *Id.* at 595–97.

[138] Fact Sheet, Ctrs. For Medicare & Medicaid Servs., HHS Notice of Benefit and Payment Parameters for 2023 Final Rule Fact Sheet (Apr. 28, 2022), https://www.cms.gov/newsroom/fact-sheets/hhs-notice-benefit-and-payment-parameters-2023-final-rule-fact-sheet.

[139] *Id.*

[140] U.S. Dep't of Health & Human Servs., *Admiral Rachel L. Levine, M.D.*, https://www.hhs.gov/about/leadership/rachel-levine.html (last reviewed Mar. 8, 2022).

undergoing mastectomies and sterilizing sex reassignment surgeries,[141] as well as for homeless youth to have an "accelerated" transition process.[142]

During Levine's confirmation hearing before the Senate Health, Education, Labor and Pensions Committee, Senator Rand Paul of Kentucky asked Levine whether "minors are capable of making such a life-changing decision as changing one's sex," and whether the government should intervene "to override the parent's consent to give a child puberty blockers, cross-sex hormones, and/or amputation surgery of breasts and genitalia."[143] Levine refused to answer both questions, responding that "transgender medicine is a very complex and nuanced field with robust research and standards of care that have been developed."[144]

While the Trump HHS Office for Civil Rights was under the direction of Roger Severino, it invited and met the leading figures in transgender medicine, including Dr. Levine. Agency officials confirmed Levine's support for surgeries and hormones for children and asked, "What does it mean to be male or female?" Levine could not give a coherent answer.[145]

On Transgender Day of Visibility in 2022, HHS was the first federal agency to fly the transgender flag outside its building.[146] Secretary Becerra

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[141] *See, e.g.*, Sarah Jacoby, *What Is Gender-Affirming Care? Admiral Rachel Levine Explains*, TODAY (Feb. 25, 2022, 4:08 PM), https://www.today.com/health/health/gender-affirming-care-admiral-rachel-levine-rcna17677.

[142] *See* Rachel Levine, Address at Franklin & Marshall College, "It's a Transgeneration: Issues in Transgender Medicine" (Jan. 19, 2017), *available at* https://www.fandm.edu/news/latest-news/2017/01/19/transgender-health-and-the-changes-occurring-in-the-gender-binary.

[143] C-SPAN, *Confirmation Hearing for Surgeon General and Assistant Health Secretary Nominees* (Feb. 25, 2021), https://www.c-span.org/video/?509143-1/confirmation-hearing-surgeon-general-assistant-health-secretary-nominees.

[144] *Id.*

[145] Roger Severino (@RogerSeverino_), Twitter (Feb. 25, 2021, 12:49 PM), https://twitter.com/rogerseverino_/status/1364996043385888771. *Cf.* C-SPAN, *Jackson Confirmation Hearing, Day 2 Part 6* (Mar. 22, 2022), https://www.c-span.org/video/?518342-102/jackson-confirmation-hearing-day-2-part-6 (Senator Blackburn: "Can you provide a definition for the word 'woman'?" Ketanji Brown Jackson: "Can I provide a definition? . . . I can't." Blackburn: "You can't?" Jackson: "Not in this context. I'm not a biologist.").

[146] Secretary Xavier Becerra (@SecBecerra), Twitter (Mar. 31, 2022, 8:44 AM), https://twitter.com/secbecerra/status/1509512008026267650.

and Assistant Secretary Levine both issued statements in support,[147] and the Department released several documents endorsing "social affirmation" at any age (including preferred name and pronouns and restroom and facility use that corresponds to a person's gender identity), as well as puberty blockers, cross-sex hormones, and "top" and "bottom" sex reassignment surgeries in early adolescence and onward.[148] In response, Florida's Department of Health issued guidelines clarifying that the treatment of gender dysphoria for children and adolescents should *not* include social gender transition, puberty blockers, cross-sex hormones, or sex reassignment surgeries based on "the lack of conclusive evidence, and the potential for long-term, irreversible effects."[149]

Also on Transgender Day of Visibility, DOJ sent a letter to state attorneys general "reminding them of federal constitutional and statutory provisions"—including Section 1557—that it claims protect transgender youth who seek "gender-affirming care,"[150] and the Secretary of State issued a statement calling the denial of such care "violence."[151]

In addition to Texas' child abuse determination, several states have passed laws that prohibit providing minor children with some combination of

[147] Press Release, U.S. Dep't of Health & Human Servs., Statements by HHS Secretary Xavier Becerra, Assistant Secretary for Health Admiral Rachel Levine, and Assistant Secretary for Global Affairs Loyce Pace on International Transgender Day of Visibility (Mar. 31, 2022), https://www.hhs.gov/about/news/2022/03/31/statements-hhs-secretary-xavier-becerra-assistant-secretary-health-admiral-rachel-levine-assistant-secretary-global-affairs-loyce-pace-international-transgender-day-visibility.html.

[148] *See, e.g.*, Office of Population Affairs, U.S. Dep't of Health & Human Servs., Gender-Affirming Care and Young People (Mar. 2022), https://opa.hhs.gov/sites/default/files/2022-03/gender-affirming-care-young-people-march-2022.pdf. *But see Fact-Checking the HHS*, SOC'Y FOR EVIDENCE BASED GENDER MED. (Apr. 7, 2022), https://segm.org/fact-checking-gender-affirming-care-and-young-people-HHS (debunking the "many highly inaccurate" claims made by HHS in its "Gender-Affirming Care and Young People" document).

[149] Office of the State Surgeon Gen., Fla. Dep't of Health, Treatment of Gender Dysphoria for Children and Adolescents (Apr. 20, 2022), https://www.floridahealth.gov/ documents/newsroom/press-releases/2022/04/20220420-gender-dysphoria-guidance.pdf.

[150] Press Release, U.S. Dep't of Justice, Justice Department Reinforces Federal Nondiscrimination Obligations in Letter to State Officials Regarding Transgender Youth (Mar. 31. 2022), https://www.justice.gov/opa/pr/justice-department-reinforces-federal-nondiscrimination-obligations-letter-state-officials; Letter, Kristen Clarke, Assistant Attorney General, Civil Rights Div., U.S. Dep't of Justice, to State Attorneys General (Mar. 31, 2022), https://www.justice.gov/opa/press-release/file/1489066/download.

[151] Press Statement, Antony J. Blinken, Secretary of State, U.S. Dep't of State, On Transgender Day of Visibility (Mar. 31, 2022), https://www.state.gov/on-transgender-day-of-visibility-2/.

puberty blockers, cross-sex hormones, and sex reassignment surgeries,[152] and more states are considering similar measures. When Arkansas's law—which prohibits gender transition procedures (including puberty blockers, cross-sex hormones, and sex reassignment surgeries) for minors, as well as public funds and insurance coverage for such procedures—was challenged in federal court, the Biden DOJ issued a statement of interest against the law, raising its interest in protecting "nondiscriminatory access to healthcare" under Section 1557.[153] In another federal lawsuit challenging an Alabama law that criminalizes providing minors with puberty blockers, cross-sex hormones, and sex reassignment surgeries, the Biden DOJ intervened, filing a complaint alleging the law violates the Equal Protection Clause of the Fourteen Amendment.[154]

4. Conscience and Religious Freedom Protections

Several key Biden appointees have been critical of conscience and religious freedom rights in health care,[155] especially as they relate to gender identity discrimination, and despite the *Bostock* Court specifically recognizing the constitutional guarantee of the free exercise of religion in a related context.[156]

Shortly after becoming Secretary of HHS, Becerra dismantled the Conscience and Religious Freedom Division within HHS's Office for Civil Rights, which was established in 2018 "to restore federal enforcement of our nation's laws that protect the fundamental and unalienable rights of conscience and religious freedom" and protect the rights of people of all faiths to be free from discrimination in health care.[157] This was no surprise since from its inception the Division faced the skepticism and disdain of key Biden

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[152] *See, e.g.*, Ala. S.B. 184 (2022); Ariz. S.B. 1138 (2022); Ark. H.B. 1570 (2021); Tenn. H.B. 0578 (2021).

[153] Statement of Interest of the United States, *Brandt v. Rutledge*, No. 4:21-cv-450 (E.D. Ark. June 17, 2021).

[154] Complaint in Intervention, Eknes-Tucker v. Alabama, No. 2:22-cv-184 (M.D. Ala. Apr. 29, 2022).

[155] *See* Rachel N. Morrison, *In Its First Year, Biden's HHS Relentlessly Attacked Christians and Unborn Babies*, THE FEDERALIST (Mar. 18, 2022), https://thefederalist.com/2022/03/18/in-its-first-year-bidens-hhs-relentlessly-attacked-christians-and-unborn-babies/; *see also* Roger Severino, *Who Has Been Politicizing the HHS Office for Civil Rights?*, NAT'L REV. (Sept. 17, 2021, 12:05 PM), https://www.nationalreview.com/corner/who-has-been-politicizing-the-hhs-office-for-civil-rights/.

[156] *See Bostock*, 140 S. Ct. at1754.

[157] Press Release, U.S. Dep't of Health & Human Servs., HHS Announces New Conscience and Religious Freedom Division (Jan. 18, 2018).

appointees. For example, prior to joining HHS, Levine stated that the Division should be "either disbanded or certainly redirected."[158] Similarly, Melissa Rogers—who was appointed by Biden to serve as Executive Director of the White House Office of Faith-Based and Neighborhood Partnerships (a position she held in the Obama administration as well)[159]—wrote in 2020, prior to her appointment, that the new administration should "immediately" review the Division "to evaluate the need for this office and its effectiveness."[160]

Becerra also removed the authority of the Office for Civil Rights to receive complaints and enforce conscience and religious projections under RFRA and the First Amendment, giving that responsibility instead to "Department components" that, unlike OCR, are not conscience and religious freedom experts or equipped to handle such complaints.[161] HHS is further planning to propose rescinding Trump-era conscience regulations.[162] When it comes to the Biden administration's gender identity policies, it has yet to specify what, if any, conscience and religious freedom protections it will recognize when there is a conflict.

In short, Biden's appointees, their statements, and actions by HHS leave substantial reason to doubt that HHS will respect existing laws protecting conscience and religious freedom. This does not bode well for health care

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[158] Chris Johnson, *Rachel Levine Tapped to Become First Out Transgender Senate-Confirmed Official*, WASH. BLADE (Jan. 19, 2021), https://www.washingtonblade.com/2021/01/19/historic-rachel-levine-tapped-to-become-first-openly-transgender-senate-confirmed-official/.

[159] Fact Sheet, The White House, FACT SHEET: President Biden Reestablishes the White House Office of Faith-Based and Neighborhood Partnerships (Feb. 14, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/14/fact-sheet-president-biden-reestablishes-the-white-house-office-of-faith-based-and-neighborhood-partnerships/.

[160] MELISSA ROGERS & E. J. DIONNE JR., BROOKINGS INST., A TIME TO HEAL, A TIME TO BUILD: RECOMMENDATIONS FOR THE NEXT ADMINISTRATION ON RESPECTING RELIGIOUS FREEDOM AND PLURALISM, FORGING CIVIL SOCIETY PARTNERSHIPS, AND NAVIGATING FAITH'S ROLE IN FOREIGN POLICY 33 (Oct. 21, 2020), https://www.brookings.edu/wp-content/uploads/2020/10/A_Time_to_Heal_report.pdf.

[161] 86 Fed. Reg. 67,067 (Nov. 24, 2021) (Delegation of Authority); *see also* Letter from Lisa J. Pino, Director, Office for Civil Rights, U.S. Dep't of Health & Human Servs., to Xavier Becerra, Secretary, U.S. Dep't of Health & Human Servs., on DECISION—Sign Delegation of Authority on the Religious Freedom Restoration Act and the Religion Clause of the First Amendment to the U.S. Constitution (Nov. XX, 2021), https://www.lankford.senate.gov/imo/media/doc/HHS RFRA Memo.pdf (requesting Becerra rescind OCR's delegation of authority to enforce RFRA and the Religious Clauses of the First Amendment and recognizing that the Department will be criticized that it "does not take seriously its compliance with RFRA or the First Amendment").

[162] *See* Proposed Rule, Rescission of the Regulation entitled "Protecting Statutory Conscience Rights in Health Care; Delegations of Authority," RIN: 0945-AA18.

providers who have conscientious or religious objections to providing gender transition services, including for minors.

C. Education & Athletics

Title IX of the Education Amendments of 1972 prohibits discrimination based on sex in education programs or activities that receive federal financial assistance, such as grants or student loans.[163] Title IX applies to nearly all schools, public and private. But it does *not* apply to an educational institution that is "controlled by a religious organization" to the extent that its application would be inconsistent with the religious tenets of the organization.[164] Historically, Title IX's prohibitions against sex discrimination were understood to refer to discrimination on the basis of biological sex, and its text and regulations repeatedly recognize a biological binary of male and female.[165] For example, Title IX explicitly states that its provisions are not to be construed as prohibiting an educational institution "from maintaining separate living facilities for the different sexes,"[166] which its regulations explain include separate toilet, locker room, and shower facilities.[167]

1. School Facilities and Harassment

In May 2016, Obama's Department of Education (ED)—the federal agency that enforces Title IX—along with DOJ issued a "Dear Colleague" letter cosigned by Catherine Lhamon and Vanita Gupta, later Biden's Assistant Secretary for Civil Rights at ED and DOJ Associate Attorney General, respectively. The letter called for transgender students to have access to sex-separate bathrooms and locker rooms consistent with their gender identity.[168] The letter was formally rescinded shortly after President Trump took office

[163] Office for Civil Rights, U.S. Dep't of Educ., *Title IX and Sex Discrimination* (last modified Aug. 20, 2021), https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html.

[164] 20 U.S.C. § 1681(a)(3); *see also* 34 C.F.R. § 106.12.

[165] *See, e.g.*, 20 U.S.C. § 1681 ("one sex," "both sexes," "other sex," "boy or girl conferences"); 34 C.F.R. § 106.34 ("one sex," "boys and girls"); *id.* § 106.41 ("one sex," "both sexes," "other sex").

[166] 20 U.S.C. § 1686.

[167] 34 C.F.R. § 106.33.

[168] Letter from Catherine E. Lhamon, Assistant Secretary for Civil Rights, U.S. Dep't of Educ., & Vanita Gupta, Principal Deputy Assistant Attorney General for Civil Rights, U.S. Dep't of Just., to Colleague on Transgender Students (May 13, 2016), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf.

by a new Dear Colleague letter.[169] The new letter emphasized that the withdrawal of the Obama administration guidance documents "does not leave students without protections from discrimination, bullying, or harassment," and that "[a]ll schools must ensure that all students, including LGBT students, are able to learn and thrive in a safe environment."[170]

The Trump administration followed up with an additional memo that stated ED may open an investigation in various situations on a case-by-case basis, including cases in which gender-based harassment created a hostile environment for a transgender student.[171] The memo provided the following examples of "gender-based harassment":

> acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, such as refusing to use a transgender student's preferred name or pronouns when the school uses preferred names for gender-conforming students or when the refusal is motivated by animus toward people who do not conform to sex stereotypes.[172]

After some commentators characterized the apparent requirement to use a transgender student's preferred pronouns as posing a threat to the free speech and religious liberty of teachers, staff, and students,[173] the Trump administration walked back this position in a memo, stating, "a recipient generally would not violate Title IX by, for example, recording a student's biological sex in school records, or referring to a student using sex-based pronouns that correspond to the student's biological sex."[174]

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[169] Letter from Sandra Battle, Acting Assistant Secretary for Civil Rights, U.S. Dep't of Educ., & T.E. Wheeler, II, Acting Assistant Attorney General for Civil Rights, U.S. Dep't of Just., to Colleague on Withdrawing Statements of Policy and Guidance (Feb. 22, 2017), https://www.justice.gov/opa/press-release/file/941551/download.

[170] *Id.* at 2.

[171] Memorandum from Candice Jackson, Acting Assistant Secretary for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ., to Regional Directors on OCR Instructions to the Field re Complaints Involving Transgender Students (June 6, 2017), *available at* https://www.documentcloud.org/documents/3866816-OCR-Instructions-to-the-Field-Re-Transgender.html.

[172] *Id.* at 1–2.

[173] *See, e.g.*, Nicole Russell, *Government Shouldn't Force Teachers to Use Transgender Pronouns*, DAILY SIGNAL (Sept. 5, 2019), https://www.dailysignal.com/2019/09/05/government-shouldnt-force-teachers-to-use-transgender-pronouns/; Eric Owens, *Trump Administration Vows to Investigate Teachers for Using Biologically Accurate Pronouns*, DAILY CALLER (June 21, 2017, 1:09 PM), https://dailycaller.com/2017/06/21/trump-administration-vows-to-investigate-teachers-for-using-biologically-accurate-pronouns/.

[174] Memorandum from Office of the General Counsel, U.S. Dep't of Educ., for Kimberly M. Richey, Acting Assistant Secretary, Office for Civil Rights, U.S. Dep't of Educ., on *Bostock v.*

The memo, issued in response to the Supreme Court's *Bostock* decision, explained that while the decision is potentially relevant is some circumstances, "*Bostock* applies only to Title VII," pointing out that *Bostock* "does not purport to construe, much less abrogate, Title IX's statutory and regulatory text permitting or requiring biological sex to be taken into account in an educational setting."[175] The memo reiterated that "the ordinary public meaning of 'sex' at the time of Title IX's enactment was biological sex, male or female, not transgender status or sexual orientation" and that "the Department's regulations recognizing the male/female biological binary carry extra weight and interpretative authority because they were the product of uniquely robust and direct Congressional review."[176] As such, the Department believed that generally it would not be a violation of Title IX to "record[] a student's biological sex in school records, or refer[] to a student using sex-based pronouns that correspond to the student's biological sex, or refus[e] to permit a student to participate in a program or activity lawfully provided for members of the opposite sex, regardless of transgender status or homosexuality."[177] Likewise, when it came to athletics, "a person's biological sex *is* relevant for the considerations involving athletics, and distinctions based thereon are permissible and may be required because the sexes are not similarly situated" based on the "physiological differences between males and females."[178] The memo pointed out that "one of Title IX's crucial purposes is protecting women's and girls' athletic opportunities . . . including by providing for sex-segregated athletics."[179] This memo was quickly rescinded by the Biden administration as "inconsistent" with its policy on gender identity and sexual orientation.[180]

Clayton Cty., 140 S. Ct. 1731 (2020) 4 (Jan. 8, 2021), https://www2.ed.gov/about/offices/list/ocr/correspondence/other/ogc-memorandum-01082021.pdf.

[175] *Id.* at 6.

[176] *Id.*

[177] *Id.* at 4.

[178] *Id.* at 7.

[179] *Id.*

[180] The memo on the ED's website states: "ARCHIVED AND NOT FOR RELIANCE. This document expresses policy that is inconsistent in many respects with Executive Order 13988 on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation and was issued without the review required under the Department's Rulemaking and Guidance Procedures, 85 Fed. Reg. 62,597 (Oct. 5, 2020)." *See id.*

The Biden DOJ issued a letter on March 26, 2021, concluding that "[a]fter considering the text of Title IX, Supreme Court caselaw, and developing jurisprudence," the "best reading" of Title IX after *Bostock* is that its prohibition against sex discrimination includes "discrimination on the basis of gender identity and sexual orientation."[181] The letter explains that "*Bostock*'s discussion of the text of Title VII informs the [DOJ Civil Rights] Division's analysis of the text of Title IX."[182]

In response to Biden's March 2021 executive order on gender identity and sexual orientation discrimination in education, ED issued its own letter in April 2021 to students, educators, and other stakeholders, stating that it will conduct a "comprehensive review" of the Department's regulations and policies, including a virtual public hearing in June 2021, forthcoming Q&A document, and an anticipated notice of proposed rulemaking.[183] The proposed rule "to align the Title IX regulations with the priorities of the Biden-Harris Administration" was anticipated in April 2022 (though at the time this article was published in May, the rule has not yet been proposed).[184] A leak disclosed draft text of the rule: "Discrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex-related characteristics (including intersex traits), pregnancy or related conditions, sexual orientation, and gender identity."[185] A coalition of state attorneys general and a group of Members of Congress both wrote to ED urging the department to not issue its proposed rule.[186]

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[181] Memorandum from Pamela S. Karlan, Principal Deputy Assistant Attorney General, Civil Rights Div., U.S. Dep't of Just., to Federal Agency Civil Rights Directors and General Counsels on Application of *Bostock v. Clayton County* to Title IX of the Education Amendments of 1972 2 (Mar. 26, 2021), https://www.justice.gov/crt/page/file/1383026/download.

[182] *Id.* at 1.

[183] Letter from Suzanne B. Goldberg, Acting Assistant Secretary for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ., to Students, Educators, and other Stakeholders on Executive Order 14021 2 (Apr. 6, 2021), https://www2.ed.gov/about/offices/list/ocr/correspondence/stakeholders/20210406-titleix-eo-14021.pdf.

[184] 87 Fed. Reg. 5002, 5047.

[185] Laura Meckler, *New Title IX Rules Set to Assert Rights of Transgender Students*, WASH. POST (Mar. 30, 2022, 6:00 AM), https://www.washingtonpost.com/education/2022/03/30/transgender-discrimination-title-ix-rule-students/.

[186] Letter from fifteen state attorneys general to Catherine E. Lhamon, Assistant Sec'y, Office for Civil Rights, U.S. Dep't of Educ., on U.S. Department of Education's Title IX Rulemaking (Apr. 5, 2022), https://content.govdelivery.com/attachments/MTAG/2022/04/05/file_attachments/2123604/Title%20IX%20Coalition%20Letter%204.5.22.pdf; Letter from forty Members of Congress to Miguel Cardona, Sec'y, U.S. Dep't of Educ., on the Department of Education's Plan to

Like HHS, ED issued a "Notification of Interpretation" on June 22, 2021, explaining that it would enforce Title IX's sex discrimination prohibition as encompassing discrimination based on gender identity and sexual orientation.[187] A June 23, 2021, "Dear Educator" letter emphasized this commitment.[188] The letter's accompanying fact sheet provided examples of the kinds of incidents the Department can investigate.[189] These examples include the use of slurs, physical contact, a school's failure to investigate, a teacher telling the class "there are only boys and girls," requiring a transgender student to use a restroom in the nurse's office instead of a restroom that corresponds with the student's gender identity, and a district policy that biological male students who identify as transgender cannot participate on girls' athletic teams.[190]

The same coalition of twenty states that sued EEOC over its technical assistance document[191] also sued ED over both its Notification of Interpretation and its Dear Educator letter, challenging the Department's reading of *Bostock* as entailing that Title IX prohibits discrimination based on gender identity and sexual orientation.[192] The lawsuit pointed out that "*Bostock* did not address any of the examples of purported discrimination identified in the Fact Sheet," such as athletics and preferred names and pronouns, and that it

Issue a Proposed Rule Reinterpreting the Prohibition on Sex-Based Discrimination Under Title IX of the Education Amendments of 1972 to Include "Sexual Orientation" and "Gender Identity" (Apr. 12, 2022), https://hartzler.house.gov/sites/hartzler.house.gov/files/2022.04.12%20SOGI%20Title%20IX%20Letter%20to%20DOE%20FINAL.pdf.

[187] Office for Civil Rights, U.S. Dep't of Educ., Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, 86 Fed. Reg. 32,637 (June 22, 2021).

[188] Letter from Suzanne B. Goldberg, Acting Assistant Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ., to Educators on Title IX's 49th Anniversary (June 23, 2021), https://www2.ed.gov/about/offices/list/ocr/correspondence/stakeholders/educator-202106-tix.pdf.

[189] Fact Sheet, Civil Rights Div., U.S. Dep't of Just., & Office for Civil Rights, U.S. Dep't of Educ., Confronting Anti-LGBTQI+ Harassment in Schools: A Resource for Students and Families (June 2021), https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-tix-202106.pdf.

[190] *Id.* at 1. ED issued another fact sheet in June 2021 detailing ways to support transgender youth in school. Fact Sheet, U.S. Dep't of Educ., Supporting Transgender Youth in School (June 2021), https://www2.ed.gov/about/offices/list/ocr/docs/ed-factsheet-transgender-202106.pdf.

[191] *See supra* note 61 and accompanying text.

[192] Complaint, Tennessee v. U.S. Dep't of Educ., No. 3:21-cv-00308 (E.D. Tenn. Aug. 30, 2021) (raising APA, Spending Clause, First Amendment, Separation of Powers, and Tenth Amendment claims).

"expressly declined to resolve any questions about bathrooms, locker rooms, or the like."[193]

In conjunction with the actions by the DOJ and ED and in response to Biden's day-one executive order on gender identity, the Department of Housing and Urban Development issued a "directive" on February 11, 2021, explaining that it was interpreting and enforcing the Fair Housing Act's sex discrimination provisions—which apply to school campus housing—to prohibit discrimination based on sexual orientation and gender identity.[194] The directive was challenged in court by a religious college seeking to ensure that it can continue its student housing policies based on biological sex, including for single-sex residence halls, dorm rooms, and communal showers.[195]

Over the last several years, policies regarding which bathrooms transgender students can or must use has been the subject of litigation. Some of the legal challenges have come from transgender students who wish to use the restrooms that correspond with their gender identity in violation of a school policy requiring students to use the restrooms that correspond with their biological sex.[196] In two such cases relied on by the Biden administration, *Grimm v. Gloucester County School Board* out of the Fourth Circuit and *Adams v. School Board of St. Johns County* out of the Eleventh Circuit, the

[193] *Id.* ¶¶ 66–69.

[194] Memorandum from Jeanine M. Worden, Acting Assistant Secretary for Fair Housing & Equal Opportunity, U.S. Dep't of Housing & Urban Dev., to Office of Fair Housing & Equal Opportunity, Fair Housing Assistance Program Agencies, and Fair Housing Initiatives Program Grantees, on Implementation of Executive Order 13988 on the Enforcement of the Fair Housing Act (Feb. 11, 2021), https://www.hud.gov/sites/dfiles/PA/documents/HUD_Memo_EO13988.pdf.

[195] Sch. of Ozarks, Inc. v. Biden, No. 6:21-03089-CV-RK (W.D. Mo. Jun. 4, 2021) (denying motion for temporary restraining order and preliminary injunction, and dismissing case), *appealed*, No. 21-2270 (8th Cir.) (oral argument held Nov. 17, 2021).

[196] *See, e.g.*, Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034 (7th Cir. 2017) (affirming district court grant of preliminary injunction against school district's unwritten policy prohibiting seventeen year old transgender high school student from using boys' restroom because it likely violated Title IX and Fourteenth Amendment's Equal Protection Clause); Dodds v. U.S. Dep't of Educ., 845 F.3d 217, 22 (6th Cir. 2016) (per curiam) (denying request to stay preliminary injunction ordering school to permit eleven year old transgender student use of the girls' restroom and treat student "as a female"); A.S. v. Lee, 3:21-cv-00600 (M.D. Tenn. Aug. 5, 2021) (denying temporary restraining order in Equal Protection Clause and Title IX challenge against Tennessee law requiring students who identify as transgender to use restrooms that correspond with their biological sex, a single-occupancy restroom, or an employee restroom); R.M.A. ex rel. Appleberry v. Blue Springs R-IV Sch. Dist., 568 S.W.3d 420 (Mo. 2019) (holding transgender middle-school student stated sex discrimination claim under Missouri Human Rights Act when student, a biological female whose legal sex is male, allegedly was not permitted to use the boys' restroom or locker room).

circuit court panels held post-*Bostock* that public school students have the right under both Title IX and the Equal Protection Clause of the Fourteenth Amendment to use bathrooms consistent with their gender identity.[197] Both decisions were appealed. In *Grimm*, the Fourth Circuit denied rehearing en banc and the Supreme Court denied certiorari.[198] In *Adams*, the Eleventh Circuit granted rehearing en banc and vacated the panel's 2-1 decision.[199] The vacated panel majority had held that *Bostock*'s reasoning that Title VII with its "starkly broad terms" forbids discrimination against transgender people "applies with the same force to Title IX's equally broad prohibition on sex discrimination."[200] The dissent, however, pointed out that "any guidance *Bostock* might otherwise provide about whether Title VII allows for sex-separated bathrooms does not extend to Title IX," since Title IX expressly "permits schools to act on the basis of sex through sex-separated bathrooms."[201] At the time this article was published, the en banc Eleventh Circuit had not issued its opinion.[202]

On the other side, parents and students have brought legal challenges seeking to invalidate school policies that allow transgender students to use school bathrooms, locker rooms, and showers that do not match their biological sex. These challenges have been brought under Title IX, as well as on other grounds, such as privacy rights, parental rights, free exercise of religion, and various state laws.[203] The cases have been met with mixed results so far,

[197] Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 593 (4th Cir. 2020) (holding equal protection and Title IX "can protect transgender students from school bathroom policies that prohibit them from affirming their gender"); Adams v. Sch. Bd. of St. Johns Cnty., 968 F.3d 1286, 1292 (11th Cir. 2020) (holding school district policy prohibiting transgender high school student from using boys' restroom violated "Constitution's guarantee of equal protection and Title IX's prohibition of sex discrimination"), *vacated*, No. 18-13592 (11th Cir. Aug. 23, 2021).

[198] Grimm v. Gloucester Cnty. Sch. Bd., 976 F.3d 399 (4th Cir. 2020), *cert. denied*, No. 20-1163 (U.S. Jun. 28, 2021).

[199] *Adams*, No. 18-13592 (11th Cir. Aug. 23, 2021).

[200] *Adams*, 968 F.3d at 1305, *vacated*, No. 18-13592 (11th Cir. Aug. 23, 2021).

[201] *Id.* at 1320 (Pryor, C.J., dissenting).

[202] Oral argument was held February 22, 2022.

[203] *See, e.g.*, Parents for Privacy v. Barr, 949 F.3d 1210 (9th Cir. 2020) (affirming dismissal of Fourteenth Amendment privacy and parental rights, First Amendment free exercise, and Title IX claims by parents against school district policy allowing transgender students to use school bathrooms, locker rooms, and showers that correspond with their gender identity), *cert. denied*, No. 20-

but with the Biden administration's support and its interpretation of Title IX, schools will likely use federal guidance as a shield for any voluntarily adopted gender identity policies.

The Biden administration's policies will likely require schools to allow students to use bathrooms, locker rooms, and dorm rooms that are consistent with their stated gender identity, without any consideration of the privacy or safety of other students.[204] Such requirements could violate Title IX's prohibition against "sexual harassment," which current ED regulations define as including "[u]nwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the [school's] education program or activity."[205] It is unclear how ED, schools, and courts will treat these conflicting Title IX claims.[206]

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62 (U.S. Dec. 7, 2020); Doe v. Boyertown Area Sch. Dist., 897 F.3d 518 (3d Cir. 2018) (rejecting constitutional bodily privacy, Title IX, and state tort law claims by students and parents, and refusing to enjoin Pennsylvania school district policy allowing transgender students to use bathrooms and locker rooms consistent with their gender identities instead of their biological sex); Students & Parents for Privacy v. Sch. Dirs. of Twp. High Sch. Dist. 211, 377 F. Supp. 3d 891 (N.D. Ill. 2019) (refusing to dismiss First Amendment free exercise, Title IX, and Illinois RFRA claims, while dismissing Fourteenth Amendment bodily autonomy and parental rights claims, by students and parents challenging high school policy allowing transgender students to use bathrooms and locker rooms conforming to their gender identity); Christian Action Network v. Va. Dep't of Educ., No. CL21000282-00 (Va. Cir. Ct., July 27, 2021) (dismissing free speech, free exercise, privacy, equal protection, and parental rights claims under federal and state law by student families against Virginia Department of Education model policies on the treatment of transgender public school students, including access to restrooms, locker rooms, and changing facilities that correspond to students' gender identities); *see also* Doe I v. Madison Metro. Sch. Dist., No. 20-cv-454 (Wis. Cir. Ct.) (involving state constitution parental and religious liberty rights claims by parents of students against school district policy allowing, *inter alia*, students to transition at school without parental notice or consent).

[204] This is already an issue at some schools. *See, e.g.*, Shawn Cohen, *EXCLUSIVE: 'We're Uncomfortable in our Own Locker Room.' Lia Thomas' UPenn Teammate Tells how the Trans Swimmer Doesn't Always Cover Up her Male Genitals when Changing and Their Concerns Go Ignored by their Coach*, Daily Mail Online (Jan. 27, 2022, 3:58 PM), https://www.dailymail.co.uk/news/article-10445679/Lia-Thomas-UPenn-teammate-says-trans-swimmer-doesnt-cover-genitals-locker-room.html.

[205] 34 C.F.R. § 106.30(a) (amended by 85 Fed. Reg. 30,026, 30,574 (May 19, 2020) (Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance)).

[206] *Cf.* Title IX Complaint from Penny Nance, President and CEO, Concerned Women for Am., and Mario Diaz, General Counsel, Concerned Women for Am., to Catherine E. Lhamon, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., against University of Pennsylvania for Ongoing Title IX Violations, https://concernedwomen.org/wp-content/uploads/2022/03/CWA-UPENN-Title-IX-Complaint.pdf (alleging Title IX violations for allowing a biological male to compete in women's

2. School Sports

Besides access to school facilities, one of the most contentious issues regarding gender identity policies has to do with women's and girls' sports. Title IX regulations allow for separate male and female school sports "where selection for such teams is based upon competitive skill or the activity involved is a contact sport."[207] Title IX's passage was lauded for dramatically increasing athletic opportunities for women and girls by ensuring that "athletic interests and abilities of male and female students must be equally and effectively accommodated."[208]

As proponents of women's sports point out, males as a class biologically have the capacity to perform at a higher level athletically than females because the average male is bigger, stronger, and faster than the average female.[209] This is because males have greater heart and lung capacity, bone density, muscle mass, as well as testosterone levels.[210] That is not to say that *all* males are better athletes than *all* females or that the top female athletes are not better

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swimming and creating a hostile environment by allowing swimmer in women's locker room); Christopher Tremoglie, *EXCLUSIVE: UPenn, Philly DA Ignore Complaints About Lia Thomas's Male Nudity in Women's Locker Room*, WASH. EXAMINER (Feb. 25, 2022), https://www.washingtonexaminer.com/opinion/exclusive-upenn-philly-da-ignore-complaints-about-lia-thomass-male-nudity- in-the-womens-locker-room (discussing how university and government officials ignored complaints alleging violations of Title IX when university allowed transgender swimmer to expose male genitalia in women's locker room); News Release, Stanley Law Group, PLLC, Family of Loudoun County Girl Sexually Assaulted at Stone Bridge High School to Pursue Civil Action Against Loudoun County Public Schools (Oct. 14, 2021), https://stoplcpscrt.com/wp-content/uploads/2021/10/FILE_1482.pdf (announcing Title IX legal action against county alleging high school male student claiming to be "gender fluid" was permitted access to girls' restroom under school restroom policy and sexually assaulted female student); *Parents for Privacy*, 949 F.3d at 1240 ("A policy that allows transgender students to use school bathroom and locker facilities that match their self-identified gender in the same manner that cisgender students utilize those facilities does not . . . create actionable sex harassment under Title IX.").

[207] 34 C.F.R. § 106.41(b).

[208] Office for Civil Rights, U.S. Dep't of Educ., *Requirements Under Title IX of the Education Amendments of 1972*, https://www2.ed.gov/about/offices/list/ocr/docs/interath.html (last modified Jan. 10, 2020).

[209] *See* INDEP. WOMEN'S FORUM & INDEP. WOMEN'S LAW CTR., COMPETITION: TITLE IX, MALE-BODIED ATHLETES, AND THE THREAT TO WOMEN'S SPORTS 17 (2021), https://www.iwf.org/wp-content/uploads/2021/09/COMPETITION_FINAL.pdf.

[210] *See generally id.* at 17–18 (summarizing the physiological differences between males and females).

than the average male athlete, but that males as a class *on average* have an inherent physiological advantage over women. If you look at track, swimming, and weightlifting records for both sexes at the high school, college, and Olympic levels, this becomes obvious.[211] Despite what some may believe, this "male athletic advantage" does not disappear with testosterone suppression, even if it decreases.[212]

Women's sports proponents argue that allowing biological males to compete with biological females undermines the very purpose of Title IX to ensure "equal athletic opportunity" and the point of having sex-specific sports in the first place.[213] Just like weight classes in weightlifting or wrestling give lighter individuals more and safer opportunities to compete, sex-specific sports provide females more and safer opportunities to compete. Male participation in contact sports with and against females increases females' risk of physical injury.[214] In practice, not limiting women's and girls' sports to biological females takes athletic opportunities—including awards, records, and potential college scholarships—away from women and girls. This has already happened at the high school, collegiate, and professional levels.

In Connecticut, a group of high school female track athletes sued to stop two biological male transgender athletes from participating in girls' track, arguing that their participation would take away the girls' opportunities to compete at the state championship, win or medal at the state championship, and gain access to college recruitment and scholarships.[215] The lawsuit argues that the state's policy "allowing boys who identify as girls to compete in girls' athletic events" runs afoul of Title IX by failing "to provide equal treatment, benefits and opportunities in athletic competition to girls."[216] The Trump DOJ filed a statement of interest in the case supporting the female track

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[211] *See, e.g.*, Doriane Lambelet Coleman & Wickliffe Shreve, *Comparing Athletic Performances: The Best Elite Women to Boys and Men*, CTR. FOR SPORTS LAW & POLICY, DUKE LAW, https://law.duke.edu/sports/sex-sport/comparative-athletic-performance/ (comparing the 2017 top women's results to the boys' and men's results across multiple standard track and field events). *See generally* COMPETITION, *supra* note 209, at 18–27 (2021) (discussing "the male athletic advantage" and differences in men's and women's athletic performances from high school to world records).

[212] *See generally* COMPETITION, *supra* note 209, at 27–31 (discussing the limits of testosterone suppression).

[213] 34 C.F.R. § 106.41(c).

[214] *See generally* COMPETITION, *supra* note 209, at 34 (2021) (discussing increased risk of injury).

[215] *See* Soule v. Conn. Ass'n of Sch., Inc., No. 3:20-cv-00201 (D. Conn.).

[216] V. Compl. for Decl. & Inj. Relief & Damages, *Soule*, No. 3:20-cv-00201, at ¶¶ 70, 170 (D. Conn. Feb. 12, 2020).

athletes.[217] But the Biden DOJ withdrew the statement, simply stating, "The government has reconsidered the matter."[218] This move is indicative of the Biden administration's policy that students should be allowed to play on athletic teams that are consistent with their gender identities, meaning that biological males who identify as transgender should be allowed to participate in women's and girls' sports.

Many states have considered or are considering legislation on the issue. For example, more than fifteen states have passed bills prohibiting biological male students from competing in girls' or women's school or college athletic teams.[219] Tennessee's governor explained that he signed his state's bill "to preserve women's athletics and ensure fair competition" and in response "to damaging federal policies that stand in opposition to the years of progress made under Title IX."[220] These state laws protecting women's and girls' athletics will likely be challenged in court, with opponents claiming the support of the Biden administration.[221] In fact, when a middle school transgender student challenged West Virginia's law in federal district court, the Biden DOJ issued a statement of interest in the case, advising the court of its view that the law violated Title IX and the Equal Protection Clause of the Fourteenth Amendment.[222]

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[217] Statement of Interest, *Soule*, No. 3:20-cv-00201 (D. Conn. Mar. 24, 2020).

[218] Notice of Withdrawal of Statement of Interest, *Soule*, No. 3:20-cv-00201 (D. Conn. Feb. 23, 2021).

[219] States include Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Iowa, Kansas, Kentucky, Mississippi, Oklahoma, South Dakota, Tennessee, Texas, Utah, and West Virginia. *See* Ala. H.B. 391 (2021); Ariz. S.B. 1165 (2022); Ark. S.B. 354 (2021); Fl. S.B. 1028 (2021); Ga. H.B. 1084 (2022); Idaho H.B. 500 (2020); Iowa H.F. 2416 (2022); Kan. S.B. 160 (2022); Ky. S.B. 83 (2022); Miss. S.B. 2536 (2021); Okla. S.B. 2 (2022); S.D. S.B. 46 (2022); Tenn. S.B. 228 (2021); Tex. H.B. 25 (2021); Utah H.B. 11 (2022); W. Va. H.B. 3293 (2021).

[220] Gov. Bill Lee (@GovBillLee), Twitter (Mar. 26, 2021, 5:21 PM), https://twitter.com/GovBillLee/status/1375558428702220289.

[221] *See, e.g.*, B.P.J. v. W. Va. State Bd. Educ., No. 2:21-cv-00316 (D. W.Va. July 21, 2021) (preliminarily enjoining enforcement of West Virginia law prohibiting biological male students from competing on women's sports teams as violation of Title IX and Equal Protection Clause as applied to transgender middle school student); Hecox v. Little, 479 F. Supp. 3d 930 (D. Idaho 2020) (preliminarily enjoining Idaho law prohibiting biological male students from competing on women's sports teams as violation of Equal Protection Clause of the Fourteenth Amendment), *remanded by* Hecox v. Little, No. 20-35813 (9th Cir. June 24, 2021) (remanding to district court to determine whether plaintiff student's claim is moot).

[222] Statement of Interest of the United States, *B.P.J.*, No. 2:21-cv-00316.

With the impending Biden Title IX regulations, schools subject to Title IX could soon face conflicting state and federal requirements. This will likely lead to more litigation, and the Supreme Court will likely have to step in to decide whether sex discrimination under Title IX includes discrimination on the basis of gender identity and sexual orientation, and whether that means transgender identifying biological males must be allowed to compete in girls' and women's athletics.

3. Parental Rights

Several states are considering laws that would prohibit or limit primary school instruction on sexual orientation or gender identity, leaving such instruction to parents. In March 2022, Florida enacted a Parental Rights in Education law that prohibits classroom instruction on sexual orientation and gender identity in kindergarten through third grade and requires that instruction on these topics in other grades be "age-appropriate or developmentally appropriate" for students.[223] In response, Secretary of Education Miguel Cardona issued a statement accusing Florida's governor of choosing "to target some of Florida's most vulnerable students and families, all while under the guise of 'parents' rights'" and promising that the Department "will be monitoring this law upon implementation to evaluate whether it violates federal civil rights law."[224]

Parental rights of and custody by parents of minor children who wish to undergo social or medical gender transitions when a parent does not support transitioning is a growing issue. In the state context, many parents have lost custody of their child—often with the encouragement and support of schools—for not catering to their child's wishes when it comes to gender.[225]

[223] Fla. H.B. 1557 (2022).

[224] Press Release, U.S. Dep't of Edu., Statement by Secretary of Education Miguel Cardona on Newly Signed Florida State Legislation (Mar. 28, 2022), https://www.ed.gov/news/press-releases/statement-secretary-education-miguel-cardona-newly-signed-florida-state-legislation.

[225] *See, e.g.*, *Protecting Our Children: How Radical Gender Ideology is Taking Over Public Schools & Harming Kids*, HERITAGE FOUND. (Mar. 7, 2022), https://www.heritage.org/gender/event/protecting-our-children-how-radical-gender-ideology-taking-over-public-schools-harming (testimony of mother who lost custody of high school daughter after not supporting daughter's medical transition encouraged by school, and whose daughter, after stated-funded medical transition, committed suicide); Abigail Shrier, *Child Custody's Gender Gauntlet*, CITY J. (Feb. 7, 2022), https://www.city-journal.org/child-custody-gender-gauntlet (discussing court proceedings involving father who lost custody of son for not agreeing son was transgender and should start medical transition); *In re JNS*, No. F17-334 X (Ohio Hamilton Cnty. Juvenile Ct. Feb. 16, 2018) (giving custody of a seventeen-year-old transgender child to grandparents after parents sought for religious reasons to stop the teen from undergoing cross-sex hormones or sex reassignment surgery).

Relatedly, in the foster care context, federal policies suggest that not endorsing a foster care youth's gender identity makes one unfit to be a foster parent. Indeed, a government fact sheet stated, "Respecting [foster care youths'] gender identity and expression is very important. Behaviors that openly reject a youth's LGBTQ+ identity must be avoided and not tolerated[,] . . . including religious activities, sports activities, and family gatherings."[226]

4. Religious Schools

The Biden administration's gender identity requirements will not be limited to public schools but will also extend to private and religious schools that receive government funding, which includes any school that enrolls students who participate in school lunch programs or receive federal student grants or loans. Title IX's religious exemption, however, may allow certain religious schools to retain and implement their beliefs about gender and sexuality when they conflict with Biden's gender identity policies.

In March 2021, a group of students challenged Title IX's religious exemption in court, claiming that it harms LGBT students in violation of the Equal Protection and Establishment Clauses (among other laws).[227] Biden's DOJ, tasked with defending the statutory exemption, stated in a court filing that it will do so: "the Federal Defendants' ultimate objective is to defend the statutory exemption and its current application by ED."[228] On February 8, 2022, the Biden Department of Education dismissed a sex discrimination complaint against Brigham Young University challenging the religious university's position that same-sex romantic relationships violate the honor code.[229] ED assured the university of its religious exemption from Title IX regulations, including those related to housing, health and insurance benefits and services, and athletics, to the extent application of those provisions would

[226] Factsheets for Families, Children's Bureau, Admin. on Children, Youth & Families, Admin. for Children & Families, U.S. Dep't of Health & Human Servs., Supporting LGBTQ+ Youth: A Guide for Foster Parents 6 (June 2021), https://www.childwelfare.gov/pubPDFs/lgbtqyouth.pdf.

[227] Hunter v. U.S. Dep't Educ., No. 6:21-cv-00474 (D. Or.).

[228] Defs.' Opp. Mots. Intervene ECF Nos. 8 & 26 at 7, *Hunter*, Case No. 6:21-cv-474 (D. Or. June 8, 2021).

[229] Letter from Sandra Roesti, Supervisory Attorney, Office for Civil Rights, U.S. Dep't of Educ., to President Kevin J. Worthen, Brigham Young Univ., on Brigham Young University OCR Case Number 08-20-2196 (Feb. 8, 2022), https://news.byu.edu/0000017e-e090-ddc8-a77f-f8b78c8c0001/final-signed-ocr-decision.

conflict with the university's religious tenets pertaining to sexual orientation and gender identity.[230] Without a Title IX religious exemption, religious colleges and universities, especially those that serve students from underprivileged communities, would face an untenable choice: either violate their deeply held religious beliefs about gender and sexuality or close their doors.

Although it is uncertain whether the federal government can legally require schools, particularly religious schools, to comply with the various gender identity policies pushed by the Biden administration, the threat of the loss of federal funding and bureaucratic investigations, coupled with social and media pressure, will likely lead many schools to voluntarily adopt such policies, whether or not they are legally required.

III. Conclusion

This article discussed the Biden administration's gender identity policies in the context of employment, health care, education, and athletics, with a specific focus on their impacts on women's rights, children's interests, and religious liberty. But there are many other contexts that will also be impacted, especially if the Equality Act is passed, such as housing, prisons, women's shelters, and adoption and foster agencies. Ultimately, the Supreme Court will likely be asked to weigh in on the questions it put off in *Bostock*: whether sex-specific bathrooms, locker rooms, and sports teams are in fact "unsustainable" under gender identity discrimination laws, and the extent to which RFRA or the First Amendment provide protection for religious exercise.

But more immediately, Congress (and the American people) will have to decide whether the Biden administration's gender identity policies reflect the will of the people, and whether they unacceptably burden women's rights, children's interests, and religious liberty.

Other Views:

- Office of Population Affairs, U.S. Dep't of Health & Human Servs., Gender-Affirming Care and Young People (Mar. 2022), https://opa.hhs.gov/sites/default/files/2022-03/gender-affirming-care-young-people-march-2022.pdf.
- Jessica A. Clarke, *They, Them, and Theirs*, 132 Harv. L. Rev. 894 (2019),

[230] *Id.* at 1–2.

available at https://harvardlawreview.org/2019/01/they-them-and-theirs/.

- World Professional Assoc. for Transgender Health, Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People, 7th Version (2011), *available at* https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7_English.pdf.
- Rachel Levine, Address at Franklin & Marshall College, "It's a Transgeneration: Issues in Transgender Medicine" (Jan. 19, 2017), *available at* https://www.fandm.edu/news/latest-news/2017/01/19/transgender-health-and-the-changes-occurring-in-the-gender-binary.

THE UNIFORM TOKEN REGULATION ACT: A PROPOSAL FOR STATES TO LEAD ON REGULATORY CLARITY FOR DIGITAL TOKENS[*]

PAUL WATKINS AND DANIELLE DUBOSE[**]

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Digital assets have the potential to transform financial services. They alter the status quo by removing intermediaries, allowing users to contribute to the product, and bringing competition to an industry that traditionally has high barriers to entry. Tokens are a type of digital asset that represent value or the right to participate in a blockchain network. As new innovations are created on the blockchain, the number of tokens underlying those blockchains

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[*] Note from the Editor: The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. To join the debate, please email us at info@fedsoc.org.

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increases. The dramatic increase in the use of tokens demonstrates both significant potential for economic growth and, as is the case with any innovation, the potential for consumer harm. However, neither federal regulators nor Congress have provided the necessary regulatory clarity that would allow token projects to innovate without fear of regulatory backlash. States, as the "laboratories of democracy," can and should fill this void. We propose a state regulatory regime that would grant an exemption from the state securities laws to tokens that meet criteria that are not consistent with a traditional security and provide token-specific, robust disclosures to consumers. Our regime maintains appropriate anti-fraud jurisdiction and is more protective of consumers than existing Securities and Exchange Act regulations. It also provides much needed certainty for token projects, some of which are likely not securities under federal or state law. Finally, the existence of an alternative and superior regulatory regime is a factor that weighs against finding that a digital asset is a security under federal securities laws. The existence of such a structure may heighten the SEC's burden in bringing an enforcement action, and mitigate against a court finding that a digital asset is a security in close cases.

I. Why a Uniform Law is Needed

Neither Congress nor the Securities and Exchange Commission (SEC) has provided clear rules explaining when a digital asset is a security under federal law.[1] The most concrete guidance available is of limited use as it contains a multitude of factors for token projects to consider without explaining how to weigh the factors against each other.[2] Furthermore, this guidance was issued under the leadership of a prior administration, and the SEC under Chair Gary Gensler may not espouse a similar view.[3] Further complicating

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[1] *See* Commissioners Hester M. Peirce and Elad L. Roisman, *In the Matter of Coinschedule* (July 14, 2021), https://www.sec.gov/news/public-statement/peirce-roisman-coinschedule ("There is a decided lack of clarity for market participants around the application of the securities laws to digital assets and their trading, as is evidenced by the requests each of us receives for clarity and the consistent outreach to the Commission staff for no-action and other relief").

[2] *See Framework for 'Investment Contract' Analysis of Digital Assets,* SEC STRATEGIC HUB FOR INNOVATION AND FINANCIAL TECHNOLOGY (Apr. 3, 2019) [hereinafter "SEC Framework"].

[3] *See* Gensler Responses to Toomey Questions for the Record, Senate Committee on Banking, Housing and Urban Affairs (Dec. 3, 2021), https://www.banking.senate.gov/imo/media/doc/gensler_responses_to_toomey_qfrs_on_crypto.pdf (omitting the SEC Framework from description of prior SEC guidance on crypto assets in response to Question #1); Chair Gary Gensler, *Remarks Before Aspen Security Forum* (Aug. 3, 2021), https://www.sec.gov/news/public-statement/gensler-

the picture, the SEC's complaints from digital asset enforcement actions often do not provide legal analysis suitable for future reliance.[4] To the extent these actions are resolved through settlement agreements, they are an especially poor vehicle for deciding novel legal questions due to the parties' incentives.[5]

The SEC has indicated it has no intention of providing further clarity. For example, when asked at a congressional hearing if the agency would provide regulatory clarity on when digital assets constitute a security, Chair Gensler responded, "The Supreme Court has weighed in a number of times . . . I think there's been a fair amount of clarity over the years."[6] Chair Gensler has even compared how cryptocurrency projects should interpret his comments on the securities laws to how one should interpret art.[7] Commissioner Caroline Crenshaw stated regarding the digital asset industry that "while the industry may desire blanket definitions or that we proactively label all the specific projects, assets, and activities that are within our jurisdiction, that is not how our regulatory framework functions. We also do not have the resources to do that."[8] Commissioner Hester Peirce has proposed a safe harbor that would provide a three-year exemption from the securities laws for token projects that make certain disclosures and are working to develop functional

aspen-security-forum-2021-08-03 ("I believe we have a crypto market now where many tokens may be unregistered securities, without required disclosures or market oversight.").

[4] *See, e.g., In the Matter of Blotics Ltd f/d/b/a/ Coinschedule Ltd,* AP File No. 3-20398 (July 14, 2021), https://www.sec.gov/litigation/admin/2021/33-10956.pdf (SEC alleging Coinschedule website platform listed unregistered securities, but not specifying which tokens were unregistered securities and why). *See also* Commissioner Hester M. Peirce, *Lawless in Austin* (Oct. 8, 2021), https://www.sec.gov/news/speech/peirce-2021-10-08 ("[I]f the SEC cannot easily articulate an unassailable legal theory for why particular assets are securities, is the line as clear as the SEC maintains it is?").

[5] *See* Peirce, *supra* note 4 ("When a party settles an SEC enforcement action, it often is trying to get the case wrapped up so it can move on. It has no incentive to force the SEC, as a condition of settlement, to lay out a clear legal analysis.").

[6] *Oversight of the U.S. Securities and Exchange Commission: Hearing Before the Senate Committee on Banking, Housing, and Urban Affairs*, 117th Cong. (Sept. 14, 2021), https://www.banking.senate.gov/hearings/09/10/2021/oversight-of-the-us-securities-and-exchange-commission at 50:00 (Chair Gensler responding to questioning from Senator Toomey).

[7] *See* Crypto Compare, *DACOM 2021: Regulatory Reckoning: The Maturing State of Crypto Regulation and Investor Protection* (Dec. 10, 2021), https://www.youtube.com/watch?v=gBAK23sP4yo at 9:41 (When asked if an interpretation regarding his views was correct, Chair Gensler stated, "My wife is an artist and she always said let others interpret what you say or what you do. So that would be one interpretation.").

[8] Commissioner Caroline Crenshaw, *Remarks at SEC Speaks: Digital Asset Securities – Common Goals and a Bridge to Better Outcomes* (Oct. 12, 2021), https://www.sec.gov/news/speech/crenshaw-sec-speaks-20211012.

or decentralized networks.[9] But the SEC has not taken action on this proposal to date, and at least one commissioner has publicly rejected the proposal.[10]

Despite the absence of clarity, the SEC has actively initiated enforcement action against dozens of token projects.[11] The Director of Enforcement has stated, "We have brought dozens of cases concerning fraudulent and unregistered [initial coin offerings], and related touting violations—and we will continue that focus."[12] Industry leaders have shared first-hand experiences of how difficult it is to work with the SEC in this environment.[13] Despite these facts, the SEC categorically denies that it is regulating by enforcement.[14]

The regulatory environment created by the SEC carries the risk that foreign jurisdictions will become the leaders in this space, attracting valuable capital away from the U.S.[15] It is also harmful to U.S. consumers, many of whom have been excluded from participation in token projects as a direct result of the SEC's heavy-handed approach.[16]

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[9] *See* Commissioner Hester M. Peirce, *Token Safe Harbor Proposal 2.0* (Apr. 13, 2021), https://www.sec.gov/news/public-statement/peirce-statement-token-safe-harbor-proposal-2.0. *See also* Clarity for Digital Tokens Act of 2021, 117th Cong., https://republicans-financialservices.house.gov/uploadedfiles/tsh_xml_signed.pdf (proposing safe harbor in legislative form).

[10] *See* Crenshaw, *supra* note 8 (outlining the "reasons [she] does not think that a safe harbor that permits unlimited capital raising with only limited disclosures, and no registration requirement, is in the best interest of investors").

[11] *See* Cyber Enforcement Actions, Digital Assets/Initial Coin Offerings, SEC (last modified Mar. 9, 2022), https://www.sec.gov/spotlight/cybersecurity-enforcement-actions.

[12] Gurbir Grewal, Director of the Division of Enforcement, *2021 SEC Regulation Outside the United States – Scott Friestad Memorial Keynote Address* (Nov. 8, 2021), https://www.sec.gov/news/speech/grewal-regulation-outside-united-states-110821.

[13] *See* @Brian_Armstrong, TWITTER (Sept. 7, 2021, 10:06 PM), https://twitter.com/brian_armstrong/status/1435439291715358721?lang=en; Brad Garlinghouse, *The SEC's Attack on Crypto in the United States,* RIPPLE (Dec. 22, 2020), https://ripple.com/insights/the-secs-attack-on-crypto-in-the-united-states/.

[14] *See* Grewal, *supra* note 12 ("This is not 'regulation by enforcement.' This is not 'regulation by enforcement.' This is not 'regulation by enforcement.' There. I have said it thrice and what I tell you three times is true.").

[15] *See* Commissioner Hester M. Peirce, *Renegade Pandas: Opportunities for Cross Border Cooperation in Regulation of Digital Assets* (July 30, 2019), https://www.sec.gov/news/speech/speech-peirce-073019 ("I often have expressed my concern that the U.S. will fall behind other countries in attracting crypto-related businesses unless we are more forward-leaning in establishing a regulatory regime with discernible parameters.").

[16] *See, e.g., DeFi: Multimillion airdrop – US citizens go away empty-handed thanks to SEC,* JUST BTC NOW (Aug. 8, 2021), https://justbtcnow.com/investment/defi/defi-multi-million-airdrop-us-citizens-go-empty-handed-thanks-to-sec/.

II. Summary of Proposal

In response to this state of affairs, the states should take a two-part course of action. First, they should use their own anti-deception authorities in conjunction with federal regulators, such as the Commodity Futures Trading Commission (CFTC), to deter wrongful conduct. Second, they should enact their own regulatory regimes for digital assets.

States possess extensive anti-deception authority through their Unfair and Deceptive Acts and Practices statutes,[17] and potentially other authorities. These authorities can be coordinated with relevant federal anti-fraud and anti-manipulation authority exercised by the CFTC or other regulators. In this way, states can stop bad actors from deceiving their citizens, without imposing a securities regulatory structure that impedes innovation.

Second, states should enact their own regulatory regime for digital assets, rather than waiting for the federal government to act. Waiting perpetuates an environment of regulatory uncertainty that impedes innovation within the United States and each state. The stakes are high. Many other countries are seizing what may be a once in a century opportunity to grab the future of finance. Furthermore, regulatory uncertainty entrenches the market concentration of incumbent financial services providers. This not only harms consumers and digital asset entrepreneurs, but also harms states that could attract digital asset companies and diversify their economies through the financial services industry.

The state regulatory regime contemplated by this proposal is superior to the current federal landscape. First, the SEC's current regulatory approach harms consumers. When consumers do not know if their digital assets are securities, they are open to harm by sudden and unexpected SEC enforcement actions that change the regulatory status of their digital assets. For example, purchasers of XRP saw the value of their tokens drop by over 30 percent when Commissioner Jay Clayton filed an enforcement action on his last day in office.[18] Given that XRP had existed for seven years, and no other regulator had declared the token a security, consumers (and the market as a whole) did not foresee this action, and they were harmed as a result. When

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[17] *See, e.g.*, Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. §§ 501.201 – 501.213; Tennessee Consumer Protection Act, Tenn. Code Ann. §§ 47-18-101 – 47-18-125.

[18] *See* Amanda Cooper, *Ripple's XRP token has fallen more than 30% after the SEC filed a lawsuit against the cryptocurrency firm,* Business Insider (Dec. 23, 2020), https://markets.businessinsider.com/news/currencies/ripple-xrp-crypto-token-falls-after-sec-lawsuit-over-sales-2020-12.

over twelve thousand XRP purchasers attempted to intervene, the SEC actually filed a motion to prevent the court from allowing their intervention.[19]

Furthermore, applying the SEC's current regulations to digital tokens will mislead consumers. The SEC's regulatory requirements focus on disclosing the financial health of the issuer, including its assets and cash flows.[20] For most digital tokens, the value of the token depends upon the characteristics of the token itself.[21] Existing disclosure requirements largely ignore this crucial component. Overlooking relevant features while requiring disclosure of irrelevant features misleads consumers into focusing on immaterial characteristics.

We propose a safe harbor from state securities laws for tokens that meet certain criteria.[22] The qualifying criteria would be based on features that cause the token to fail the test for the federal definition of a security. The safe harbor would leverage certain portions of Commissioner Peirce's proposal, particularly the disclosure regime. This proposal could be implemented by multiple states in the form of a uniform law with reciprocity. In effect, the proposal clarifies the already applicable regulatory regime that federal courts could impose if the issues were fully litigated.

Enacting such a safe harbor has three primary benefits. First, it protects consumers by establishing disclosure requirements focused on the characteristics of the digital token itself. Second, the safe harbor provides regulatory certainty for tokens that should not fall within the securities law framework. Third, establishing a regulatory framework superior to the SEC's existing framework would provide further support for the conclusion that tokens are not securities under applicable case law. These critical implications are discussed in later sections.

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[19] *See* Kendal Enz, *SEC Opposes Intervention by Cryptocurrency Holders in SDNY Suit,* LAW STREET (May 19, 2021), https://lawstreetmedia.com/news/tech/sec-opposes-intervention-by-cryptocurrency-holders-in-sdny-suit/.

[20] *See* Regulation S-K, 17 C.F.R. §§ 229.10 – 229.1406 (requiring disclosures regarding the business of the registrant including risks, controls, executive compensation, and financial information).

[21] *See* Christopher J. Brummer, Trevor Kiviat, and Jai Ruhi Massari, *What Should Be Disclosed in an Initial Coin Offering?*, CRYPTOASSETS: LEGAL AND MONETARY PERSPECTIVES, OUP PRESS 34 (Nov. 29, 2018), *available at* https://ssrn.com/abstract=3293311 ("[I]t is the predicted utility value of the token as it is to be used in the future underlying project that drives prices under optimal conditions, together with the features of the ICO token enabling access to that utility value.").

[22] *See* Appendix, Uniform Token Regulation Act.

The model legislation is written with references to the Uniform Securities Act of 2002,[23] and would need to be adapted for use in each state.[24]

III. Description of the Uniform Token Regulation Act

The proposed legislation provides an exemption (or safe harbor) from the state's securities laws for tokens that meet certain criteria specified in the statute or that apply for and are granted an exemption from a state official based on the official's evaluation of the token's characteristics that distinguish it from a security. The statutory qualifications and factors for the state official to consider are designed to exempt tokens that do not meet the definition of security under federal law as interpreted by Supreme Court precedent.[25] This section contains an overview of the relevant factors and case law. Additional detail and analysis of case law can be found in Section IV.

A. Statutory Qualifications

As a threshold matter, no token may qualify for an exemption if it represents a financial interest in a company, partnership, or fund, including a debt interest, revenue share, or entitlement to any interest or dividend payment.[26] Such features may result in the application of the federal securities laws.[27]

The first statutory qualification applies when the token is provided without any exchange of consideration, whether monetary or another type of tangible and definable consideration.[28] Such a token is not a security because

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[23] Uniform Securities Act of 2002, National Conference of Commissioners on Uniform State Laws, https://www.nasaa.org/wp-content/uploads/2021/09/2002-Uniform-Securities-Act.pdf.

[24] The vast majority of states have adopted some form of the Uniform Securities Act. States that have not adopted the Uniform Securities Act include Arizona, California, Florida, Illinois, New York, North Dakota, Ohio, Tennessee, and Texas. *See* Joseph C. Long, Michael J. Kaufman, and John M. Wunderlich, Blue Sky Law, § 12:1, State by State Charts for State Securities Act, Westlaw (2021).

[25] *See* SEC v. W.J. Howey Co., 328 U.S. 293 (1946) (holding an investment contract under the federal securities laws is one in which a person invests his money in a common enterprise and is led to expect profits solely from the efforts of others).

[26] Appendix, Uniform Token Regulation Act Section 2(7)(C) [hereinafter Uniform Token Regulation Act].

[27] *See* William Hinman, Director of the Division of Corporation Finance, *Digital Asset Transactions: When Howey Met Gary (Plastic)* (June 14, 2018), https://www.sec.gov/news/speech/speech-hinman-061418 ("In cases where the digital asset represents a set of rights that gives the holder a financial interest in an enterprise . . . calling the transaction an initial coin offering, or 'ICO,' or a sale of a 'token,' will not take it out of the purview of the U.S. securities laws.").

[28] Uniform Token Regulation Act Section 3(b)(1).

there is no investment of money, as there is no consideration given up by the purchaser in exchange.[29]

The second statutory qualification applies when the token's value is pegged to a fiat currency; such tokens are commonly referred to as "stablecoins."[30] To be considered a security under the '33 Act, purchasers must be "attracted solely by prospects of a return" on their investment.[31] The dominant feature of stablecoins is that they remain stable in value in order to facilitate use as a form of payment or medium of transfer. Thus, purchasers of stablecoins are not attracted by prospects of a return.

The third statutory qualification applies when the network on which the token operates is functional and the initial development team's marketing efforts are focused on the token's consumptive use, not on speculative activity.[32] A functional network is defined as a network on which token holders use tokens for the transmission and storage of value on the network, participation in an application running on the network, or otherwise in a manner consistent with the utility of the network.[33] These uses show that the tokens have a consumption purpose, rather than an investment purpose, and courts have made clear that "when a purchaser is motivated by a desire to use or consume the item purchased . . . the securities laws do not apply."[34] Tokens that are used for a functional purpose—such as a payment method or to participate in decentralized applications on the network—which are also marketed consistent with this functionality do not meet the definition of a security because a reasonable purchaser is primarily motivated by a consumption and not a profit purpose.[35]

The fourth statutory qualification applies when the initial development team is in the process of developing a functional network with an intent to achieve such functionality within three years of the date of the first sale of tokens, and each of the following criteria are met: (1) the initial development

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[29] *See* International Board of Teamsters v. Daniel, 439 U.S. 551, 559-60 ("In every decision of this Court recognizing the presence of a 'security' under the Securities Acts . . . the purchaser gave up some tangible and definable consideration in return for an interest that had substantially the characteristics of a security.").

[30] Uniform Token Regulation Act Section 3(b)(2).

[31] United Housing Foundation, Inc. v. Forman*,* 421 U.S. 837, 852 (1975) (quoting *Howey,* 328 U.S. at 300).

[32] Uniform Token Regulation Act Section 3(b)(3). Efforts to support listing a token on a trading platform do not constitute speculative activity.

[33] Uniform Token Regulation Act Section 2(2).

[34] *Forman,* 421 U.S. at 852-53.

[35] *See id.*

team's marketing efforts are focused on the token's consumptive use, not on speculative activity, (2) the initial development team focuses its marketing on those who are likely to utilize the token for its consumption purpose, and (3) the initial development team does not advertise to purchasers the potential for a secondary market for trading the token.[36] Tokens that are in the process of reaching functional status and have each of these features that strengthen the token's consumption over a profit purpose are not securities because the actions of the initial development team do not lead purchasers to expect profits.[37]

The fifth statutory qualification applies when token holders not affiliated with the initial development team actively contribute to the network in a way that increases the token's value,[38] such as by causing changes to the network or performing essential tasks and responsibilities. In these cases, profits are not "solely from the efforts of others," as required by the *Howey* test,[39] because the unaffiliated token holders have taken actions that increase the value of the token and drive any profits that come from the token.

The sixth statutory qualification applies when the network on which the token operates is decentralized and each of the following criteria are met: (1) the initial development team's continuing activities cannot reasonably be expected uniquely to drive an increase in the value of the token, and (2) the initial development team does not have any material information about the network that is not publicly available.[40] A decentralized network is a network that is not economically or operationally controlled and is not reasonably likely to be economically or operationally controlled or unilaterally changed by any single person, entity, or group of persons or entities under common control.[41] A network cannot meet this definition if the initial development team owns more than twenty percent of tokens or owns more than twenty

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[36] Uniform Token Regulation Act Section 3(b)(4).

[37] *See Forman,* 421 U.S. at 852-53. *See also* Aldrich v. McCulloch Properties, Inc., 627 F.2d 1036, 1039 (10th Cir. 1980) ("Central to [the *Howey*] test is the promotional emphasis of the developer . . . [p]romotional materials, merchandising approaches, oral assurances and contractual agreements were considered in testing the nature of the product in virtually every relevant investment contract case.").

[38] Uniform Token Regulation Act Section 3(b)(5).

[39] *Howey,* 328 U.S. at 301 ("The test is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others."). The Supreme Court has not recognized the expanded definition of efforts of others that has been adopted by some lower courts. *See Forman,* 421 U.S. at 851 n.16.

[40] Uniform Token Regulation Act Section 3(b)(6).

[41] *Id*. Section 2(1).

percent of the means of determining network consensus.[42] A token operating on a decentralized network with these additional conditions is not a security, even under the more expansive definition of efforts of others recognized by many lower courts, because the initial development team's efforts are not "the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise."[43]

B. Considerations for State Official

In addition to the statutory qualifications listed above, there are several factors that make a token more or less likely to be a security under the *Howey* test and its progeny. The state official should consider these and other relevant factors put forth by the token project when deciding whether to grant an administrative exemption. While each factor is listed under only one of the *Howey* prongs, some of the factors are relevant for multiple prongs.

1. Investment of Money

In order for an instrument to constitute an investment of money, the consideration given in exchange for the instrument must be "tangible and definable."[44] The Supreme Court has not clarified the extent to which consideration may go beyond the terminology of *Howey,* which specifically referred to an investment of "money."[45] Therefore, to the extent that a token is provided in exchange for mining, other services in support of the network, consumer data, or any other non-monetary consideration, a court is less likely to find an investment of money.

2. Common Enterprise

A network where token holders' returns are based on their own individual actions is less likely to be a common enterprise.[46] Factors influencing this determination include whether a network is functional, whether it is close to reaching full functionality, and whether token holders can earn tokens from their own active efforts. A common enterprise is lacking between an investor

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[42] *Id.*

[43] *See* SEC v. Glenn W. Turner Enters., Inc., 474 F.2d 476, 482 (9th Cir. 1973) (adopting standard for determining reliance on the efforts of others commonly recognized in the lower courts).

[44] *Daniel*, 439 U.S. at 560.

[45] *Id.* at 560 n.12.

[46] *See* Eberhardt v. Waters, 901 F.2d 1578, 1580-81 (11th Cir. 1990) ("The thrust of the common enterprise test is that investors have no desire to perform the chores necessary for a return, and are attracted to the investment solely by the prospects for a return.").

and promoter where the fortunes of the promoter are not tied to those of the investors.[47] For example, a common enterprise is less likely if members of the initial development team receive compensation outside of their token ownership. A common enterprise is also less likely if the proceeds from the token sale are not pooled towards a common use,[48] or if the initial development team owes no contractual obligations to purchasers following the token sale.[49]

3. Expectation of Profit From the Efforts of Others

Several factors increase the likelihood that the token purchaser is motivated by a desire to "use or consume the item purchased," in which case there is no expectation of profit and the securities laws do not apply.[50] Such factors include if the function of the token is available only to token holders, the function is inherent in the token and takes place automatically, the initial development team takes actions to discourage holding tokens for investment, or the token is sold in an amount and at a price that is consistent with a consumption purpose.

Other factors decrease the likelihood that a reasonable purchaser would be led to expect profits based on the actions of the promoter.[51] Such factors include if capital is raised from a source other than token sales, there are restrictions on the transfer of the token outside of the network, or the initial development team takes no action to intervene with token supply and demand.

Some factors make it less likely that a profit will be realized, which diminishes the likelihood that purchasers have an expectation of profit.[52] Such factors include if later purchasers of the token pay the same price as earlier purchasers, the value of the digital asset remains stable in correlation to the asset to which it is fixed, or any economic benefit derived from appreciation of the token is incidental to using the token for its intended functionality. The

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[47] *See* Revak v. SEC Realty Corp., 18 F.3d 81, 88 (2d Cir. 1994) ("'Strict vertical commonality' requires that the fortunes of investors be tied to the *fortunes* of the promoter.").

[48] *See id.* at 87 ("In fact, a finding of horizontal commonality requires a sharing or pooling of funds.").

[49] *See* Woodward v. Terracor, 574 F.2d 1023, 1025 (10th Cir. 1978) (finding no common enterprise where the only contractual obligation was to deliver title to real estate).

[50] *See Forman,* 421 U.S. at 852-53.

[51] *See* Warfield v. Alaniz, 569 F.3d 1015, 1021 (9th Cir. 2009) ("Under *Howey,* courts conduct an objective inquiry into the character of the instrument or transaction based on what the purchasers were 'led to expect.'").

[52] *See Forman,* 421 U.S. at 856 ("[I]n the present case this income—if indeed there is any—is far too speculative and insubstantial to bring the entire transaction within the Securities Acts.").

characteristics of the marketing plan and the degree to which it avoids the perception of promising profits also impacts the expectation of profits analysis.[53]

Factors supporting the conclusion that there is no reliance on the efforts of others include if there is no identifiable project team[54] or if the network is operational or close to operational.[55] Factors indicating there are no essential managerial efforts from the initial development team include if the initial development team retains no interest in the tokens, refrains from encouraging broader adoption or use of the token, does not own any intellectual property rights related to the token, does not indicate an intention to engage in further development efforts, or does not hold its members out as experts. Whether the initial development team's efforts occur before or after the token sale also impacts the analysis.[56] Active participation from token holders other than the initial development team may support a conclusion that there are no longer any essential managerial efforts. Factors to consider include if the holders exercise substantive governance rights, have the ability to suggest changes to the network, perform essential tasks and responsibilities, or the network is actively used for its intended purpose by a material number of parties other than the initial development team.

4. Factors from the *Reves* Test

Courts also consider the test articulated in *Reves v. Ernst & Young* in determining whether an instrument is a security,[57] therefore the state official may also consider relevant factors from that test when determining whether to grant a token project an exemption. While many of the factors from *Reves* are found within the *Howey* test, there are a few additional considerations that apply. If the token is offered to a limited group of purchasers rather than to the general public, it is less likely to be a security.[58] If the token project expressly disclaims the token's status as an investment in documents to token

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[53] *See id.* at 853-54 (considering the information bulletin provided to prospective purchasers as a factor in determining whether investors were attracted by an expectation of profit).

[54] In this case, there is no active participant who could provide the "essential managerial efforts" required to find a reliance on the efforts of others. *See Glenn W. Turner Enters.*, 474 F.2d at 482.

[55] An operational network is less likely to need "essential managerial efforts." *Id.*

[56] *See* SEC v. Life Partners, 87 F.3d 536 (D.C. Cir. 1996) (finding no reliance on the efforts of others where the managerial efforts occurred before the purchase).

[57] Reves v. Ernst & Young, 494 U.S. 56, 65 (1990).

[58] *See id.* at 66 (holding that an instrument is more likely to be a security if the plan of distribution involves common trading or speculation).

purchasers, it is also less likely to be a security.[59] Finally, if the token is collateralized or backed by insurance, a court will recognize this as a risk reducing factor that decreases the likelihood of security classification.[60]

A significant factor for the state official's consideration is which federal and state regulatory schemes the token project is already subject to, and the additional regulatory schemes that will apply upon compliance with the safe harbor.[61] Such schemes may include oversight from federal agencies (e.g., the Financial Crimes Enforcement Network (FinCEN), CFTC, and potentially the Consumer Financial Protection Bureau (CFPB) and the Federal Trade Commission (FTC)), in addition to state-level money transmission laws and attorney general unfair and deceptive acts and practices authority. These schemes reduce the risk of harm to consumers, provide recourse to purchasers for any wrongdoing that does take place, and remove the need to apply the federal securities laws.[62]

5. Additional Factors

Under the Securities Exchange Act of 1934, currency is exempt from the definition of a security.[63] Therefore, the state official may consider the extent to which the token has the characteristics of a currency when considering an exemption.[64]

C. Disclosure and Other Requirements

Token projects that qualify for the safe harbor based on the statutory qualifications or a ruling from the state official would subsequently have to meet the following requirements in order to claim the benefit of regulation under the safe harbor:

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[59] *See id*. (holding that an instrument is more likely to be a security if the public expects it to be classified as a security).

[60] *See* Resolution Trust Corp. v. Stone, 998 F.2d 1534 (10th Cir. 1993).

[61] *See Reves*, 494 U.S. at 67 (holding that an instrument is less likely to be a security if another regulatory scheme applies).

[62] *See id.*

[63] Section 3(a)(10) of the Securities Exchange Act of 1934 [hereinafter "'34 Act"].

[64] Features indicating status as a currency include if the token has an equivalent value as currency or acts as a substitute for currency. *See Application of FinCEN's Regulations to Certain Business Models Involving Convertible Virtual Currencies,* FINCEN, FIN-2019-G001 at 7 (May 9, 2019), https://www.fincen.gov/sites/default/files/2019-05/FinCEN%20Guidance%20CVC%20FINAL%20508.pdf.

- Provide initial disclosures on a freely accessible public website and update for material changes as soon as practicable.[65] Included in the disclosures must be a warning to token purchasers of the risk involved in purchasing tokens. The initial disclosures must also include information pertaining to:
  - Source code
  - Transaction history
  - Token economics
  - Plan of development, for tokens intending to reach status as a functional network
  - Prior token sales
  - The initial development team, including sales of tokens by the initial development team and related person transactions, unless the token operates on a decentralized network
  - Trading platforms
- File a notice of reliance with the designated state official containing the names and contact information for the initial development team and the website where the initial disclosures may be found.[66] The notice of reliance must be made publicly available on a state website.[67]
  - If the token project is relying on a statutory exemption, attached to the notice of reliance should be an analysis from outside counsel that supports the grounds under which the token claims an exemption, or an attestation from an individual authorized by the initial development team that the token project satisfies the condition it is claiming.
  - If the token project is relying on a ruling from a state official, such ruling should be attached to the notice of reliance.
  - Token projects that operate on a decentralized network are not required to include the information pertaining to the initial development team, and may include an attestation from a token holder or a group of token holders authorized by the token's governance process, a foundation affiliated with the token project, or a platform on which the token is available or accepted as payment.
- Pay a fee, provided in the form of the token that is the subject of the notice of reliance, to the designated state official.[68] The amount of

[65] Uniform Token Regulation Act Section 3(d).
[66] *Id*. Section 3(e).
[67] *Id*. Section 3(e)(4).
[68] *Id*. Section 3(f).

> the fee is bracketed in the uniform law to allow states to set the fee to meet their needs.

The state official who receives the notice and fee is the same one designated by the governor to review special exemption requests, as discussed in section III.D. below.

The initial development team has a duty to disclose material changes to the token that cause the token to no longer be eligible for the statutory qualification that it claims.[69]

The safe harbor applies to offers, sales, transactions, and distributions of the exempted token. This includes so-called airdrops of tokens.

Importantly, the exemption is available for existing token projects that have already engaged in token sales. The eligibility of the token for the safe harbor is based on its characteristics at the time the notice of reliance is filed, and the characteristics of distributions of the token that take place after that filing.

Under the legislation, anti-fraud authority would continue to apply to eligible tokens at the state and federal level. At the state level, the state attorney general's unfair and deceptive acts and practices authority would apply to tokens covered under the safe harbor. This authority is enforceable by the Attorney General only and includes the authority to verify the accuracy of the required disclosures and notify the designated state official if an exemption should be revoked for a violation of the terms of the exemption. At the federal level, anti-fraud authority would be exercised by the CFTC and possibly other agencies such as the CFPB. Neither state securities commissioners nor the SEC would have anti-fraud authority over exempted tokens, which are determined to be non-securities.

As a result of the exemption from the definition of security under the Uniform Securities Act, broker-dealers would not meet the definition of broker-dealer in the Uniform Securities Act with respect to transactions in exempted tokens.[70]

Finally, the legislation would establish a multistate regulatory regime by providing reciprocity for tokens that obtain a favorable ruling from a state official in another state, so long as the token project files a notice of reliance and pays the fee in each state in which it is seeking safe harbor treatment.[71]

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[69] *Id.* Section 3(g).
[70] Uniform Securities Act Section 102(4).
[71] Uniform Token Regulation Act Section 4.

D. Process for Exemption by State Official

The state official is designated by the governor and could be within the office of, for example, the State Banking Commissioner, the Securities Commissioner, the Attorney General, or in the Department of Commerce.[72] If the token project is seeking an exemption under a ruling from the state official, the project should file a request with the state official according to the process outlined by such official. The request should include an analysis from outside counsel or the initial development team listing the factors that distinguish the token from a security under the *Howey* test and other relevant authorities.[73]

The state official should evaluate the merits of the filing and issue a ruling on whether an exemption will be granted. The official should grant the exemption if he or she determines that the token is likely not a security under federal law and therefore appropriate for regulation under the state regime.[74] This ruling must be issued no later than 45 days after the date the request is filed.[75] A confidential preliminary ruling including any conditions should be verbally communicated to the applicant, after which communication the token project may withdraw its application and the ruling shall not be issued and remain confidential.[76] If the exemption is granted, the decision should be made publicly available on a state website.[77]

IV. Tokens Regulated Under the Safe Harbor are Not Securities

The federal statutory definition of a security contains an enumerated list of various instruments that are deemed to constitute a security "unless the context otherwise requires."[78] Digital assets were decades away from being invented when the statute was drafted in the 1930s; thus no examples of digital assets are included in the list. Some digital assets may be sold pursuant to an "investment contract," which is on the list of instruments meeting the definition of a security. While SEC staff has issued a framework of factors meant to serve as a guide to token projects,[79] and various SEC officials have

[72] *Id*. Section 2(6).

[73] *Id*. Section 3(c)(1).

[74] *Id*. Section 3(c)(2).

[75] *Id*. Section 3(c)(3).

[76] *Id*. Section 3(c)(4).

[77] *Id*. Section 3(c)(5).

[78] Section 2(a)(1) of the Securities Act of 1933; Section 3(a)(10) of the '34 Act. *See also* Tcherepnin v. Knight, 389 U.S. 332, 336 (1967) (treating the two definitions as identical in meaning).

[79] *See* SEC Framework at n.1 ("This framework represents the views of the Strategic Hub for

made statements on the matter,[80] the SEC has issued no official, binding guidance on whether digital assets meet the definition of a security. Furthermore, only a few federal district courts have ruled on this matter,[81] without the benefit of precedents from higher courts to follow.[82] Most of the lower court decisions were decided in the initial stages of a case using summary judgment or preliminary injunction standards.[83] In the only token case that has reached the stage of a jury trial, a jury in federal district court found that none of the four cryptocurrency products at issue met the definition of a security.[84] This contradicted the SEC's earlier order asserting that one of the tokens was a security,[85] and it raises doubt as to the validity of the SEC's position on tokens as securities.

Additionally, the federal statutory definition of a security in the '34 Act explicitly excludes "currency" from its definition.[86] Guidance from FinCEN labels tokens that have an equivalent value in real currency or that act as a substitute for real currency as a type of currency—convertible virtual currency—and regulates them as such.[87] FinCEN describes such tokens as a "medium of exchange that can operate like a currency" despite not having all the features of fiat currency.[88] To the extent that a token is a convertible virtual currency, it does not meet the definition of a security under the '34 Act.[89]

Innovation and Financial Technology of the Securities and Exchange Commission. It is not a rule, regulation or statement of the Commission, and the Commission has neither approved nor disapproved its content.").

[80] *See, e.g.*, *Hinman*, *supra* note 27; *Remarks before Aspen Security Forum, supra* note 3; Commissioner Hester M. Peirce, *Regulation: A View from Inside the Machine* (Feb. 8, 2019), https://www.sec.gov/news/speech/peirce-regulation-view-inside-machine.

[81] *See* SEC v. Telegram Grp. Inc., 448 F. Supp. 3d 352 (S.D.N.Y. 2020); SEC v. Kik Interactive Inc., 492 F. Supp. 3d 169, 180 (S.D.N.Y. 2020); Balestra v. ATBCOIN LLC, 380 F. Supp. 3d 340 (S.D.N.Y. 2019); Hodges v. Harrison, 372 F. Supp. 3d 1342 (S.D. Fla. 2019); Rensel v. Centra Tech, Inc., 2018 WL 4410126 (S.D. Fla. June 25, 2018), United States v. Zaslavskiy, 2018 WL 4346339 (E.D.N.Y. Sept. 11, 2018); SEC v. Blockvest, LLC, 2018 WL 6181408 (S.D. Cal. Nov. 27, 2018); SEC v. Shavers, 2014 WL 12622292 (E.D. Tex. Aug. 26, 2014).

[82] *See Kik Interactive*, 492 F. Supp. 3d at 177 ("I have to decide this case without benefit of direct precedent in relation to cryptocurrencies.").

[83] *See Balestra*, 380 F. Supp. 3d 340 (denying motion to dismiss for failure to state a claim); *Kik Interactive*, 492 F. Supp. 3d 169 (granting preliminary injunction based on likelihood of success on the merits); *Zaslavskiy*, 2018 WL 4346339 at 5 ("[T]he ultimate fact-finder will be required to conduct an independent *Howey* analysis based on the evidence presented at trial.").

[84] Audet v. Fraser, No. 3:16-cv-940, ECF No. 330 (D. Conn. Nov. 1, 2021).

[85] Complaint, SEC v. Garza et al*.*, No. 3:15-cv-01760 (D. Conn. Dec. 1, 2015).

[86] Section 3(a)(10) of the '34 Act.

[87] *See supra* note 64.

[88] *Id.* at 7.

[89] *See Audet*, No. 3:16-cv-940, at 30-31 (jury instructions explaining that "even if a [p]roduct

This is a factor the state official should consider when determining whether to grant an exemption under Section 3(c) of the Act.

The use of cryptocurrencies as a substitute for traditional currency has been increasing, and has been supported by state policy in certain instances. For example, there has been a heightened demand from employees to receive wages in cryptocurrency,[90] which is generally legal in states except for those which require wages to be paid in U.S. currency.[91] At least one state has established a program for paying taxes in cryptocurrency,[92] and legislation to do so has been proposed in other states.[93] These use cases provide further support for the conclusion that some tokens are properly classified as currencies, not securities.

A. The Howey *Test*

"Investment contract" is not defined by statute but was interpreted by the Supreme Court over seventy-five years ago in *SEC v. W.J. Howey Co.*[94] There, the Court had to decide whether an orange grove managed by others and sold as an investment opportunity to traveling hotel guests met the definition of a security. The Court based its decision on existing state court rulings in the context of state blue sky laws, which defined an investment contract as a contract or scheme for "the placing of capital or laying out of money in a way intended to secure income or profit from its employment."[95] From this standard, the Court derived the three-part test commonly applied today: "whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others."[96]

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meets the definition of an 'investment contract', it is not a 'security' if it is a currency"). *See also* Answer, SEC v. Ripple Labs, No. 1:20-cv-10832, 2 (S.D.N.Y. Mar. 4, 2021) (asserting that XRP is not a security because it was classified as a virtual currency by FinCEN).

[90] *See Cryptocurrency Clamor: Paying Employees in Bitcoin Has Reached the Mainstream,* JD SUPRA (May 3, 2021), https://www.jdsupra.com/legalnews/cryptocurrency-clamor-paying-employees-1276795/.

[91] These states include California, Washington, Georgia, Maryland, Delaware, Pennsylvania, Michigan, New Jersey, Texas, and Illinois. *See id.*

[92] *See* Paul Vigna, *Pay Taxes With Bitcoin? Ohio Says Sure*, WALL STREET J. (Nov. 26, 2018), https://www.wsj.com/articles/pay-taxes-with-bitcoin-ohio-says-sure-1543161720.

[93] *See id.* (citing legislation in Arizona, Georgia, and Illinois); Natasha Gabrielle, *Colorado Governor Wants to Allow Residents to Pay State Taxes in Crypto*, THE MOTLEY FOOL (July 17, 2021), https://www.fool.com/the-ascent/cryptocurrency/articles/colorado-governor-wants-to-allow-residents-to-pay-state-taxes-in-crypto/.

[94] *Howey*, 328 U.S. 293.

[95] *Id.* at 298 (quoting State v. Gopher Tire & Rubber Co., 177 N.W. 937, 938 (Minn. 1920)).

[96] *Howey*, 328 U.S. at 301.

The Supreme Court has only applied the *Howey* test a handful of times,[97] and the Court's jurisprudence in this area has left open many questions even as applied to traditional assets.[98] The ambiguity and inconsistent application of the *Howey* test in the lower courts raises further uncertainty, especially as it applies to digital assets as an entirely new category of technology. While the Court characterized the *Howey* test as "capable of adaption to meet the countless and variable schemes devised by those who seek to use the money of others on the promise of profits,"[99] a test created three-quarters of a century ago for the harvesting of orange groves is not necessarily the appropriate test to apply to twenty-first century blockchain technology. The application of the *Howey* test to digital currencies and related legal issues were discussed in a prior paper.[100]

When applying *Howey,* courts have held that "form should be disregarded for substance and the emphasis should be on the economic reality."[101] Courts have also warned that the *Howey* test should not be used to transform all commercial transactions into securities,[102] as the federal securities laws were "not intend[ed] to provide a broad federal remedy for all fraud."[103] Finally, under *Howey,* each of the three criteria must be met; if any of them fail, then the instrument is not a security.[104]

The *Howey* test looks not only at the characteristics of the token itself, but also at the manner in which the token was sold or distributed.[105] Thus, the

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[97] *See, e.g.*, *Tcherepnin*, 389 U.S. 332; *Forman*, 421 U.S. 837; SEC v. Edwards, 540 U.S. 389 (2004).

[98] Miriam R. Albert, *The Howey Test Turns 64: Are the Courts Grading this Test on a Curve?*, 2 WM. & MARY BUS. L. REV. 1, 8 (2011), https://scholarship.law.wm.edu/wmblr/vol2/iss1/2 ("The intentional breadth and adaptability of the definition of investment contract necessarily leads to complex and fact-intensive judicial inquiries in the application thereof . . . the specter of inconsistent interpretation and/or application by the lower courts arguably threatens to undermine the utility of the *Howey* test itself as a trigger for investor protection.").

[99] *Howey*, 328 U.S. at 299.

[100] Troy Paredes and Scott Kimpel, *From Orange Groves to Cryptocurrency: How Will the SEC Apply Longstanding Tests to New Technology?*, 20 FEDERALIST SOC'Y REV. 56 (Jan. 2020), https://fedsoc.org/commentary/publications/from-orange-groves-to-cryptocurrency-how-will-the-sec-apply-old-tests-to-new-technologies.

[101] *Tcherepnin*, 389 U.S. at 336.

[102] *See* Rodriguez v. Banco Cent. Corp., 990 F.2d 7, 10 (1st Cir. 1993) ("Not all property is a security, and fuzzy edges do not mean that the concept is unbounded.").

[103] Marine Bank v. Weaver, 455 U.S. 551, 551 (1982).

[104] *See Revak*, 18 F.3d at 87 ("The three elements of the *Howey* test must all be present for a land sale contract to constitute a security.").

[105] *See* SEC Framework at 1; Hinman, *supra* note 27 ("The digital asset itself is simply code. But the way it is sold—as part of an investment; to non-users; by promoters to develop the

context and manner of the sale or distribution should be considered along with the features of the token. The safe harbor takes this into account by considering several characteristics of the manner of the sale, such as how the token is marketed.

1. Investment of Money

The "investment of money" prong is the Court's way of characterizing the portion of the holding in *State v. Gopher Tire & Rubber Co.* that refers to "the placing of capital or laying out of money."[106] While the Supreme Court has suggested that this test extends beyond cash to include goods and services, the Court has not clarified the characteristics of the goods and services that would qualify.[107] It is clear, however, that tokens sold in exchange for other digital currency are considered to be an investment of money.[108] It should also be clear that a token received without any exchange of consideration, such as in an air drop, lacks the investment of money element, although the SEC has not taken this position.[109]

In *International Brotherhood of Teamsters v. Daniel*, the Court held that a pension plan was not an investment of money because the employee was not selling his labor in exchange for the pension investment, but rather for the compensation package as a whole.[110] The Court reasoned that other cases under the securities laws involved purchasers giving up "tangible and definable consideration" in return for an instrument that resembles a security.[111] The Supreme Court has not elaborated on what qualifies as "tangible and definable consideration," but validating a transaction on the blockchain is much less involved than the full-time employment that the Court considered in *Daniel*.[112] Therefore, to the extent that tokens are received in exchange for

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enterprise—can be, and in that context, most often is, a security.").

[106] *Howey,* 328 U.S. at 298 (quoting *Gopher Tire,* 177 N.W. at 938).

[107] *See Daniel,* 439 U.S. at 560 n.12 ("This is not to say that a person's 'investment,' in order to meet the definition of an investment contract, must take the form of cash only, rather than of goods and services.").

[108] *See Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934, the DAO*, SEC Release No. 81207, 11 (July 25, 2017) [hereinafter "DAO Report"] (alleging an investment of money where tokens were purchased with Ethereum); *Shavers*, 2014 WL 12622292 at 6 (E.D. Tex. Aug. 26, 2014) (finding payment in bitcoin to be an investment of money).

[109] *See* SEC Framework at 2 n.9 ("The lack of monetary consideration for digital assets, such as those distributed via a so-called 'air-drop,' does not mean that the investment of money prong is not satisfied.").

[110] *Daniel*, 439 U.S. at 560.

[111] *Id.*

[112] *See id*. at 560-61.

mining, taking another action on the network, providing consumer data, or any other non-monetary consideration, the tokens are less likely to be considered an investment of money.[113]

2. Common Enterprise

In general, the common enterprise inquiry looks to the "extent to which the success of the investor's interest rises and falls with others involved in the enterprise, including the other investors or the promoter."[114] However, the Supreme Court has not defined the term "common enterprise," and lower courts currently apply three different approaches to assess whether there is a common enterprise: horizontal commonality, broad vertical commonality, and strict vertical commonality.[115] The Supreme Court has avoided addressing this inconsistency in the test's application.[116]

No token regulated under the safe harbor may represent a financial interest in a legal entity,[117] therefore there is no pro rata distribution or formalized profit-sharing mechanism that is typically found in a common enterprise.[118] Several factors present in a token project may lessen the ties between holders' fortunes (horizontal commonality). If the token project has reached status as a functional network, there is less likely to be a common enterprise as each holder's profit is based on how they choose to spend their tokens, and therefore their fortunes are not tied to each other.[119] Even if a project has not yet reached functional status, the closer it is to functional status, the less likely a

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[113] *See A Securities Law Framework for Blockchain Tokens,* COINBASE 24 (December 7, 2016), https://www.coinbase.com/legal/securities-law-framework.pdf [hereinafter "Coinbase Framework"]. *But see* SEC Framework at 2 n.9 ("The lack of monetary consideration for digital assets, such as those distributed via a so-called 'bounty program,' does not mean that the investment of money prong is not satisfied.").

[114] *See* Albert, *supra* note 98.

[115] *See id.*

[116] *See Edwards,* 540 U.S. 389 (ruling on public policy grounds and not addressing which common enterprise test is proper).

[117] *See* Uniform Token Regulation Act Section 2(7)(C).

[118] *See Revak*, 18 F.3d at 87 ("A common enterprise within the meaning of *Howey* can be established by a showing of 'horizontal commonality': the tying of each individual investor's fortunes to the fortunes of the other investors by the pooling of assets, usually combined with the pro-rata distribution of profits.").

[119] *See Audet,* No. 3:16-cv-940 (defendant successfully argued hashlets were not a common enterprise because token holders retained choice and direction in how to spend their tokens, which affected daily profits); Marini v. Adamo, 812 F. Supp. 2d 243 (E.D.N.Y. 2011) (finding no common enterprise in rare coin collection where "plaintiff was free to direct the sale of his coins separate and apart from [defendant's] decision to sell his coins").

common enterprise will be found.[120] If holders have other opportunities to earn returns through their own individual actions, such as through staking, this further reduces the ties between holders.[121]

There are also factors that reduce the ties between the fortunes of holders and the initial development team (vertical commonality). For example, a token project is less likely to be a common enterprise if the initial development team earns revenues from sources other than their ownership of the token, such as through user fees or a licensing agreement.[122]

Some courts have found that the pooling of investor funds is required for a common enterprise.[123] Therefore, if the funds from the token sale are not pooled, a common enterprise is less likely.[124] Other courts have found that the lack of continuing contractual obligations between the promoter and the investor means there cannot be a common enterprise.[125] Therefore, if the initial development team owes no contractual obligation to the purchasers following the sale of the token, a common enterprise is less likely.[126]

3. Expectation of Profit From the Efforts of Others

The final criterion—a reasonable expectation of profits in reliance on the efforts of others—is where the analysis as applied to tokens has focused.[127] In

[120] *See* Coinbase Framework at 24.

[121] *See id.*; *Crypto Rating Council's Securities Law Framework*, CRYPTO RATING COUNCIL 3, 10 (last updated May 10, 2021), https://assets.website-files.com/5d766f847039d787f8a99a02/609998f89636a3f99c8429c6_CRC%20Securities%20Law%20Framework.pdf [hereinafter "Crypto Rating Council Framework"]. *See also Telegram,* 448 F. Supp. 3d at 369 (finding common enterprise where "the ability of each [holder] to profit was entirely dependent on the successful launch of the TON blockchain").

[122] *See* Brodt v. Bache & Co, Inc., 595 F.2d 459, 461 (finding no common enterprise where the promoter could earn large commissions even if the individual accounts were lost); Crypto Rating Council Framework at 4.

[123] *See Revak*, 18 F.3d at 88; Salcer v. Merrill Lynch, Peirce, Fenner and Smith, 682 F.2d 459, 460 (3d Cir. 1982) (finding no common enterprise where plaintiff's investment was not pooled with other funds).

[124] *See Balestra*, 380 F. Supp. 3d at 353 (finding a pooling of funds where the stated goal of the ICO "was to raise capital to create and launch a new blockchain that would deliver blazing fast, secure and near-zero cost payments to anyone in the world"). *See also* Brief for Appellant, *Telegram*, 448 F. Supp. 3d 352, 50 (2d Cir. Mar. 27, 2020) (arguing no common enterprise where the money paid by purchasers to acquire Grams on the open market would not be pooled).

[125] *See Woodward*, 574 F.2d at 1025.

[126] *See* Wells Submission, *In re Kik Interactive* (HO-13388), 19 (Dec. 10, 2018) (alleging no common enterprise where Kik's only contractual obligation to token purchasers under the Terms of Use was to deliver the tokens).

[127] *See* SEC Framework at 2 ("Usually, the main issue in analyzing a digital asset under the *Howey* test is whether a purchaser has a reasonable expectation of profits (or other financial returns)

cases where the token has achieved status as either a functional or decentralized network, this criterion will not be met.[128]

Profits include all types of returns including "dividends, other periodic payments, or the increased value of the investment."[129] Price appreciation resulting solely from external market forces is not sufficient.[130] The test is an objective rather than a subjective test, meaning that it does not consider the subjective intent of any single purchaser but rather what a reasonable purchaser in the purchaser's position would be led to expect based on the actions of the promoter.[131] The manner in which the token is marketed is considered an especially important fact in this analysis.[132]

Tokens qualifying under the safe harbor may not represent a financial interest in a company, partnership, or fund, including a debt interest, revenue share, or entitlement to any interest or dividend payment.[133] Such financial interests may result in an expectation of profit for the purchaser.

Some token holders choose to stake their token or deposit it in a cryptocurrency savings account, for the purpose of earning interest or other yield. If this action is taken independent of the token project, it does not demonstrate an expectation of profit that would convert the token into a security. In this case, the source of the profit expectation comes from the token holder's own subsequent actions and not the actions of the promoter, as required under the *Howey* test.[134]

Stablecoins do not yield a profit and thus fail this prong of *Howey.*[135] Courts have rejected a profit expectation where there is a small and uncertain chance of profit from the instrument.[136] Thus, even though a holder of stablecoin may hypothetically earn a miniscule return based on a slight variation in the stablecoin's value from time to time based on demand, this potential

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derived from the efforts of others.").

[128] *See* Hinman, *supra* note 27 (A token may not be a security in "cases in which there is no longer any central enterprise being invested in or where the digital asset is sold only to be used to purchase a good or service available through the network on which it was created.").

[129] *Edwards*, 540 U.S. at 394.

[130] *See* SEC Framework at 6.

[131] *See Warfield*, 569 F.3d at 1021.

[132] *Id.* at 1022 (finding charitable annuities were investments where marketing materials described them as "A Gift that Gives to the Donor" and highlighted the rate of return).

[133] Uniform Token Regulation Act Section 2(7)(C).

[134] *See Warfield,* 569 F.3d at 1021.

[135] *See* Uniform Token Regulation Act Section 3(b)(2).

[136] *See Forman*, 421 U.S. at 856 (holding that possibility of income from leases was "far too speculative and insubstantial to bring the entire transaction within the Securities Acts").

return is not significant enough to trigger the application of the securities laws under Supreme Court precedent.[137]

In *United Housing Foundation v. Forman*, the Court held that "when a purchaser is motivated by a desire to use or consume the item purchased . . . the securities law do not apply."[138] Courts have further held that "if the benefit to the purchasers . . . was largely in their own use and enjoyment, the necessary expectation of profit is missing."[139] Courts again consider how the purchase is marketed in making this determination.[140] Therefore, a token that operates on a functional network that is marketed in a way that emphasizes its consumption purpose[141] is not a security.[142]

The fact that the consumptive use is not yet available on the network does not negate a consumption purpose.[143] For example, the SEC has previously taken the position that seat licenses that come with a right to purchase season tickets in the future are not a security, even though the consumptive use was not immediately available when the license was granted.[144] Applying a similar logic, a network that is working to achieve a functionality that is not immediately available upon token sale may still be exempt from the securities laws in certain circumstances. Specifically, the safe harbor assumes a token that achieves functionality within three years and meets the other three statutory

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[137] *See also* SEC Framework at 8 (identifying as relevant factors (i) "the value of the digital asset has shown a direct and stable correlation to the value of the good or service for which it may be exchanged or redeemed" and (ii) "any economic benefit that may be derived from appreciation in the value of the digital asset is incidental to obtaining the right to use it for its intended functionality"); TurnKey Jet Inc. No-Action Letter, SEC (Apr. 3, 2019), https://www.sec.gov/divisions/corpfin/cf-noaction/2019/turnkey-jet-040219-2a1.htm (recognizing token as not a security where market value of token was equal to one USD throughout its existence).

[138] *See Forman,* 421 U.S. at 853 (share in a housing co-op deemed not to be a security where the sole purpose was to enable the purchaser to occupy an apartment).

[139] *Aldrich*, 627 F.2d at 1040. *See also* Hinman, *supra* note 27 (framing relevant question as "is it clear that the primary motivation for purchasing the digital asset is for personal use or consumption, as opposed to investment?").

[140] *Forman,* 421 U.S. at 853 (citing bulletins that emphasized the "favorable environment for family and community living" of the co-op as opposed to any profit benefit).

[141] *See* Uniform Token Regulation Act Section 3(b)(3).

[142] *See* TurnKey Jet, *supra* note 137 (respecting status as non-security where tokens are immediately usable for intended functionality). *See also* Answer, *Ripple,* No. 1:20-cv-10832 (asserting XRP is not a security as it functions as a store of value, medium of exchange, and unit of account).

[143] *See Forman,* 421 U.S. at 842 (housing co-op shares deemed not to be a security where acquired prior to the apartment being put to its functional use). *See also* Wells Submission, *In re Kik Interactive* (HO-13388) at 20 (alleging no change in consumptive purpose based on the fact that the token's consumptive use is not available at the time of purchase).

[144] *See* San Francisco Baseball Associates L.P. No Action-Letter, SEC (Feb. 24, 2006), https://www.sec.gov/divisions/corpfin/cf-noaction/sfba022406.htm.

factors that support functionality[145] is not a security as the weight of the evidence in such a case supports a consumption over a profit motive.[146]

First, a marketing effort that is focused on consumptive use and avoids using profit-related terms such as "initial coin offering" or "returns" makes it unlikely for a reasonable purchaser to develop a profit expectation.[147] Second, the requirement that the initial development team focus its marketing efforts on people likely to use the token for its consumption purpose demonstrates that functionality is prioritized over profit.[148] Third, the fact that the initial development team does not advertise a secondary market for trading the token provides further support for the conclusion that purchasers should not reasonably expect to earn a profit.[149]

Even if a token does not meet each of the specific criteria listed above, other factors related to the token may result in a finding that there is no profit expectation. Certain factors increase the strength of the consumption purpose and therefore lessen the profit expectation. Such factors include if the function of the token is only available to those inside the network,[150] the function is inherent in the token and takes place without manual action outside the network,[151] the initial development team takes actions such as devaluing and slashing to discourage holding the tokens for investment,[152] or the token is

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[145] *See* Uniform Token Regulation Act Section 3(b)(4).

[146] *See* SEC Framework at 11 (citing factors that make a token more likely to be a security when the functionality is being developed or improved).

[147] In many of the cases the SEC has brought against a token, the initial development team made statements touting the token's profit potential when marketing the token sales. *See Balestra*, 380 F. Supp. 3d at 355 (citing ATBCoin press release stating, "ATB investors are serious people from many prosperous countries, they are interested in the development of the company, the growth of the rate, and of course, the profit, which as is known, will soon come to those who are 100% sure of the possibilities of cryptocurrency"); *Kik Interactive*, 492 F. Supp. 3d at 179 (citing Kik CEO statement: "If you could grow the demand for it, then the price—the value of that cryptocurrency would go up, such that if you set some aside for yourself at the beginning, you could make a lot of money."); *Zaslavskiy*, 2018 WL 4346339 at 7 (ReCoin token marketed as "an attractive investment opportunity" which "grows in value").

[148] *See* Hinman, *supra* note 27 (listing as relevant question, "Is the asset marketed and distributed to potential users or the general public?"); *Telegram,* 448 F. Supp. 3d at 374 (finding significant the fact that Telegram marketed to sophisticated firms and high net worth individuals).

[149] *See Kik Interactive*, 492 F. Supp. 3d at 180 (noting that Kik explained in whitepapers how Kin tokens would be tradable on the secondary market); *In the Matter of Munchee, Inc.*, SEC Release No. 10445, 9 (Dec. 11, 2017), https://www.sec.gov/litigation/admin/2017/33-10445.pdf (finding an expectation of profit where Munchee promoters stated they would ensure a secondary trading market for the token).

[150] *See* SEC Framework at 10; Coinbase Framework at 25.

[151] *See* Coinbase Framework at 25.

[152] *See* Crypto Rating Council Framework at 7.

sold in an amount and at a price that is consistent with its consumption purpose.[153] The way in which a token is marketed has a significant impact on investors' expectations.[154] The more the marketing plan emphasizes the consumption purpose and avoids the perception of profits, the more likely a court will find that there is no profit expectation.[155]

Other factors that diminish the likelihood that a reasonable purchaser is led to expect profits[156] include if capital is raised from a source other than token sales,[157] there are restrictions on transfer of the token outside of the network,[158] or the initial development team takes no action to intervene with token supply and demand.[159] Other factors lessen the profit expectation by making it less likely that a profit will be realized.[160] These factors include if later purchasers of the token pay the same price as earlier purchasers,[161] the value of the digital asset remains stable in correlation with that of the asset to which it is fixed,[162] or any economic benefit derived from appreciation of the token is incidental to using the token for its intended functionality.[163]

In *Howey,* the Supreme Court held that profits must come "solely from the efforts of others" in order for an instrument to meet the definition of a security.[164] Some lower courts have adopted a more flexible test that asks whether the active participant's efforts are "the undeniably significant ones,

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[153] *See Telegram*, 448 F. Supp. 3d at 372 (finding large amount of capital raised and limited number of initial purchasers indicated that the purchasers did not intend to use the tokens for a consumption purpose); SEC Framework at 7; Crypto Rating Council Framework at 7-8.

[154] *See Aldrich,* 627 F.2d at 1039.

[155] *See In the Matter of Munchee, supra* note 149, at 6 (finding expectation of profit where Munchee offered to provide tokens to people who published promotional videos); Crypto Rating Council Framework at 9.

[156] *See Warfield*, 569 F.3d at 1021 (Under *Howey,* courts conduct an objective inquiry into the character of the instrument or transaction based on what the purchasers were 'led to expect.'").

[157] *See* Crypto Rating Council Framework at 8.

[158] *See* TurnKey Jet, *supra* note 137 (token not a security where tokens can only be transferred to wallets within the network); SEC Framework at 6, 10; Crypto Rating Council Framework at 3.

[159] *See Telegram,* 448 F. Supp. 3d at 372 (finding significant the fact that the foundation was authorized to repurchase tokens on the open market if the market price fell below a certain amount); *In the Matter of Munchee, supra* note 149, at 4 (noting that Munchee created a tiered membership plan designed to increase the value of tokens); SEC Framework at 4; Crypto Rating Council Framework at 6.

[160] *See Forman,* 421 U.S. at 855.

[161] *See Telegram*, 448 F. Supp. 3d at 372 (noting that purchasers were granted a discount as compared to expected price post-launch); Crypto Rating Council Framework at 10.

[162] *See* TurnKey Jet, *supra* note 137 (token not a security where market value of token maintained at one USD throughout its existence); SEC Framework at 8.

[163] *See* SEC Framework at 8.

[164] *Howey*, 328 U.S. at 301.

those essential managerial efforts which affect the failure or success of the enterprise."[165] However, the Supreme Court has never upheld this departure from *Howey.*[166] Therefore, if unaffiliated token holders contribute to the network in ways that increase the token's value, such increase in value is not "solely from the efforts of others," and the token should not be a security.[167] Examples of such contributions include voting on significant decisions, suggesting changes to the network, and performing essential tasks and responsibilities. The *Howey* Court specifically noted that the investors in that case had no ability or interest in actively participating in the endeavor.[168] In many token projects, however, purchasers are knowledgeable about the blockchain and are purchasing tokens in order to facilitate their participation on the network. A decentralized network will certainly qualify under this test, but a network that still has centralized features but allows unaffiliated token holders to contribute to the network in ways that increase the token's value will also meet this qualification.

Another area of ambiguity in the efforts of others prong is whether the efforts of the active participant before the investment is made count for purposes of the test.[169] Therefore, to the extent that the initial development team only takes actions to develop the network prior to the token sale, these actions may not be sufficient to find profits from the efforts of others.

Many token projects will not qualify as securities even under the expanded definition of "efforts of others" recognized by some lower courts.[170] In a decentralized network under the safe harbor, the network is not economically or operationally controlled by any person or group of persons or reasonably likely to become so.[171] The fact that the initial development team's

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[165] *Glenn W. Turner Enters.*, 474 F.2d at 482.

[166] *See Forman*, 421 U.S. at 851 n.16 ("This test speaks in terms of 'profits to come solely from the efforts of others.' Although the issue is not presented in this case, we note that the Court of Appeals for the Ninth Circuit has held that 'the word 'solely' should not be read as a strict or literal limitation on the definition of an investment contract, but rather must be construed realistically, so as to include within the definition those schemes which involve in substance, if not form, securities.' We express no view, however, as to the holding of this case.").

[167] *See* Uniform Token Regulation Act Section 3(b)(5).

[168] *See Howey*, 328 U.S. at 299-300 (Noting that investors do not reside near the orange groves, lack the equipment and experience to harvest the groves, and "have no desire to occupy the land or to develop it themselves.").

[169] Lower courts are split on this question, and the Supreme Court has not addressed it. *See* Albert*, supra* note 98, at 29-30.

[170] *See Glenn W. Turner Enters.,* 474 F.2d at 482.

[171] *See* Uniform Token Regulation Act Section 2(1).

continuing activities cannot reasonably be expected uniquely to drive an increase in the value of the token[172] demonstrates the lack of a connection between profits and the efforts of others, which is required under the *Howey* test.[173] The confirmation that the initial development team has no material information about the network that is not publicly available[174] supports the conclusion that there is no longer a central actor with an informational advantage.[175] Under these facts, the initial development team's efforts are not "the undeniably significant ones, those essential managerial efforts which affect the success or failure of the enterprise,"[176] and therefore the token does not meet the definition of a security.[177]

Other factors are associated with a decentralized network. If there is no identifiable team that the public views as the management or developers behind the network, then the network is likely decentralized.[178] If the network is operational or close to being operational, it is more likely that the network is decentralized, as an operational network is less likely to rely on the initial development team's efforts.[179]

Even if a token does not meet the definition of decentralized under the safe harbor, several factors related to the efforts of others may result in a finding that the token is not a security. The absence of certain actions from the initial development team will support the conclusion that their actions are

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[172] *See* Uniform Token Regulation Act Section 3(b)(6)(A).

[173] *See Howey,* 328 U.S. at 300 ("A common enterprise managed by respondents or third parties with adequate personnel and equipment is therefore essential if the investors are to achieve their paramount aim of a return on their investments.").

[174] *See* Uniform Token Regulation Act Section 3(b)(6)(B).

[175] *See* Crypto Rating Council Framework at 8.

[176] *Glenn W. Turner Enters.*, 474 F.2d at 482.

[177] *See* Letter from SEC to Jacob E. Comer Re: Cipher Technologies Bitcoin Fund (Oct. 1, 2019), https://www.sec.gov/Archives/edgar/data/1776589/999999999719007180/filename1.pdf ("[W]e disagree with your conclusion that bitcoin is a security . . . [a]mong other things, we do not believe that current purchasers of bitcoin are relying on the essential managerial and entrepreneurial efforts of others to produce a profit."); *Telegram*, 448 F. Supp. 3d at 358 ("In the abstract, an investment of money in a cryptocurrency utilized by members of a decentralized community connected via blockchain technology, which itself is administered by this community of users rather than by a common enterprise, is not likely to be deemed a security under the familiar test laid out in [*Howey*]."); Hinman, *supra* note 27 (identifying as the primary question for whether a digital asset is a security "whether a third party—be it a person, entity, or coordinated group of actors—drives the expectation of a return"). *See also* Brief for Appellant at 44, *Telegram*, 20 WL 1502476 (alleging no reliance on the efforts of others where the network is open source and Telegram has no control over, or any unique rights to, the TON blockchain).

[178] *See* Crypto Rating Council Framework at 4.

[179] *See id*. at 13.

not "the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise."[180] Factors supporting this conclusion include if the initial development team retains no interest in the tokens,[181] refrains from encouraging broader adoption or use of the token,[182] does not own any intellectual property rights related to the token,[183] does not indicate an intention to engage in further development efforts,[184] or does not hold its members out as experts.[185]

On the other hand, certain actions of unaffiliated token holders support a finding that their efforts are more significant to the network than those of a central actor.[186] Such actions include exercise of substantive governance rights by the holder, such as the right to vote on making significant changes to the protocol or on whether the development team can access proceeds from the token sale.[187] If unaffiliated holders can suggest changes to the network, the significance of the development team's efforts is further diminished (particularly if changes suggested by such holders have previously been adopted by the network).[188] Another relevant consideration is the degree to which

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[180] *Glenn W. Turner Enters.*, 474 F.2d at 482. *See also* DAO Report at 12-13 (finding a reliance on the efforts of others where designated curators reviewed and selected the project proposals that token holders would vote on, which were the source of holders' profits).

[181] *See Kik Interactive,* 492 F. Supp. 3d at 180 (finding that Kik had an incentive to contribute to the success of the token because it retained 30% of tokens created); *Telegram*, 448 F. Supp. 3d at 378 (noting that Telegram reserved 4% of Grams for the development team); SEC Framework at 5.

[182] *See Telegram,* 448 F. Supp. 3d at 376 (finding reliance on the efforts of others where Telegram's stated intent was to "integrate the TON blockchain with Messenger in order to encourage the widespread use of Grams"); Crypto Rating Council Framework at 13.

[183] *See* SEC Framework at 5; Crypto Rating Council Framework at 13.

[184] *See Kik Interactive,* 492 F. Supp. 3d at 180 (finding reliance on the efforts of others where the white paper stated that Kik would "provide startup resources, technology, and a covenant to integrate with the Kin cryptocurrency and brand"); *Telegram,* 448 F. Supp. 3d at 377 (finding reliance on efforts of others where Telegram touted in its sales efforts the integration of the TON blockchain with Telegram messenger as a major driver of the token's adoption); Crypto Rating Council Framework at 12.

[185] *Zaslavskiy,* 2018 WL 4346339 at 7 (finding reliance on the efforts of others where the marketing materials stated that members of the development team would use their expertise to develop the token).

[186] *See Audet*, No. 3:16-cv-940, at 21 (jury instructions providing that "if there was a reasonable expectation of significant investor control, then profits would not be considered derived solely from the efforts of others").

[187] *See* DAO Report at 13-14 (finding reliance on efforts of others where token holders' voting rights were limited in that they could only vote on proposals already cleared by curators); Coinbase Framework at 26.

[188] *See* Crypto Rating Council Framework at 14.

unaffiliated holders perform essential tasks and responsibilities on the network.[189] Finally, if the network is actively used for its intended purpose by a material number of parties other than the initial development team, reliance on the efforts of others is less likely.[190]

4. Other *Howey* Considerations

In applying the *Howey* test, the Court frequently looks beyond the mechanical application of the three-factor test to consider policy considerations and other purpose-driven factors. For example, when considering whether shares in savings and loan associations constituted securities, the Court noted that the legislative history of the '33 Act showed that Congress debated the issue of whether to apply the securities laws to these products and created an exemption from the registration requirements.[191] Reaching a similar conclusion as applied to digital assets is difficult given that they did not exist at the time the '33 Act was passed, but the '34 Act's exemption of currency is instructive.[192] In another case, the Court fell back on the legislature's purposes when considering whether a product was excluded from the definition of a security simply because it offered a fixed rather than a variable rate of return.[193] Exempting tokens from the definition of security does not undermine the purpose of the securities laws in this way given that they are fundamentally distinguishable from traditional asset classes.

B. The Reves *Test*

In *Reves v. Ernst & Young,* the Court considered whether a note marketed to members of an agricultural cooperative as an "Investment Program" met the definition of a security.[194] The Court weighed four factors in its analysis: 1) the motivations of the buyer and the seller, 2) whether there was common trading of the instrument, 3) the expectations of the public, and 4) whether there was an alternative regulatory regime already governing the instrument.[195] While courts have traditionally applied the *Reves* factors to notes that

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[189] *See* SEC Framework at 4; Crypto Rating Council Framework at 14.

[190] *See* Crypto Rating Council Framework at 14.

[191] *Tcherepnin*, 389 U.S. at 340.

[192] *See* Section 3(a)(10) of the '34 Act.

[193] *Edwards*, 540 U.S. at 395 ("Under the reading respondent advances, unscrupulous marketers of investments could evade the securities laws by picking a rate of return to promise. We will not read into the securities laws a limitation not compelled by the language that would so undermine the laws' purposes.").

[194] *Reves*, 494 U.S. at 65.

[195] *Id.* at 66.

do not fit squarely into the definition of a security, the SEC has recently sought to expand the scope of *Reves* by applying the test to digital assets.[196] Thus, a court *may* apply the reasoning of *Reves* to supplement the *Howey* analysis.

1. Motivations of Buyer and Seller

Under the first prong, if the seller's purpose was to raise money for use in a business or to finance investments and the buyer was driven primarily by the desire to obtain a profit, the instrument is more likely to be a security.[197] On the other hand, if the instrument was bought for a consumption purpose such as facilitating the sale of a consumer good, it is less likely to be a security.[198] The requirement that tokens qualifying for the safe harbor cannot represent a financial interest makes it less likely that the seller is motivated by traditional business or investment intentions. Many of the same factors that were considered with respect to the expectation of profit prong of *Howey* will also be applicable here. For example, tokens with features of functionality are less likely to be a security under this factor as the purchasers in those instances are motivated by a consumption purpose. Tokens that are not marketed in ways that emphasize a profit potential are also less likely to be a security under this factor.

2. Common Trading

Under the second prong, the instrument is more likely to be a security if the plan of distribution involves common trading or speculation.[199] Even if the instrument is not traded on an exchange, if it is offered and sold to a broad segment of the public, this factor is likely met.[200] Courts have found instruments were sold to a broad segment of the public where there were no limitations on who could purchase the instruments.[201] The finding on this factor will vary based on how extensive the reach of the marketing of the token is.

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[196] *See In the Matter of Blockchain Credit Partners d/b/a DeFi Money Market,* AP File No. 3-20453 (Aug. 6, 2021); *In the Matter of BlockFi Lending LLC,* AP File No. 3-20758 (Feb. 14, 2022).

[197] *See Reves*, 494 U.S. at 66. *See also In the Matter of Blockchain Credit Partners, supra* note 196 (finding the motivation of the company in selling tokens was to "raise funds for the general use of its business").

[198] *See Reves*, 494 U.S. at 66.

[199] *See id*.

[200] *See id.* at 68. *See also In the Matter of Blockchain Credit Partners*, *supra* note 196 (noting that mTokens were "offered and sold to the general public").

[201] *See* SEC v. Wallenbrock, 313 F.3d 532, 539 (9th Cir. 2002).

3. Reasonable Expectations of the Public

The third prong of the *Reves* test considers whether the public would have a reasonable expectation that the instrument is classified as a security and subject to the federal securities laws.[202] Courts will again consider many of the same factors that were applicable to the reasonable expectation of profit prong of the *Howey* test.[203] As in the *Howey* test, the relevant consideration is the objective expectations of a reasonable investor, not the subjective expectation of any one individual.[204] For example, courts have found that the sale of a business to a single informed purchaser constituted the sale of a security because the public's expectations are that common stock is always a security.[205] Tokens, on the other hand, represent an entirely new area of financial products that the public may not bring traditional expectations to. Furthermore, if a token project expressly disclaims status as an investment, it is reasonable to conclude that the public does not expect it to be treated as a security.[206] Thus, this factor likely weighs against treatment as a security for most token projects.

4. Alternative Regulatory Regime

The fourth and final prong assesses whether there is a risk-reducing factor, such as the existence of another regulatory scheme, that renders the application of the federal securities laws unnecessary.[207] The *Reves* Court was especially concerned with instruments that "would escape federal regulation entirely" if the federal securities laws did not apply.[208] Courts have typically recognized regulatory schemes at the federal level for this category, [209] but they have not ruled out the recognition of a state regulatory regime. A state regulatory regime was deemed inadequate where the defendant did not discuss the nature of the state enforcement mechanisms, how they interact with

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[202] *See Reves*, 494 U.S. at 66.

[203] *See In the Matter of Blockchain Credit Partners*, *supra* note 196 (finding significant the fact that the company promoted mTokens as a "way to earn a consistent return of 6.25%").

[204] *See Wallenbrock*, 313 F.3d at 539.

[205] *See Landreth Timber*, 471 U.S. 681 (1985).

[206] *See* Stoiber v. SEC, 161 F.3d 745, 751 (D.C. Cir. 1998) ("When note purchasers are expressly put on notice that a note is not an investment, it is usually reasonable to conclude that the 'investing public' would not expect the notes to be securities.").

[207] *See Reves*, 494 U.S. at 67.

[208] *Id.* at 69.

[209] *See Marine Bank*, 455 U.S. 551 (finding a bank certificate of deposit was subject to an alternative regulatory regime through regulation as a federally regulated bank); *Daniel,* 439 U.S. 551 (finding a pension plan was subject to an alternative regulatory regime through federal ERISA law).

the federal securities acts, and how they protect out of state holders.[210] Additionally, courts have held that collateralization and insurance can serve as a risk-reducing factor.[211]

Tokens regulated under the safe harbor are subject to a complex web of federal and state regulatory schemes. Federal regulation includes FinCEN anti-money laundering and countering the financing of terrorism regulations, potentially CFPB or FTC authority, CFTC anti-fraud and anti-manipulation authority, and oversight by the Office of the Comptroller of the Currency with respect to certain digital assets that have sought national trust charters. State regulation includes state money transmission laws, state attorney general unfair or deceptive acts or practices authority, and the additional regulatory regime established by the safe harbor and administered by the states. This regime is much more comprehensive than the state-only regulatory regimes that have previously been rejected as alternative regulatory regimes by the courts, and token projects certainly do not "escape federal regulation entirely."[212] State regulation also exists in multiple states, unlike the single-state regulatory regimes that courts have found inadequate.[213] Furthermore, as discussed in section V below, the disclosure regime established by the safe harbor is superior to the existing disclosure regime under the federal securities laws, as applied to digital assets. To the extent that the token is backed by reserves or covered by insurance, courts will find a further risk-reducing factor. Therefore, this factor weighs heavily against classifying a token regulated under the safe harbor as a security.

5. Conclusion

The *Reves* test is an alternative test that may be appropriate to apply to tokens under certain circumstances. When applied, it is a balancing test that should be applied to the facts and circumstances of each token. However, its overall reasoning—particularly the risk reduction factor—provides further

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[210] *See* SEC v. Thompson, 732 F.3d 1151 (10th Cir. 2013). *See also Wallenbrock*, 313 F.3d 532 (finding California Department of Corporation's Desist and Refrain order authority insufficient); Holloway v. Peat Marwick, Mitchell & Co, 900 F.2d 1485 (10th Cir. 1990) (finding state regulation by the Oklahoma Banking Department and the Oklahoma Securities Commission insufficient).

[211] *See Stone*, 998 F.2d 1534.

[212] *Reves*, 494 U.S. at 69.

[213] *See Wallenbrock*, 313 F.3d at 540 ("The fact that a company is subject to regulation by a single state is not nearly enough to remove the company from the umbrella of the federal securities laws.").

support for the conclusion that tokens regulated under the safe harbor are not securities.[214]

V. Applying the Federal Securities Laws to Tokens Regulated by the Safe Harbor Would not Benefit Consumers

The primary aim of the federal securities laws is full and fair disclosure. This is evident in the legislative history of the '33 Act, which represents the origin of federal securities laws. In a message to Congress accompanying his proposal, President Franklin Roosevelt stated that recent events created an obligation for the government to ensure that "every issue of new securities sold in interstate commerce shall be accompanied by full publicity and information, and that no essentially important element attending the issue shall be concealed from the buying public."[215] The congressional report later describes the effect of the Act as "clos[ing] the channels of [interstate] commerce to security issues unless and until a full disclosure of the character of such securities has been made."[216] *Howey* itself acknowledges disclosure was the primary purpose of the statute.[217] The SEC has also consistently cited full and fair disclosure and the problem of information asymmetry as its reason for bringing enforcement actions against tokens.[218]

The safe harbor's disclosure regime dispenses with the SEC's information asymmetry argument altogether. Not only does the safe harbor require sufficient disclosure to replace the federal securities regime, it requires disclosure

[214] In addition to the benefit that the regulatory regime safe harbor provides under the *Reves* test, the SEC may need to consider the effects of a state regulatory regime when making a rule through adjudication, to ensure that any such rule is rationally drawn to address a real problem. *Cf.* American Equity Inv. Life Ins. Co. v. SEC, 613 F.3d 166, 179 (2010) (holding, in the rulemaking context, that the SEC was obligated to consider the state regulatory regime against the background of which it acted).

[215] *Federal Supervision of Traffic in Investment Securities in Interstate Commerce*, House Report No. 85, 2 (73d Congress, 1933).

[216] *Id.* at 3.

[217] *See Howey*, 328 U.S. at 299 ("The [*Howey* test] permits the fulfillment of the statutory purpose of compelling full and fair disclosure relative to the issuance of 'the many types of instruments that in our commercial world fall within the ordinary concept of a security.'").

[218] *See, e.g.,* Complaint at 2, *Ripple,* No. 1:20-cv-10832 (S.D.N.Y. December 22, 2020) ("Ripple created an information vacuum . . . [Defendants] can continue to monetize their XRP while using the information asymmetry they created in the market for their own gain, creating substantial risk to investors."); Press Release, SEC Charges Decentralized Finance Lender and Top Executives for Raising $30 Million Through Fraudulent Offerings, SEC (Aug. 6, 2021) (Director Grewal stating "[f]ull and honest disclosure remains the cornerstone of our securities laws—no matter what technologies are used to offer and sell those securities").

that is superior to what would be required under the federal securities laws. While the federal securities laws apply disclosures to the issuer of the token, the safe harbor applies disclosure to the token itself. For example, Regulation S-K requires issuers to provide information on dividends and stockholders' equity,[219] executive compensation,[220] and corporate governance.[221] Given that token purchasers are purchasing the underlying digital asset and not an interest in the issuer, this information is irrelevant and potentially misleading to token holders. For some token projects, particularly decentralized ones, certain disclosure items may not be applicable at all.[222] Disclosure about an issuer's financial condition, the central focus of existing securities law disclosures, are not helpful for most tokens because the token projects themselves are often not businesses or engaged in business activities related to the generation of the token.

As some commentators have stated regarding tokens, "reliance on Securities Act disclosure forms would prove not only potentially burdensome, but also inadequate for investor protection."[223] Furthermore, providing these irrelevant disclosures may mislead purchasers into believing that the financial information regarding the company affects the value of the token.

The disclosures required under the safe harbor, on the other hand, relate to the asset that is being purchased and are tailored to the unique characteristics of tokens.[224] The value of a token depends on its underlying technology, user base, and potential uses, and the disclosures are tailored to these considerations. This is the information that purchasers need to make informed

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[219] Regulation S-K, Item 102, 17 C.F.R. § 229.102.

[220] Regulation S-K, Item 402, 17 C.F.R. § 229.402.

[221] Regulation S-K, Item 407, 17 C.F.R. § 229.407.

[222] Specifically, the requirement that the issuer disclose its directors and officers and their compensation would be inapplicable. *See* Mengqi Sun, *SEC Halts Registration of 2 Digital Tokens Over Allegedly Misleading and Missing Information,* WALL STREET J. (Nov. 10, 2021), https://www.wsj.com/articles/sec-halts-registration-of-2-digital-tokens-over-allegedly-misleading-and-missing-information-11636588273 (American CryptoFed CEO commenting on SEC enforcement action: "The purported 'deficiencies' the SEC referred to were the lack of attributes inherent to securities. These are attributes that the two tokens . . . of a decentralized blockchain-based CryptoFed DAO monetary system will never have.").

[223] Brummer, *supra* note 21 at 34 (further stating, "The disclosure regime embodied in the Securities Act is one based on pricing assumptions that, though well suited to the industrial age, do not map neatly onto the developing field of digital assets"). *See also* Chris Brummer, *Disclosure, Dapps and Defi* (Mar. 24, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4065143 (proposing a framework for disclosure to apply to DeFi).

[224] *See* Uniform Token Regulation Act Section 3(d) (requiring disclosure of source code, token economics, plan of development, and more).

decisions about whether to purchase the token and is thus a more suitable way to serve the investor protection goals the SEC asserts.[225] The disclosures under the safe harbor are also superior tools of investor protection in that the disclosures are available on a publicly accessible, user friendly website that token purchasers are already familiar with, as opposed to the bureaucratic and often unfamiliar EDGAR system used for SEC filings.

VI. CONCLUSION

The actions of the current SEC have created an unworkable environment for token projects creating the next generation of financial technology and the consumers wishing to take advantage of those innovations. States can take action to remedy this situation by enacting their own regulatory frameworks that provide regulatory certainty to token projects while also protecting consumers. This legislation would ensure that the U.S. remains the leading jurisdiction for cryptocurrency in the world, while benefitting the economies of the states that choose to enact it.

Other Views:

- Chair Gary Gensler, *Remarks Before Aspen Security Forum* (Aug. 3, 2021), https://www.sec.gov/news/public-statement/gensler-aspen-security-forum-2021-08-03.
- Commissioner Caroline Crenshaw, *Remarks at SEC Speaks: Digital Asset Securities – Common Goals and a Bridge to Better Outcomes* (Oct. 12, 2021), https://www.sec.gov/news/speech/crenshaw-sec-speaks-20211012.
- Chris Brummer, *Disclosure, Dapps and Defi* (Mar. 24, 2022), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4065143.

[225] *See* SEC, *Office Hours with Gary Gensler: The SEC & Cryptocurrencies* (Aug. 16, 2021), youtube.com/watch?v=-kKGkbrwCT0 (Gary Gensler stating, "that's what the SEC has to do with crypto . . . investor protection").

Appendix: Uniform Token Regulation Act

Legislative Note: *The purpose of this act is to act jointly with other enacting states to provide certainty to the treatment of Token projects under the securities laws while preventing fraud, protecting consumers, fostering innovation, and promoting competition in the financial services industry.*

Section 1. Title

This act may be cited as the "Uniform Token Regulation Act."

Section 2. Definitions

In this act:

(1) A "Decentralized Network" is a network that is not economically or operationally controlled and is not reasonably likely to be economically or operationally controlled or unilaterally changed by any single person, entity, or group of persons or entities under common control, except that networks for which the Initial Development Team owns more than 20% of Tokens or owns more than 20% of the means of determining network consensus cannot satisfy this condition.

(2) A "Functional Network" is a network on which Token holders use Tokens for the transmission and storage of value on the network, the participation in an application running on the network, or otherwise in a manner consistent with the utility of the network.

(3) "Initial Development Team" means any person, group of persons, or entity that provides the essential managerial efforts for the development of the network prior to reaching status as a Decentralized Network.

(4) "Related Person" means the Initial Development Team, directors or advisors to the Initial Development Team, and any immediate family member of such persons.

(5) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any other territory or possession subject to the jurisdiction of the United States.

(6) "State Official" means an official of the State designated by the Governor to administer this Act.

(7) A "Token" is a digital representation of value or rights

(A) that has a transaction history that:

(i) is recorded on a distributed ledger, blockchain, or other digital data structure;

(ii) has transactions confirmed through an independently verifiable process; and

(iii) cannot be modified;

(B) that is capable of being transferred between persons without an intermediary party; and

(C) that does not represent a financial interest in a company, partnership, or fund, including a debt interest, revenue share, or entitlement to any interest or dividend payment.

(8) "Uniform Securities Act" means the Uniform Securities Act of 2002.

Section 3. Exemption for Qualifying Tokens

(a) The term "security" as defined by the Uniform Securities Act does not apply to a Token involved in an offer, sale, transaction, or distribution if all of the following are satisfied:

(1) The Token project:

(A) Satisfies one of the conditions of subsection (b); or

(B) Obtains a ruling from the State Official under subsection (c).

(2) The Token project provides initial disclosures under subsection (d).

(3) The Token project files a notice of reliance under subsection (e).

(4) The Token project pays a fee under subsection (f).

(b) A Token project satisfying one or more of the following conditions is eligible for the exemption under subsection (a):

(1) The Token is provided without any exchange of consideration, whether monetary or another type of tangible and definable consideration.

(2) The value of the Token is pegged to a fiat currency.

(3) The Token operates on a Functional Network and the Initial Development Team's marketing efforts are focused on the Token's consumptive use, not on speculative activity. Efforts to support listing a Token on a trading platform shall not constitute speculative activity.

(4) The Initial Development Team intends for the network on which the Token operates to become a Functional Network not later than three years after the date of the first sale of Tokens, and:

(A) The Initial Development Team's marketing efforts are focused on the Token's consumptive use, not on speculative activity,

but efforts to support listing a Token on a trading platform shall not constitute speculative activity;

(B) The Initial Development Team's marketing efforts are focused on those who are likely to utilize the Token for its consumption purpose; and

(C) The Initial Development Team does not advertise to purchasers the potential for a secondary market for trading the Token.

(5) Holders of the Token other than the Initial Development Team and Related Persons actively contribute to the network in a way that increases the Token's value.

(6) The Token operates on a Decentralized Network, and each of the following are satisfied:

(A) The Initial Development Team's continuing activities cannot reasonably be expected uniquely to drive an increase in the value of the Token; and

(B) The Initial Development Team has no material information about the network that is not publicly available.

(c) The Token project obtains a ruling from the State Official granting an exemption.

(1) The Token project must file a request for a ruling with the State Official under procedures to be determined by the State Official. The request must include an analysis from outside counsel or the initial development team listing the factors that distinguish the Token from a security under federal law.

(2) The State Official shall grant an exemption to Tokens that the State Official determines are not likely to meet the definition of a security under federal law.

(3) The State Official shall issue a ruling not later than 45 calendar days after the date the request is filed, unless both parties agree to an extension of the time period.

(4) A confidential preliminary ruling shall be verbally communicated to the Token project, after which the Token project may withdraw its application and a ruling shall not be issued.

(5) If the State Official grants an exemption, the ruling shall be made publicly available on a state website.

(d) Prior to filing a notice of reliance, the Token project must provide initial disclosures on a freely accessible public website. Any material changes to the information required below must be provided on the same

freely accessible public website as soon as practicable after the change. Initial disclosures must include all of the following:

(1) A text listing of commands to be compiled or assembled into an executable computer program used by network participants to access the network, amend the code, and confirm transactions.

(2) A narrative description of the steps necessary to independently access, search, and verify the transaction history of the network.

(3) A narrative description of the purpose of the network, the protocol, and its operation. At a minimum, such disclosures must include the following:

(A) Information explaining the launch and supply process, including the number of Tokens to be issued in an initial allocation, the total number of Tokens to be created, the release schedule for the Tokens, and the total number of Tokens outstanding;

(B) Information detailing the method of generating or mining Tokens, the process for taking Tokens out of circulation, the process for validating transactions, and the consensus mechanism;

(C) An explanation of governance mechanisms for implementing changes to the protocol;

(D) Sufficient information for a third party to create a tool for verifying the transaction history of the Token (e.g., the blockchain or distributed ledger); and

(E) A hyperlink to a block explorer.

(4) If the Token project is seeking qualification under subsection (b)(4), the current state and timeline for the development of the network to show how and when the Token project intends to achieve a Functional Network. While the Token project continues to rely on subsection (b)(4), the Token project must update this disclosure every six months. These updates must be made within 30 calendar days after the end of the semiannual period.

(5) The date of sale, number of Tokens sold prior to filing a notice of reliance, any limitations or restrictions on the transferability of Tokens sold, and the type and amount of consideration received.

(6) If the Token does not operate on a Decentralized Network, the following information related to the Initial Development Team:

(A) The names and relevant experience, qualifications, attributes, and skills of each person who is a member of the Initial Development Team;

(B) The number of Tokens or rights to Tokens owned by each member of the Initial Development Team and a description of any limitations or restrictions on the transferability of Tokens held by such persons; and

(C) If any member of the Initial Development Team or Related Person has a right to obtain Tokens in the future, in a manner that is distinct from how any third party could obtain Tokens, identify such person and describe how such Tokens may be obtained.

(D) Each time a member of the Initial Development Team sells five percent of his or her Tokens as disclosed pursuant to subparagraph (B) over any period of time, state the date(s) of the sale, the number of Tokens sold, and the identity of the seller.

(E) A description of any material transaction, or any proposed material transaction, in which the Initial Development Team is a participant and in which any Related Person had or will have a direct or indirect material interest. The description should identify the nature of the transaction, the Related Person, the basis on which the person is a Related Person, and the approximate value of the amount involved in the transaction.

(7) Identify secondary trading platforms on which the Token trades, to the extent known.

(8) A statement that the purchase of Tokens involves a high degree of risk and the potential loss of money.

(e) The Token project must file a notice of reliance prior to the date of the first Token sold or distributed in reliance on subsection (a).

(1) The notice of reliance for a Token that satisfies a condition under subsection (b), other than subsection (b)(6), must contain:

(A) The name of each individual on the Initial Development Team;

(B) An email address at which the Initial Development Team can be contacted;

(C) The website where disclosures required under subsection (d) may be accessed; and

(D) An analysis by outside counsel that identifies the condition that the Token is claiming and describes the facts that support the Token's satisfaction of that condition or an attestation from an individual authorized by the initial development team that the Token project satisfies the condition it is claiming.

(2) The notice of reliance for a Token that satisfies the condition under subsection (b)(6) must contain:

(A) The website where disclosure required under subsection (d) may be accessed; and

(B) An analysis by outside counsel that identifies subsection (b)(6) as the condition that the Token is claiming and describes the facts that support the Token's satisfaction of that condition or an attestation from a person or entity described in paragraph (4) that the Token projects satisfies the condition.

(3) The notice of reliance for a Token that obtains a ruling from the State Official under subsection (c) must contain:

(A) A copy of the ruling provided by the State Official;

(B) The name of each individual on the Initial Development Team;

(C) An email address at which the Initial Development Team can be contacted; and

(D) The website where disclosure required under subsection (d) may be accessed.

(4) If a Token operates on a Decentralized Network, the notice of reliance may be filed by, and the fee under subsection (f) may be paid by, any of the following:

(A) A Token holder or group of Token holders authorized by the Token's governance process;

(B) A Foundation affiliated with the Token project; or

(C) A platform on which the Token is available or accepted as a method of payment.

(5) The notice of reliance must be filed with the State Official under procedures to be determined by the State Official. The notice of reliance must be made publicly available on a state website, except an analysis by outside counsel shall not be made publicly available.

Legislative Note: *Each state may designate the official that it best suited to administer the regulation. Possible officials include the State Banking Commissioner, Securities Commissioner, Attorney General, or Director of the Department of Commerce.*

(f) The Token project must pay a fee to the State Official at the time the notice of reliance under subsection (e) is filed. The fee must be:

(1) Equal to [$250]; and

(2) Paid in the form of the Token that is the subject of the notice of reliance.

Legislative Note: *Each state may determine the amount of the fee to meet their own needs.*

(g) The Initial Development Team has a duty to disclose to the State Official a material change to the Token that causes the Token to no longer satisfy the condition under subsection (b) that it claims.

Section 4. Reciprocity

(a) A Token project subject to an exemption in any other state substantially similar to the exemption in Section 3 may rely on the exemption in Section 3 if the conditions of subsections (e) and (f) of Section 3 are satisfied with respect to this state.

(b) Subsection (a) shall only apply if the other state provides reciprocity to Token projects subject to an exemption in this state.

Section 5. Uniformity of Application and Construction

In applying and construing this uniform act, a court shall consider the promotion of uniformity of the law among jurisdictions that enact it.

Section 6. Effective Date

This act takes effect . . .

Rights Talk in a Post-Liberal Age: Mary Ann Glendon's Enduring Insight Into the American Rights Tradition[*]

Gabrielle M. Girgis[**]

Gross human rights violations occur every day, often invisibly to most of us. Media coverage of Russian rights violations in Ukraine has resurfaced this issue, but even that has begun to fade months after the initial invasion. Mary Ann Glendon's classic book, *Rights Talk*, provides helpful analysis of the efficacy of rights discourse, not only in America but within the liberal order more broadly.[1]

American conflicts about rights are deeply polarized, with ongoing battles over religious liberty, abortion, racial discrimination, immigration, and Covid-19 vaccines. Soaring inflation, economic turmoil, and a huge question mark over international security not only compound these issues, but press questions about them more firmly: How can we meaningfully talk about human rights today, and how are courts best placed to enforce them?

What follows is an effort to remind us of Glendon's core insights about rights as we plod our way through current politics, and to distill them into an enduring middle ground between newer critiques. Those more recent prognoses for rights run in opposite directions, even if they agree that there's a problem to be solved. Jamal Greene, on the one hand, has argued that our courts should recognize more rights claims as legitimate (rights are everywhere!) but enforce them more weakly, through something like the

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[*] Note from the Editor: The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. To join the debate, please email us at info@fedsoc.org.

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[1] Mary Ann Glendon, Rights Talk: The Impoverishment of Political Discourse (1991), *available at* https://www.simonandschuster.com/books/Rights-Talk/Mary-Ann-Glendon/9780029118238.

proportionality model of jurisprudence in European courts.[2] Nigel Biggar, by contrast, discourages our reliance on the idea of natural rights (concluding, at one point, that "there are no natural rights"), which he thinks are too indeterminate to do real philosophical work in our political debates.[3] We should instead stick to the concept of *legal* rights that are limited and enforceable, a practice which would scale back what he calls the "imprudent jurisprudence" of judges who either extend the reach of human rights doctrine too far—into domains where they paralyze quick and prudent decision-making (e.g. the military)—or fill it out implausibly with new meanings (e.g., a "right" to assisted suicide). Glendon's earlier critique of rights paves a more reasonable path, calling for *renewal* of our rights tradition rather than its unbounded expansion or its abandonment.

Few scholars apart from Glendon have dedicated their lives so thoroughly to the intellectual defense of human rights. Most recently, she served as the Chair of President Trump's Commission on Unalienable Rights, which was tasked with explaining how America's rights tradition should inform our foreign policy today.[4] Because of the surrounding circumstances, the commission's report is something of a disappointment. Its contribution lies more in clarification than recommendation: it highlights the deep tensions between U.S. efforts to promote the cause of human rights abroad and the respect required for other countries' sovereignty (and their prerogative over their own human rights policies). But apart from identifying China, Russia, and non-state organizations as chief threats to global respect for human rights, the report says little about what a truly *comprehensive* foreign policy on human rights would look like.

Any such policy will be shaped in large part by America's domestic human rights policy, and the commission rightly draws its limited recommendations from the ways our own rights tradition is compatible with the provisions of the Universal Declaration on Human Rights (UDHR). Notably, for all of the report's appropriate contrition over American failures to guarantee unalienable rights for blacks, women, and racial minorities, it says nothing about

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[2] JAMAL GREENE, HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART (2021), *available at* https://scholarship.law.columbia.edu/books/302/.

[3] NIGEL BIGGAR, WHAT'S WRONG WITH RIGHTS? (2021), *available at* https://global.oup.com/academic/product/whats-wrong-with-rights-9780198861973?cc=us&lang=en&.

[4] Report of the Commission on Unalienable Rights (2020), *available at* https://www.state.gov/wp-content/uploads/2020/07/Draft-Report-of-the-Commission-on-Unalienable-Rights.pdf.

Glendon's own concern, expressed in other work of hers, to protect prenatal life. Any complete foreign policy on human rights would take positions even on these controversial questions about how to understand the right to life, the most basic inalienable right.

One of Glendon's most important insights about rights does shape the report, and in a way it's the one that most distinguishes her position from newer rights critiques. The report warns against the dangers of an expansive list of allegedly universal rights. As the commission explains, the UDHR was originally constructed around a small list of rights so as to bolster the authority and credibility of each one, and not to exceed what a diverse range of countries could reasonably agree to. Pushing the scope of rights farther, the commission argues, risks undermining the goal of the Declaration's original drafters: "There is good reason to worry that the prodigious expansion of human rights has weakened rather than strengthened the claims of human rights and left the disadvantaged more vulnerable. More rights do not always yield more justice." Indeed, Glendon offered a compelling argument on this point thirty years ago in *Rights Talk*, and it is one of two features of her analysis I want to highlight. For Glendon, America's rights tradition has urged a problematic understanding of what rights are and the purpose they serve. This has led to their proliferation over time, which has in turn frustrated healthy political debate.

Glendon also recognized that what courts say (and do not say) about rights matters: in an increasingly pluralist and polarized culture with fewer shared values and norms, jurisprudence takes on more pedagogical power. And how the public and the courts ought to respond to that fact is an urgent question, on which we will see that Greene and Biggar have more to say.

Rights Talk was first and foremost a book about political conversation; it set out to diagnose the ways that "rights talk reflects and distorts our culture." In the late 1980s and 90s, Glendon could already see that the language of rights had completely pervaded American discourse in harmful ways: it "has become the principal language that we use in public settings to discuss weighty questions of right and wrong, but time and again it proves inadequate, or leads to a standoff of one right against another." Yet importantly, as if to anticipate future critiques, she insisted that "the problem is not . . . with the very notion of rights, or with our strong rights tradition. It is with a new version of rights discourse that has achieved dominance over the past thirty years." That "new version," she thought, had obscured our ability to see what justice truly requires, by fostering a hyper-individualism averse to

the requirements of civic virtue and communal responsibility. "[R]ights talk," she contended, "encourages our all-too-human tendency to place the self at the center of our moral universe."

This preoccupation with our individual needs and demands, and with cloaking them in rights language, Glendon argued, could be traced to the American ideal of the "lone rights bearer." For Glendon, this ideal—of a citizen free from state interference in her pursuit of personal freedom and happiness—emerged out of the political thought of figures like John Locke and Jean-Jacques Rousseau and influenced the American founders. For these thinkers, the origin and end of government lies in the free consent of a group of individuals to the coercive power of the state, for the protection of their natural rights to life, liberty, and property. And this theory of government not only shaped the American Constitution, but in turn shaped our view that constitutional law's primary goal is to protect each person in the exercise of her natural rights.

Yet over time, Glendon thought, this important goal had been distorted into an obsession with unrestricted personal autonomy and privacy, closed off to our pre-existing relationships and obligations to others. We had lost our founders' attention to ideas of duty, virtue, and civic responsibility that were needed to sustain a healthy republic. And those ideas, unlike the warped vision of the lone rights bearer, were grounded in the truth about human life. We are all born into relationships and communities, with pre-existing duties of justice and care towards each other. Our rights are grounded in those duties, and true freedom and happiness are to be found in living them out.

Yet American neglect of that reality urged the proliferation of all kinds of rights claims—entrenched in an absolutism that bred deep polarization. And as Americans became more divided on questions of morals, religion, and politics, our constitutional law began to play a greater pedagogical role. Glendon saw that our jurisprudence had become a common teacher, not just on the meaning and scope of rights, but on how to think about deep debates that rights protections are supposed to conclude. The Supreme Court's affirmation of certain fundamental rights became the starting point for political discourse, rather than its end.

Glendon offers many comparative examples of European and American jurisprudence to illustrate this pedagogical power of the law, but often with caveats and qualifications, which sometimes make it hard to determine what exactly the examples are supposed to draw out. In general, she suggests that Western European constitutional law has been more clearly guided by the

reality that human beings are born into relationships and communities, which impose obligations that make it hard to treat conflicts as a simple question of whose rights trump whose.

Her best and clearest illustration of that difference lies in her discussion of abortion. The Supreme Court's decision in *Planned Parenthood v. Casey*, she shows, helped further entrench the myth of the lone rights bearer. In *Casey*'s joint opinion by Justices Anthony Kennedy, Sandra Day O'Connor, and David Souter, *Roe* was traced to a line of earlier cases recognizing "the right of the individual to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." In the same opinion's famous "mystery of life" passage, the Justices treated abortion as the ultimate free choice in a woman's quest for self-definition, totally abstracted from her other relationships and obligations: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."

Other countries, Glendon shows, took a more realistic approach to abortion. In the United States, pregnant women were left with "their constitutional right to privacy and little else." But countries like Germany decided abortion cases by giving the state more responsibility to help women fulfill their maternal obligations. Even today, a woman in Germany who seeks an abortion must be given counseling on the public benefits and social supports available to her as a single mother, which are more generous than those offered in the United States. And except in cases of emergency, she must also wait three days before obtaining an abortion, which a doctor must certify is the only possible means to relieve her of serious harm to her physical or mental health.

So Glendon astutely saw both the power of law—in particular the way courts speak about constitutional rights—to shape public discussion of deep moral questions (like abortion), and the power of mythical ideals to distort our understanding of the meaning of rights in the first place. Unfortunately, even thirty years ago, she was already pessimistic about the possibility for reform and renewal. These words still ring true for readers today:

> Rights talk in its current form has been the thin end of a wedge that is turning American political discourse into a parody of itself and challenging the very notion that politics can be conducted through reasoned discussion and compromise. For the new rhetoric of rights is less about human dignity and freedom than about insistent, unending desires. Its legitimation of individual and group egoism is in flat opposition to the great purposes set

> forth in the Preamble to the Constitution . . . the possibility must be reckoned with that our shallow rights talk is a faithful reflection of what our culture has become.

Are there any solutions to the distortion and proliferation of rights? Glendon suggested a few. Chief among them is the need to ensure space and freedom for intermediate institutions like families, churches, and schools to rebuild our understanding of rights from the ground up, by instilling in young people better ideas of virtue and responsibility for the common good. In schools, Glendon's recommendation is playing itself out in a striking way she may not have foreseen. The prevailing philosophies of education today share a commitment to fostering virtues, but they disagree completely on what those virtues are. On one hand are those who wish to train our students on the despair of critical race theory and transgender ideology, forming them through an endless litany of oppression, victimization, and desire affirmation. On the other hand are those who are trying to impart hope to children through religious and classical traditions, which teach us not only to identify our faults but also to foster good habits that overcome them. These two schools of thought are both efforts to instill civic responsibility in our children, but Glendon would surely (and sadly) see the first as a "faithful reflection of what our culture has become." The other approach carries the restorative potential she hoped for, but it is still burgeoning in start-up classical and faith-based schools across the country.

It is a testament to the strength of Glendon's analysis that newer rights critiques focus less on the power of *language* than on the power of *courts*. These more contemporary analyses move quickly from echoing Glendon's original concerns to proposing what courts should do about them.

Had Glendon predicted the form of rights critiques if nothing had changed thirty years on, she would have found a good template in Jamal Greene's *How Rights Went Wrong*. Like Glendon, Greene notices that our rights conflicts usually take the form of seemingly irresolvable standoffs. And he narrows in right away on the role of courts in perpetuating this problem. It has become the special job of courts to say which right wins in a conflict. Greene calls our American affirmation of this judicial role "rightism"—an excessive preoccupation with the strength of our rights claims and the courts as the natural setting for their enforcement. Thus Greene sets out to prescribe a solution for "a common but unrecognized problem in American law: in striving to take rights seriously, we take them too literally. We believe that holding a right means getting a judge to let us do whatever the right protects."

Greene also shares Glendon's concern about the proliferation of rights, arguing that it has undermined our sense of responsibility toward each other and our communal bonds. But he is less concerned about the expansion of rights *per se* than about the divisive role we've given some "strong" rights by entrusting them so completely to the courts. "The proliferation of strong rights," he argues, "can frustrate the democratic will and erode the solidarity of communities. Judicial dominion over constitutional rights can absolve the rest of us from our responsibility to take rights seriously, leading our moral intuitions to atrophy and eventually to decay." Glendon, by contrast, thought that our warped preoccupation with personal autonomy and privacy had *bred* rights claims completely at odds with the duties and responsibilities that ground rights in the first place.

In spite of their similar diagnoses, Greene's proposal for courts is one I suspect Glendon would depart from. Glendon, like Greene, was concerned that the spread of rights claims had undermined the very credibility and authority of our rights tradition. But she was also concerned to remedy the self-absorbed conception of rights and morality that American courts had helped to foster. So for Glendon, the path forward would ultimately mean scaling back our understanding of what can legitimately be claimed as a right, and thereby putting less of a strain on courts to be the common moral teacher in a pluralist society. Greene, however, seeks to encourage the courts' pedagogical role, at least in the short term, by proposing that they enforce more rights claims in a looser fashion: "U.S. courts recognize relatively few rights, but strongly. They should instead recognize more rights, but weakly."

In the long run, though, Greene hopes his proposal would foster less reliance on judges as moral arbiters. On his model, judicial enforcement of rights would look much more like European courts' proportionality jurisprudence than the U.S. textualist and originalist approach. Judges, he argues, should be guided less to find a textual or historical basis for enforcing a limited number of constitutional rights, than to determine as clearly as possible the facts of a case and the competing interests involved, in order to balance whatever rights claims have been made:

> Courts should devote less time to parsing the arcane legalisms—probes of original intentions, pedantic textual analysis, and mechanical application of precedent—that they use to discriminate between the rights they think the Constitution protects and the ones they think it doesn't, and spend more time examining the facts of the case before them: What kind of government institution is acting? Is there good cause, grounded in its history,

> procedures, or professional competence, to trust its judgments? What are its stated reasons? Are those reasons supported by evidence? Are there alternatives that can achieve the same ends at less cost to individual freedom and equality?

Greene thinks this method would be more likely to give each side some of what it is looking for and, at least in theory, would encourage government and community actors to take more responsibility. And, in line with Glendon's original aspiration, it would help break down the polarization that follows from U.S. courts always staking a clear winner and loser.

Like Glendon, Greene finds the German constitutional approach to abortion a helpful analogue to consider. ". . . [R]ather than structure abortion jurisprudence around the rights of either women or fetuses alone," as he thinks the U.S. has done, "the [German] court has consistently structured the law around *both* sets of rights." This dual recognition of "the constitutional status of fetal life" and women's interest in autonomy has made abortion politics far less controversial in Germany, and it has urged the government to take more responsibility for women in crisis pregnancies.

Yet although Greene's proposal is intended to scale back the power of judges over deep moral and political questions, it is hard to see how a proportionality-style jurisprudence would achieve that in practice. As other reviewers have noted, Greene isn't clear about the constraints on judges that should guide such a model. Pushing courts to follow a much more vaguely defined set of balancing tests in adjudicating rights would surely leave judges just as much power as they already have, albeit in a different form. In other words, while Glendon's shared concern about the power of the courts led her to urge the renewal of other sources for common values (like families, schools, and churches), Greene's proposal in the end would likely just channel judicial power differently. And it would do so in a way likely to make court interventions into our politics even more pervasive. This would do nothing to resolve the long-term harm that judicial power—by inflaming our debates—poses to the authority or credibility of rights themselves.

Nigel Biggar's recent critique of rights offers a starkly opposite approach. It shares Glendon's goals of renewing a common moral tradition and limiting judicial power over deep political conflicts, but it proposes that we abandon the concept of natural rights altogether. For Biggar, rights claims, which always arise from a prior conception of natural law or objective moral principles, should be limited to legal rights that are determinate in their content and truly enforceable. For Biggar, it doesn't make sense to speak of the

existence of a "natural" right when the terms of its guarantee are vague or simply cannot be realized by states as a matter of empirical contingency (due, for example, to limited resources). He criticizes some provisions of the UDHR, including its "unqualified assertion of rights to 'life, liberty, and security,'" as "so indefinite as to license absurd interpretations." At the end of five chapters outlining a series of objections to natural rights from the Enlightenment period to the present day, Biggar concludes:

> In a nutshell, . . . my answer to the question, 'Are there natural rights?', is this. There is natural right or law or morality, that is, a set of moral principles that are given in and with the nature of reality, specifically the nature of human flourishing. There are also positively legal rights that are, or would be, justified by natural morality. But there are no natural rights.

On the more general point that rights flow from natural law or morality, Glendon would surely agree. There is much common ground between her analysis and Biggar's in his discussion of American founding documents, many of which presupposed ideas of civic virtue and responsibility as necessary grounds for natural rights.

But Glendon would reject Biggar's criticism of the UDHR by emphasizing its aspirational quality (a fact he briefly concedes). The commission's report explains that the UDHR "was intentionally crafted as a moral and political document, but not as a legal instrument creating formal law. It provides a 'common standard of achievement' and invites a competition in excellence among nations. It aims to educate individuals about their rights and nations about their responsibilities." So to say, as Biggar does, that rights claims found in international declarations are morally meaningless if they are not concretely enforceable, is largely to ignore the original purpose of such documents. They were meant to set moral guidelines for the content of legally enforceable rights and left ample room for states to direct their own human rights policies accordingly. Glendon's fellow commissioner Christopher Tollefsen puts this point succinctly: "Natural rights are the standard by which legal rights are to be understood and corrected; but legal rights are the means by which natural rights are to be secured and realized in a polity."

Biggar thinks that because claims of universal rights are often vague in content, they foster judicial overreach by moving judges either to extend the application of rights doctrine to realms where it proves harmful, or to fill out the meaning of the doctrine in ways that are contrary to the natural law (which is the foundation for any rights). In applying universal human rights provisions to certain areas of the military, for example, Biggar thinks judges

have paralyzed military officials who are trained to act quickly based on good moral intuitions.

This kind of objection to applying rights doctrine, however, appears incoherent. Biggar seems to be saying that judges and others who favor the application of human rights provisions to military practices are to blame for some military failures, because effective warfare sometimes requires suspending some human rights claims. It is certainly true that holding military officials accountable to the moral absolutes that ground human rights doctrines (such as a prohibition against torture, or against the intentional killing of innocent life) could lead to disadvantages in war. But it would be wrong to suggest, as Biggar might be doing, that we are morally culpable for the evils that might result from adhering to absolute moral norms in warfare, unless we do something immoral.

A more plausible lesson to draw from Biggar's discussion of judges—and one that Glendon would likely agree with—is that there are costs when judges try to translate the demands of morality into determinate legal rules or policies, because they often lack the institutional competence, knowledge, or experience of other legal actors (like the executive or legislative branches or the military).

So we have in Biggar a sharp departure from Glendon on the plausibility of natural rights, and in Greene a disagreement about the role of judges in resolving rights conflicts (and a deeper difference on the proliferation of rights in liberal societies). But neither of these newer critiques proposes a solution that is ultimately convincing. Glendon's original analysis of rights stands as a better middle ground: We should seek renewal of our natural rights tradition so as to better inform our legal rights. And we should do this not by giving courts more of a say over the meaning and scope of rights, but by encouraging the seeds of renewal in institutions that rebuild from the ground up: our local governments, our schools, our churches, and our homes. The Supreme Court's decision to overturn *Roe* in *Dobbs*, it's worth pointing out, will likely do exactly that: it will encourage state governments and community actors to take more responsibility for women in crisis pregnancies and the vulnerable lives they are carrying.

Greene's and Biggar's critiques mirror a strange parallel that paradoxically shapes the polarization of left and right. Contingents on both sides of the political spectrum have become more aggressive about rejecting a "neutral" public square in the last ten years. Some progressives are doing all they can to cancel those who dissent from progressivism's tenets, and some conservatives

are calling much more overtly for the promotion of Catholic or Christian morality through politics, even at the cost of hard-won liberal freedoms like religious liberty. Echoes of this sharp divide can be heard in Greene, who stubbornly refuses to question whether some progressive rights claims are legitimate in the first place, and in Biggar, who voices deep pessimism about the future of one of liberalism's core principles. At a time when these views sound like fairly sane voices in a sea of political chaos, Glendon's middle way steers above as the most enduring and the most reasonable.

Other Views:

- Anthony Sanders, *Which Rights Are We Mediating?*, 22 FEDERALIST SOC'Y REV. 108 (2021), *available at* https://fedsoc.org/commentary/publications/which-rights-are-we-mediating.
- Kenneth Roth, *Pompeo's Commission on Unalienable Rights Will Endanger Everyone's Human Rights*, Human Rights Watch (Aug. 27, 2021), https://www.hrw.org/news/2020/08/27/pompeos-commission-unalienable-rights-will-endanger-everyones-human-rights.
- JAMAL GREENE, HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART (2021), *available at* https://scholarship.law.columbia.edu/books/302/.
- NIGEL BIGGAR, WHAT'S WRONG WITH RIGHTS? (2021), *available at* https://global.oup.com/academic/product/whats-wrong-with-rights-9780198861973?cc=us&lang=en&.

TRANSUNION, ARTICLE III, AND EXPANDING THE JUDICIAL ROLE*

JACOB PHILLIPS**

In 2021's *TransUnion v. Ramirez*, the Supreme Court confirmed that Article III standing requires a claimant to show not only a legal injury, but also an injury-in-fact that is concrete and particularized. There are many critics of modern Article III jurisprudence, especially the requirement of a concrete and particularized factual injury in addition to the legal injury. These critics tend to focus on either the lack of textual support for the doctrine or the relationship between the judicial and executive branches, particularly with regard to the regulatory function of executive agencies. This article critiques Article III jurisprudence for the way it has altered the separation-of-powers framework as it pertains to the relationship between the judicial and legislative branches.

The Court's seminal decision in *Lujan v. Defenders of Wildlife* emphasized the central importance of the separation of powers in explicating the famous test for Article III standing. This article first addresses *Lujan*'s explanation that the Article III injury-in-fact requirement is meant to protect the Constitution's separation-of-powers framework, then briefly examines post-*Lujan* Article III jurisprudence, culminating in *TransUnion*. Next, the article addresses some of the major critiques—academic and judicial—of modern Article III jurisprudence. Finally, the article argues that *TransUnion* has skewed the Constitution's separation of powers by expanding judicial authority beyond that contemplated by our constitutional framework, thus arrogating to courts a legislative role.

"It is emphatically the province and duty of the Judicial Department to say what the law is"[1]—no more, but also no less. Pursuant to Article III's

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* Note from the Editor: The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. To join the debate, please email us at info@fedsoc.org.

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[1] Marbury v. Madison, 5 U.S. 137, 177 (1803).

standing requirements and the separation-of-powers structure they protect, if adjudicating a dispute would invade the exclusive province of the executive branch, then, to paraphrase Alison Krauss, courts say it best when they say nothing at all. But it is the role of the People's representatives in Congress to identify their constituents' rights and interests and proscribe behavior that violates those private rights. Where Congress has done so, litigants possess standing to see vindication of those private rights, and for courts to decline to adjudicate such cases usurps the legislative prerogative of determining whether a right vindicable in federal court should exist. Article III jurisprudence has over time transformed "Cases . . . [and] Controversies" from a jurisdictional limitation protecting the executive to a provision expanding the power of the judiciary to assume a legislative role—from *preventing* encroachment upon the executive branch to *requiring* encroachment upon the legislative branch. When it comes to the constitutional separation-of powers-framework, *TransUnion* is a battering ram, not a fortress. But even accepting *TransUnion*'s premise that to allow the vindication of private rights in the absence of a factual injury would encroach upon the executive branch's authority, preventing federal courts from adjudicating such violations does not protect the executive; it merely consigns such alleged encroachment to state courts, which have plenary jurisdiction and are not constrained by Article III.

I. THE ADVENT AND TRANSFORMATION OF THE ARTICLE III "INJURY-IN-FACT" REQUIREMENT

A. Lujan*'s Protection of the Constitution's Separation-of-Powers Framework*

Under modern Article III jurisprudence, to establish standing to sue, the claimant must show an injury-in-fact. The term did not exist prior to 1970, before which plaintiffs could sue only for *legal* injuries.[2] In *Association of Data Processing Service Organizations v. Camp*, data processors objected to a

[2] Modern standing doctrine more generally began taking shape earlier in the 20th century, in what Professor Cass Sunstein persuasively argues was an attempt to insulate "New Deal legislation from frequent judicial attack." Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 179 (1992). Or, as Professor Robert Pushaw pithily puts it, the "Cases and Controversies" language was "coopted by Progressives led by Justice Brandeis and his collaborator Felix Frankfurter who sought to restrict federal court jurisdiction to prevent private parties (especially corporations) from attacking liberal regulatory legislation." Robert J. Pushaw, *"Originalist" Justices and the Myth that Article III "Cases" Always Require Adversarial Disputes* (forthcoming), *available at* https://ssrn.com/abstract=3934668.

regulation opening the data processing market to banks.[3] The claimants sustained no legal injury—no tort, breach of contract, statutory violation, etc.—but did sustain a factual injury: economic loss from increased competition. The Court held Article III expands jurisdiction beyond common law standing—where legal injuries were both sufficient and necessary—by conferring jurisdiction over factual injuries even absent a legal injury.[4] As Judge Kevin Newsom explains in a recent concurring opinion, the introduction of the injury-in-fact concept "was an effort to expand, rather than contract" federal court jurisdiction.[5] Far from holding that Article III requires an injury-in-fact *in addition to* a legal injury, the Court held that a factual injury confers Article III jurisdiction *even in the absence of* a legal injury. Nothing in the opinion suggested the Court was substituting factual injuries for legal injuries as the sine qua non of constitutional standing. Over the subsequent decade, however, the Court gradually transformed the injury-in-fact element from an expansion to a contraction of common law standing, but without much doctrinal explanation.[6]

Enter Justice Antonin Scalia's towering *Lujan* opinion, which supplied the missing doctrinal explanation: Constitutional limits on standing, in addition to common law legal standing requirements, are necessary to protect the separation of powers established by the fundamental constitutional structure.[7] Requiring a factual injury prevents Congress from usurping the executive's authority to enforce generally applicable laws and giving it to the public. Congress can, per *Lujan*, "elevate to legally cognizable status those injuries that were already concrete but previously inadequate at law,"[8] so long as they are personal to the plaintiff. For example, Congress can grant individuals the right to sue a company for dumping toxic waste on their own property, but

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[3] 397 U.S. 150 (1970).

[4] *Id*. at 152.

[5] Sierra v. City of Hallandale Beach, 996 F.3d 1110, 1118 (11th Cir. 2021). Judge Newsom argues on originalist grounds that the constitutional limit on jurisdiction has been misidentified from the beginning, and that jurisdictional constraints do not sound in Article III at all. While Judge Newsom takes a different road, he arrives at a similar conclusion to that of this article: The legislative branch has the constitutional authority to create legally vindicable private rights.

[6] *See, e.g.*, Warth v. Seldin, 422 U.S. 490 (1975) (clarifying that the "injury-in-fact" concept introduced in *Data Processing* does not emanate from the APA statutory language, but is instead part of the constitutional floor but without explaining why Article III requires factual injuries).

[7] Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-60 (1992).

[8] *Sierra*, 996 F.3d at 1120 (citing *Lujan*, 504 U.S. at 578).

not for dumping toxic waste on someone else's property.[9] Within our constitutional framework, responsibility for creating modern legal rights in a rapidly developing society and prescribing redress for violations of private rights lies with those who make laws, not those who interpret or enforce them.[10] So *Lujan* establishes (or confirms, depending on how you look at it) the constitutional framework: Congress creates both private and public rights, the executive enforces public rights, and the courts adjudicate private rights.

But post-*Lujan* standing jurisprudence has distorted this framework by giving courts the ability to effectively veto legislation that creates private rights enforceable in federal courts. To see how this jurisprudence strays from *Lujan* requires a closer look at *Lujan* itself. Justice Scalia established the familiar test: Article III standing requires an injury-in-fact that is "(a) concrete and particularized and (b) actual or imminent," fairly traceable to the defendant, and redressable by a court.[11] How did Article III's mention of "Cases" and "Controversies" become a concrete and particularized and actual or imminent and redressable injury that is traceable to the defendant? The reason, according to Justice Scalia, is that the standing requirements emanate not from the actual text of Article III, but from the constitutional separation-of-powers framework as a whole—indeed, the Court only used the cases and controversies language "for want of a better vehicle."[12]

To see how post-*Lujan* jurisprudence has distorted that opinion's delineation of the separation of powers, the critical question is why "concrete and particularized" is a single subpart rather than two distinct subparts—why is it not (a) concrete, (b) particularized, and (c) actual or imminent? Later cases—including *TransUnion*—construe the injury-in-fact requirement as if it is a three-part subtest, not as a two-part subtest as it is written in *Lujan*. This is a distortion of *Lujan*.

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[9] *Lujan*, 504 U.S. at 578; *see also id*. at 561-62 (noting that "to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue").

[10] *See generally* Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 125-28 (2014) (given the "separation-of-powers principles underlying" Article III, courts can no more "limit a cause of action that Congress has created" than they can "recognize a cause of action that Congress has denied"); Linda R. S. v. Richard D., 410 U.S. 614, 617 n.3 (1973) (recognizing that Congress has constitutional authority to "creat[e] legal rights, the invasion of which creates standing, even though *no injury* would exist without the statute") (emphasis added); Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1553 (2016) (Thomas, J., concurring) (same).

[11] *Lujan*, 504 U.S. at 560.

[12] Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 882 (1983).

Lujan involved legislation requiring federal agencies to consult with the Secretary of the Interior to ensure "any action" by the agency did not threaten endangered species.[13] The Secretary issued a regulation requiring consultation only on actions within the United States or on the high seas, but not on actions taken overseas.[14] Several organizations sued to enjoin the Secretary to require consultation on actions taken overseas.[15] The plaintiffs argued they had a cognizable interest because they wanted to observe endangered species, and the Secretary's more lenient interpretation of the legislation threatened that ability. Justice Scalia agreed that even the mere "desire to . . . observe an animal species . . . is undeniably a cognizable interest for purpose of standing," but he explained that, to satisfy Article III, a litigant must have actually been prevented from observing the animal species.[16] The claimants were attempting to establish standing based merely on the possibility of a future prevention. But while that would be a particularized and concrete harm were it to occur, that it *could* occur was conjectural.[17] In other words, what prevented standing was not the "concrete and particularized" requirement, but rather the "actual or imminent" requirement, which prevents courts from issuing "advisory opinions."[18]

Because the harm of being prevented from seeing a species was not actual or imminent, the claimants could only establish standing if the interest in faithful execution of laws by itself conferred standing. And this is where the "concrete and particularized" requirement, which is meant to protect constitutional separation of powers, kicks in:

> To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an individual right vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed."[19]

In other words, because an "*undifferentiated* public interest" in the executive's "compliance with the law" is not a particularized interest, it is also not a

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[13] *Lujan*, 504 U.S. at 558.

[14] *Id*. at 558-59.

[15] *Id*. at 559.

[16] *Id*. at 563.

[17] *Id*. at 564.

[18] *E.g.*, Florida Audubon Soc. v. Bentsen, 94 F.3d 658, 663 (D.C. Cir. 1996) (the purpose of requiring that an injury be "actual or imminent" is to "reduce the possibility" that courts will render an advisory opinion "by deciding a case in which no injury would have occurred at all").

[19] *Lujan*, 504 U.S. at 577 (cleaned up).

concrete harm; the two factors are inextricable. Congress cannot circumvent this reality by prescribing a particularized *remedy* via courts to what remains a generalized *harm*.[20]

On the other hand, standing "may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing,'" because it is within Congress's authority to "elevat[e] to the status of legally cognizable concrete, *de facto* injuries that were previously inadequate at law."[21] And this is true even where "no injury" occurred other than a violation of the litigant's statutory right.[22] When "the plaintiff is himself an object of the action (or foregone action) . . . , there is ordinarily little question that the action or inaction has caused him injury."[23] This is because "the province of the court is to decide on the rights of individuals," not to "vindicat[e] the public interest."[24] Properly understood, then, *Lujan* protects the separation of powers in two ways. It protects Congress's legislative function of weighing public policy concerns and creating private rights and remedies by holding justiciable all cases involving factual or legal harms to specific plaintiffs. At the same time, it prevents Congress from usurping the executive's role of ensuring general conformance with the law by requiring that alleged harms be concrete and particularized.[25]

Thus, "concrete and particularized" is combined as a single subpart because the two are inextricably linked. The invasion of a *public* interest is not concrete precisely because it is an "undifferentiated"—i.e., not particularized—interest. But if the undifferentiated, non-concrete harm is accompanied by an additional harm particular to the litigant, such harm *is* concrete.

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[20] *Id*. at 576.

[21] *Id*. at 578 (quoting *Warth*, 422 U.S. at 500).

[22] *Id.* (quoting *Linda R. S.*, 410 U.S. at 617 n.3).

[23] *Id*. at 562.

[24] *Id*. at 576 (cleaned up).

[25] To crystallize this principle, imagine a hypothetical where Congress proscribes internet service providers from selling consumers' private information. Assume that an ISP sells Jim's information, but not Bob's. Bob and Jim both have an interest in ISPs not breaking the law, which is the generalized, undifferentiated public interest. Bob and Jim also both have a particular interest in ISPs not selling their own personal information, which is the private right protected by the statute. Here, their public right was equally violated, but only Jim's private right was. So, under *Lujan*, Congress could make a cause of action available to Jim for the sale of Jim's information, but not to Bob for the sale of Jim's information. Even if the ISP sold the information to someone who immediately deleted it and thus no factual injury occurred, Jim would still have standing under *Lujan* because, as the Court pointed out, Congress can create private rights "the invasion of which creates standing," even if "no injury" occurs other than the statutory violation. 509 U.S. at 578 (quoting *Linda R. S.*, 410 U.S. at 617, n.3).

Even the inability to observe an animal is a concrete harm because it is particular for the claimant. But an alleged failure of the executive to ensure general conformance with the law is not. Invasions of private interests are inherently particularized and thus almost certainly concrete. Even if the harm that results from the invasion of a private interest would have been insufficient at common law to state a cognizable cause of action,[26] Congress can elevate such harm to the status of legally cognizable by creating a statutory cause of action. As such, under *Lujan*, a harm is not concrete unless it is particularized, while a harm that is particularized is almost always concrete.[27] *Lujan*'s joining of these requirements with a conjunctive as a single subpart is not sloppy drafting; the two concepts are inextricably linked.

*B. The Post-*Lujan *Decoupling of Particularity and Concreteness*

The relationship between particularity and concreteness was revisited in 2016 in *Spokeo v. Robins*. There, the Supreme Court reversed the Ninth Circuit because it had only addressed particularity notwithstanding that the Supreme Court had "made it clear time and time again that an injury in fact must be both concrete *and* particularized."[28] But while it is true that previous Supreme Court cases literally used the phraseology "concrete and particularized," the cases Justice Samuel Alito cited in the majority opinion do not support the implication that the two terms are separable, nor that particularization is "necessary" but not "sufficient" as he claimed.[29] In *Susan B. Anthony*

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[26] This does not mean those litigants would have lacked standing under common law—indeed, a court cannot dismiss a case for failure to state a cognizable claim unless the court possesses jurisdiction to adjudicate the merits. And dismissal for failure to state a claim is an adjudication on the merits. So if, at common law, a litigant alleged intrusion upon seclusion based on receiving one or two unwanted telemarketing calls, it would be dismissed for failure to state a claim, precisely because courts would possess jurisdiction to adjudicate and dismiss the claim. And if Congress passes a law stating that one or two unwanted telemarketing calls give rise to a cause of action (which it did), it is not conferring jurisdiction—courts already possessed jurisdiction over such allegations—but merely lessening the threshold for what gives rise to a cause of action.

[27] It might seem that this position makes "concrete" a redundant requirement. I do not think that it does, however, for reasons explained by the "almost always" modifier: Concrete carries with it the connotation of "not abstract." So, for example, a uniquely intense desire to see a specific law enforced is too abstract to satisfy Article III even if it is particularly felt by certain groups or individuals. *See* Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464, 485-86 (1982) (the "psychological consequence" felt by litigants with a unique desire to see the separation of church and state enforced is insufficient because Article III standing does not depend on "the intensity of the litigant's interest or the fervor of his advocacy").

[28] *Spokeo*, 136 S. Ct. at 1548 (emphasis in original).

[29] *Id.*

List v. Driehaus, the Court found constitutional standing was established because the injury was sufficiently imminent, and it did not address concreteness or particularity at all.[30] Less relevant still is *Sprint Communications v. APCC Services*, where an injury-in-fact "clearly" occurred, and the Court merely addressed whether assigning a cause of action is constitutionally permitted.[31] And the barrier to standing in *Massachusetts v. EPA* was that the injury—loss of coastal lands—failed to satisfy Article III's traceability and "actual or imminent" requirements.[32] To the extent Chief Justice John Roberts addressed the "concrete and particularized" requirement in that case, it was merely to note the general topic at issue—global warming—is the type of undifferentiated, non-particular harm usually insufficient for Article III standing.[33] Far from suggesting that loss of property is particular but not concrete (or vice versa), however, Chief Justice Roberts assumed it is a constitutionally sufficient harm and pivoted to analyzing whether it was actual or imminent.[34]

Be that as it may, Justice Alito's *Spokeo* opinion posited that concreteness and particularity are independent requirements, and it said concreteness is not about whether the injury is "undifferentiated" and "generalized," but rather whether it "actually exists" and is "real."[35] Justice Alito said courts should consult history and the judgment of Congress to determine whether a harm "actually exists" and is "real."[36] Making concreteness turn on whether a harm "actually exists" is odd given the separate requirement that the injury also be "actual or imminent." There is little explanation of the redundancy, or how a claimed injury can be "actual" within the meaning of subpart (b) but not "actually exist" within the meaning of subpart (a).[37] So while *Spokeo*

[30] 573 U.S. 149 (2014).

[31] 554 U.S. 269, 274 (2008).

[32] 549 U.S. 497, 541-46 (2007).

[33] *Id*. at 541.

[34] The last case cited in *Spokeo*'s discussion, *Summers*, is a closer call at first glance. The Court explained that a procedural right which protects a substantive, concrete interest is sufficient for Article III, while a procedural right divorced from any substantive interest is not. Summers v. Earth Island Inst., 555 U.S. 488, 496-97 (2009). But even here, far from distinguishing between particularity and concreteness, *Summers* combines them into one analysis: Because procedural rights are afforded without differentiation to the public, violations of them are neither concrete nor particular absent an underlying substantive injury. *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2220 (2021) (Thomas, J., dissenting) (citing *Summers*, 555 U.S. at 497).

[35] *Spokeo*, 136 S. Ct. at 1548.

[36] *Id*. at 1549.

[37] "Actual" in the context of "actual or imminent" means something like "already happened"—in other words, the injury must have actually happened or it must be shortly forthcoming. At issue

decoupled the particularity and concreteness requirements, what that decoupling meant practically was unclear, especially given that Justice Alito maintained that Congress can elevate concrete harms to the status of legally vindicable.[38] And Justice Clarence Thomas's concurring opinion appeared to clarify that the nature of the right invaded (public or private) is virtually dispositive.[39] This lack of clarity and seeming inconsistency led to significant jurisprudential divergence in lower courts.

Following *Spokeo*, there emerged in lower courts three approaches to analyzing whether a harm is sufficiently concrete that Congress may make it legally vindicable. Some jurists privileged the judgment of Congress over identifying a historical analogue.[40] A second group did the opposite, focusing on whether the alleged harm was sufficiently analogous to common law harms to determine whether it merited redress.[41] Third, some followed Justice Thomas's guidance that the critical question is instead whether the invaded right is public or private, thereby implicitly questioning *Spokeo*'s dicta.[42] The first two approaches both adopt *Spokeo*'s test, but they differ over which prong to emphasize: some courts privilege Congress's determination (with a nod to ensuring it is not completely divorced from traditionally recognized injuries), while others privilege common-law analogues (with a

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in *Spokeo* was the statutory right to accurate credit reports. By remanding, the Court appeared to implicitly suggest that while the injury was "actual" in that it had unquestionably already occurred, it might not "actually exist" within the meaning of the "concrete" requirement.

[38] *Spokeo*, 136 S. Ct. at 1549.

[39] *Id.* at 1551-53.

[40] *See, e.g.*, Jeffries v. Volume Servs. Am., 928 F.3d 1059, 1068-70 (D.C. Cir. 2019) (Rogers, J., concurring); Melito v. Experian Mktg. Solutions, Inc., 923 F.3d 85, 92-93 (2d Cir. 2019) (Hall, J.); Susinno v. Work Out World Inc., 862 F.3d 346, 350-52 (3d Cir. 2017) (Hardiman, J.); In re Horizon Healthcare Servs. Data Breach Litig., 846 F.3d 625, 638-40 (3d Cir. 2017) (Jordan, J.).

[41] *See, e.g.*, Salcedo v. Hanna, 936 F.3d 1162, 1171-72 (11th Cir. 2019) (Branch, J.); Hagy v. Demers & Adams, 882 F.3d 616, 621-23 (6th Cir. 2018) (Sutton, J.); Frank v. Autovest, LLC, 961 F.3d 1185, 1187-90 (D.C. Cir. 2020) (Griffith, J.). While Judge Jeffrey Sutton's opinion explicitly found Congress intended to vindicate a particular interest while finding it unworthy of such protection, the other two did not. But all three emphasized that the judiciary's supposed independent duty to assess whether a harm is sufficiently cognizable overrides Congress's judgment on that question, making it is difficult to see how congressional judgment could be relevant at all.

[42] *See, e.g.*, Springer v. Cleveland Clinic Empl. Health Plan Total Care, 900 F.3d 284, 290-93 (6th Cir. 2018) (Thapar, J., concurring); Muransky v. Godiva Chocolatier, Inc., 979 F.3d 917, 970-73 (11th Cir. 2020) (Jordan, J., dissenting); Bryant v. Compass Grp. USA, Inc., 958 F.3d 617, 624 (7th Cir. 2020) (Wood, C.J.); *Sierra*, 996 F.3d at 1138 (Newsom, J., concurring) (while opining that standing doctrine should be grounded in Article II, noting that such approach "resembles the rights-based approach advanced by Justice Thomas and others"); Buchholz v. Tanick, 946 F.3d 855, 872-74 (6th Cir. 2020) (Murphy, J., concurring).

mostly theoretical acknowledgement that congressional judgment can be instructive). Keep in mind that in analyzing whether they have jurisdiction, courts must assume the plaintiff's allegations are correct (i.e., that a statutory violation occurred). Therefore, the relevant analysis is not of the statutory text, but rather of legislative intent.[43] So if Congress outlaws placing unwanted telemarketing calls, for example, the question for these courts is what harm Congress intended to prevent by outlawing unwanted telemarketing calls, and whether that harm has a sufficient common-law analogue.[44] The "private rights" approach of the third group, by contrast, ignores legislative intent altogether and analyzes instead whether the invaded right is particularized (private) or undifferentiated (public).

The private v. public approach is consistent with the separation of powers as delineated in *Lujan*. If the right allegedly invaded is private, then courts adjudicate the dispute because it is the province of the court "to decide on the rights of individuals."[45] If the right allegedly invaded is a public right, then courts do not adjudicate the dispute because "[v]indicating the public interest" is the province of the executive and Congress.[46] By contrast, the first approach (in theory) and the second approach (in practice) are inconsistent with the separation of powers as delineated in *Lujan*. By making courts the arbiters of whether a private right is important enough to merit legal vindication, these approaches prevent Congress from exercising its legislative prerogative to "creat[e] legal rights, the invasion of which creates standing, even though *no injury* would exist without the statute."[47]

This divergence led to *TransUnion*. Justice Brett Kavanaugh, writing for the Court, and Justice Thomas, writing for a four-Justice dissent, presented sharply different interpretations of *Lujan* and of Article III. According to the Court, the critical issue in determining whether an alleged injury is concrete

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[43] Otherwise, that a violation occurred would conclusively establish Congress's judgment on the matter, and there would be no need to attempt to discern congressional judgment. *See generally Salcedo*, 936 F.3d at 1168-69 n.6 (considering legislative history, findings, and committee reports to discern Congress's judgment while clarifying that "[w]e are not suggesting that legislative history should play a role in *statutory interpretation*. Salcedo's allegation is undisputedly a violation of the statute . . .") (emphasis added).

[44] *Compare Salcedo*, 936 F.3d at 1170-72 (receiving an unwanted text message does not have a sufficiently close relationship to any common-law analogues) *with* Gadelhak v. AT&T Servs., 950 F.3d 458, 462-63 (7th Cir. 2020) (disagreeing with *Salcedo* and holding that receiving unwanted text messages is sufficiently similar to the common-law tort of intrusion upon seclusion).

[45] *Lujan*, 504 U.S. at 576.

[46] *Id*.

[47] *Linda R. S.*, 410 U.S. at 617 n.3 (emphasis added).

is whether a court believes it is sufficiently analogous to a traditionally redressable injury.

C. TransUnion*'s Conception of Article III Requirements*

Though *Spokeo*'s vagueness permitted jurisprudential divergence, *TransUnion* does not.[48] Like *Spokeo*, *TransUnion* addressed Article III standing in the context of the Fair Credit Reporting Act. *TransUnion* was a class action in which the plaintiff class was composed of 8,185 individuals who received credit reports that falsely flagged them as potential terrorists or drug traffickers; a jury rendered a verdict in favor of the class.[49] For 1,853 of the class members, TransUnion sent the false credit reports to third-party businesses.[50] For the remaining class members, the credit reports were sent only to them.[51]

Writing for the Court, Justice Kavanaugh held that the 1,853 class members whose reports were disseminated to third parties possessed Article III standing because the resulting harm was "closely related" to the "reputational harm associated with the tort of defamation."[52] The remaining class members, however, did not possess Article III standing because they were the only ones who received their false credit reports.[53] The lack of publication to third parties was fatal for purposes of Article III because it rendered the claimed injury too different from the only possible common law analogue.[54]

In arriving at this conclusion, the Court confirmed that particularity and concreteness are separate and distinct requirements. Congress's judgment that a harm merits a legal remedy "may be instructive," it said, but it is insufficient if the court determines that the harm is not concrete.[55] And if the judicial and legislative branches disagree as to whether a harm merits redress, it is the legislative branch that must bow.[56] This, at least for now, concludes the jurisprudential debate. Although at common law the invasion of a private right was by itself sufficient to establish jurisdiction, that is no longer the case,

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[48] *TransUnion*, 141 S. Ct. 2190.
[49] *Id*. at 2201.
[50] *Id*. at 2200.
[51] *Id*.
[52] *Id*. at 2208.
[53] *Id*. at 2209.
[54] *Id*. at 2209-10.
[55] *Id*. at 2205.
[56] *Id*.

at least as it pertains to *statutory* private rights.[57] In such contexts, litigants must now allege and eventually show not only an invasion of their private rights, but also that such invasion caused enough damage to satisfy a judge that the case is worth adjudicating.

II. Critiques of Modern Article III Jurisprudence

Modern Article III jurisprudence in general and *TransUnion* in particular have been subject to criticism, including from originalist scholars and jurists. Under the logic of most such criticisms, however, *TransUnion* merely exacerbates a preexisting flaw in Article III jurisprudence created by *Lujan*. Such criticisms focus on history, tradition, and/or the specific text of Article III, especially the terms "Cases" and "Controversies." My position, however, is that *Lujan* correctly observed that the specific "Cases" and "Controversies" terminology in Article III is subservient to the overarching separation-of-powers structure contemplated by the Constitution as a whole. Under this theory, *TransUnion* is a deviation from, not a continuation of, *Lujan*. At the very least, *TransUnion* results in a significant—perhaps radical—change in the role traditionally reserved to Congress that *Lujan* did not.

Justice Thomas's fiery dissent in *TransUnion* is an example of an originalist (although not textualist) critique focusing on the history of jurisdictional limitations and how Article III would have been understood by the Framers. Building on his *Spokeo* concurrence, Justice Thomas argued that "[a]t the time of the founding, whether a court possessed judicial power over an action with no showing of actual damages depended on whether the plaintiff sought to enforce" private rights or community-based rights—a distinction that applied equally to common-law and statutorily created rights.[58] As such, he continued, quoting Justice Joseph Story, "where the law gives an action for a particular act, the doing of that act imports of itself a damage to the party" because "[e]very violation of a right imports some damage."[59] For example, a trespass on property need not cause any damage to the property owner—the

[57] The Court has not yet addressed post-*TransUnion* whether common-law legal injuries—trespass, breach of contract, etc.—where there is no factual injury, but the litigant would at common law have been entitled to nominal damages, remain legally cognizable. But it is difficult to see in theory how Article III could require a factual injury for statutory causes of action, but not for common law causes of action.

[58] *TransUnion*, 141 S. Ct. at 2217.

[59] *Id.*

trespass is by itself the harm.[60] Even if the trespasser simply cuts across the property as a shortcut and causes no additional harm whatsoever, the property owner can vindicate the invasion of his right in court, usually for $1.00 in nominal damages.[61] Vindication of public rights, however, was different: At common law, "where an individual sued based on the violation of a duty owed broadly to the whole community . . . courts required 'not only *injuria* [legal injury] but also *damnum* [damages]."[62]

Justice Thomas criticized the majority's theory as "remarkable in both its novelty and effects."[63] Never before had the Court pronounced that the "concrete and particularized" requirement was even relevant in the context of private rights; rather, the invasion of a private right was itself the harm, and no further analysis was necessary.[64] Justice Thomas wryly noted that, given *Lujan*'s dicta that the "inability to observe an animal" for "aesthetic purposes" is a concrete injury, perhaps class members should have claimed "an aesthetic interest in viewing an accurate report."[65]

Justice Thomas's critique is mostly unrelated to overarching separation-of-powers principles,[66] but rather is based on originalist grounds. As he put it, "[t]he principle that the violation of an individual right gives rise to an actionable harm was widespread at the founding, in early American history, and in many modern cases."[67] Furthermore:

> In light of this history, tradition, and common practice, our test should be clear: So long as a "statute fixes a minimum of recovery . . ., there would seem to be no doubt of the right of one who establishes a technical ground of action to recover this minimum sum without any specific showing of loss."[68]

Other originalist critiques—with more of a focus on the constitutional text than Justice Thomas's dissent—come from Professor Robert Pushaw and Judge Newsom. Building on a previous article, Professor Pushaw recently explained that while Article III's term "Controversies" assumes an adversarial

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[60] *Id.*

[61] *See generally* Uzuegbunam v. Preczewski, 141 S. Ct. 792, 802 (2021) (holding that nominal damages alone are sufficient to maintain standing and observing that "Article III is worth a dollar").

[62] *TransUnion*, 141 S. Ct. at 2217 (brackets in original, citations omitted).

[63] *Id.* at 2221.

[64] *Id.* at 2217.

[65] *Id.* at 2224.

[66] Although not entirely so. *See id.* at 2221.

[67] *Id.* at 2218.

[68] *Id.* (quoting T. Cooley, Law of Torts, *271).

process, "Cases" arise anytime a party "assert[s] his rights in a form prescribed by law" and are "centered on law, not parties."[69] We have centuries of experience with "non-adversarial cases, such as naturalization, various bankruptcy and trust proceedings, warrants, consent decrees, and prerogative writs like habeas corpus."[70] This is consistent with Judge Newsom's discussion in his *Sierra v. Hallandale Beach* concurrence, issued just before *TransUnion* was decided in 2021.[71] He argued there that, "as a matter of plain text" and how the word would have been publicly understood at the time, "case" is simply synonymous with "cause of action."[72] He pointed out that, even by itself, the fact that litigants at the time of and after the passage of Article III could bring suit for nominal damages even in the absence of factual injury precludes the possibility that Article III limited jurisdiction to cases involving factual injury.[73]

Another category of criticism focuses on administrative law (particularly environmental law) and the relationship between the judicial and executive branches. (This is perhaps unsurprising, given that, until *Spokeo*, the Supreme Court's Article III jurisprudence emanated almost entirely from administrative and environmental regulations.) For example, Professor Cass Sunstein argues that modern Article III jurisprudence, including *TransUnion*, is inextricably linked to a misinterpretation of the Administrative Procedure Act (APA) and functions mainly as an anti-regulatory device. In his view, current doctrine is meant to subvert the APA, which itself governs jurisdiction for suits emanating from executive agency action.[74] Historically, standing jurisprudence was an atextual and unmoored *expansion* of the APA, which provided for judicial review of allegations that a person suffered "legal wrong because of agency action, or [was] adversely affected or aggrieved by agency action *within the meaning of a relevant statute*."[75] Yet the Supreme Court held

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[69] Pushaw, *supra* note 2, at 3-6.

[70] *Id.*

[71] *Sierra*, 996 F.3d at 1121 (arguing that "our current Article III standing doctrine can't be correct—as a matter of text, history, or logic").

[72] *Id.* at 1123-24. Judge Newsom pointed out that this cuts both ways. If a legal cause of action exists, factual injury is unnecessary; if a legal cause of action does not exist, factual injury is insufficient. *Id.* at 1124 (observing the common-law principle of *damnum absque injuria*, meaning that "[t]here must not only be loss, but it must be injuriously brought about by a violation of the legal rights of others").

[73] *Id.*

[74] Cass R. Sunstein, *Injury In Fact, Transformed* (March 11, 2022) (preliminary draft), *available at* https://ssrn.com/abstract=4055414.

[75] *Id.* at 4.

in *Data Processing* that a person who "is *in fact* adversely affected may obtain judicial review."[76] The Court simply added a factual injury as jurisdictionally sufficient under the APA, which significantly broadened plaintiffs' ability to challenge agency actions. But then, according to Professor Sunstein, beginning with *Lujan*, one wrong was replaced by the opposite wrong, as the Court began using the new injury-in-fact concept as an excuse to constitutionalize standing so as to subvert, rather than expand, the APA.[77] Under Professor Sunstein's reading, *TransUnion* is simply a continuation of this anti-regulatory program; but rather than reserving constitutionalized standing to limit challenges to executive agency action, *TransUnion* applies the jurisdictional limitations to subvert regulations of private parties. Like Judge Newsom and Professor Pushaw (and perhaps Justice Thomas), Professor Sunstein perceives *TransUnion* as an expansion of, not a deviation from, the logic of *Lujan*.[78]

There is much to commend in these analyses and critiques of the Court's standing jurisprudence. Judge Newsom's explication of the meaning of "Cases" and "Controversies" seems unassailable. But I disagree with his argument (or at least its necessary implication) that *Lujan* was therefore wrong on the merits. In fact, presumably Justice Scalia would not necessarily disagree with Judge Newsom's textual analysis, given his observation that the "Cases" and "Controversies" language was picked "for want of a better vehicle."[79] In any event, my position is that courts do indeed have jurisdiction over all "Cases" and "Controversies" as those words are interpreted by Judge Newsom—so long as the exercise of jurisdiction is consistent with the traditionally recognized roles of the branches within our separation-of-powers framework. And it is worth noting that Judge Newsom's conception of the proper separation of powers—including maintaining Congress's role of creating legally vindicable rights—mirrors Justice Scalia's in *Lujan*; Judge Newsom simply thinks Article II's Vesting Clause is the better vehicle for rooting standing requirements in the Constitution. Even more than Judge Newsom, Professor Pushaw trains much of his criticism on *Lujan*. And while I take his point that *Lujan* both protected the executive's role and arguably expanded the judiciary's role, the latter was incidental to, and necessitated by, the former. Post-

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[76] *Id*. at 8 (emphasis added).

[77] *Id*. at 16-17.

[78] Professor Sunstein notes, however, that *Lujan* "could easily be read as a narrow ruling." *Id*. at 11.

[79] Scalia, *supra* note 12, at 882.

Lujan jurisprudence, by contrast, does the latter without even doing the former, as I explain below.

In my view, *Lujan* properly identified and enforced the roles of the three branches contemplated by our separation-of-powers system, and it correctly held that courts have jurisdiction over "Cases" and "Controversies" only if the exercise of that jurisdiction does not invade the province of the executive branch. The problem is that post-*Lujan* jurisprudence, culminating with *TransUnion*, has skewed this delineation of separation of powers. The doctrine purports to prevent Congress from usurping an executive power, but it really requires courts to usurp a legislative power—and fails even on its own terms at protecting the executive branch.

III. *TRANSUNION* AND THE EXPANSION OF JUDICIAL AUTHORITY

TransUnion established that an invasion of a statutorily created private right is insufficient by itself to establish Article III standing. The case was wrongly decided for three reasons. First, it decoupled particularity and concreteness and thus required courts to make "inescapably value-laden"[80] judgments concerning whether a right is worth protecting in court; such judgment calls are more appropriate for the legislative branch. Second, although *Lujan* made clear that the purpose of the injury-in-fact requirement was to protect the constitutional separation of powers, *TransUnion*'s limitation on standing does not protect the executive branch; it simply guarantees that *state* courts will adjudicate alleged invasions of statutorily created private rights rather than federal courts. Third, *TransUnion* improperly replaced the legislative branch with the judicial branch as the arbiter of whether a harm deserves legal redress; according to *TransUnion*, it is the role of the court not merely to say what the law is, but also to say whether it should exist.

A. Decoupling Particularity and Concreteness

TransUnion decoupled particularity from concreteness in the context of private rights and held that courts should determine whether an invasion of a particularized private right is sufficiently concrete for purposes of Article III. This decoupling means that rather than agreeing with *Lujan* that a right that is particularized to an injured person is by definition concrete, the Court sees concreteness as a distinct inquiry that goes to whether a particularized harm is sufficiently *important* to merit redress in court. To use the facts in

[80] *TransUnion*, 141 S. Ct. at 2224 (Thomas, J., dissenting) (citing *Sierra*, 996 F.3d at 1129).

TransUnion, Congress judged that sending someone a credit report falsely stating they are a potential terrorist or drug dealer is an invasion of their right sufficiently serious to be redressable in court. According to the *TransUnion* Court, however, it is for *courts* to determine whether such harm merits redress, using guidance from common-law causes of action.

As Justice Thomas pointed out in his dissent, for the Court to hold that "courts alone have the power to sift and weigh harms to decide whether they merit the Federal Judiciary's attention" is "remarkable in both its novelty and effects."[81] It is this decoupling and authorizing courts to independently determine whether conduct is sufficiently harmful that requires "value-laden" judgment calls.[82] And as Judge Newsom pointed out, giving courts the ability—indeed, the responsibility—to evaluate what private rights should be vindicable in court mirrors the development of "substantive due process" jurisprudence.[83] Just as the Supreme Court decided that the Due Process Clause was not merely a procedural constraint on the executive and judicial branches but also a substantive limitation on the legislative branch, the Court has now decided that Article III is a constraint not on the judiciary, but on Congress's authority to create substantive rights.[84] *TransUnion* is a clear example of this. The Court suggested that for a person to receive a credit report falsely asserting they are potentially a terrorist or drug trafficker is "not remotely harmful."[85] The dissent disagreed, asserting that "one need only tap into common sense to know that receiving a letter identifying you as a potential drug trafficker or terrorist is harmful."[86] Presumably Congress agrees with the dissent, and that is why it created a legally vindicable private right. For the Court to disagree and decline to allow for such vindication is to apply a policy-based value judgment.

The Court failed to confront this reality. Consider the hypotheticals Justice Kavanaugh used to explain why particularity and concreteness must be

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[81] *Id.* at 2221.

[82] *Id.* at 2224 (citing *Sierra*, 996 F.3d at 1129) (arguing it is impossible to "go about picking and choosing" which harms are "sufficiently 'concrete' and 'real'" without such inquiry "devolv[ing] into [pure] policy judgment").

[83] *Sierra*, 996 F.3d at 1127-29.

[84] *Id.* at 1128; *see also TransUnion*, 141 S. Ct. at 2221 ("In the name of protecting the separation of powers, this Court has relieved the legislature of its power to create and define rights.") (citation omitted).

[85] *TransUnion*, 141 S. Ct. at 2205 (quoting Hagy v. Demers & Adams, 882 F.3d 616, 622 (6th Cir. 2018)).

[86] *Id.* at 2223.

analyzed as independent and distinct requirements. First, Justice Kavanaugh used a hypothetical where pollutants are dumped on the home of a Maine citizen.[87] Both the Maine citizen and a Hawaii citizen who learns of the pollution sue the defendant.[88] According to Justice Kavanaugh, preventing the Hawaii plaintiff from filing suit is an example of how the "concrete harm principle operates in practice."[89] This is an odd example: Obviously, dumping toxic pollutants on someone's land causes a concrete harm.[90] The problem with the Hawaii plaintiff's claim is not concreteness, but that she was not the one who particularly sustained the (indisputably concrete) harm. Justice Kavanaugh argues that because "[t]he violation did not personally harm the plaintiff in Hawaii," she could only be suing to enforce "general conformance with the law," which is not a basis for Article III standing.[91] Recall, however, that the reason a litigant cannot sue to enforce general conformance with the law is because it is an undifferentiated interest held by the public at large.[92] Indeed, Justice Kavanaugh specifically noted that the Hawaii plaintiff would not be suing "to remedy any harm to herself."[93] Even in arguing concreteness is independent from particularity, Justice Kavanaugh could not avoid implicitly acknowledging the two are linked.[94]

Justice Kavanaugh's choice to not use examples of particularized invasions of *private* rights brought by the person whose right was invaded is conspicuous. In *Lujan* and in Justice Kavanaugh's hypotheticals, where the issue is generally enforcing compliance with regulatory laws, there is no judgment call—it is not that a personalized harm is not quite serious enough under a separate concreteness analysis, but that a personalized harm does not exist at

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[87] *Id.* at 2205.

[88] *Id.*

[89] *Id.*

[90] *Id.* at 2206 ("The [Maine] lawsuit may of course proceed in federal court because the plaintiff has suffered concrete harm to her property.").

[91] *Id.* at 2205-06.

[92] *Lujan*, 504 U.S. at 576-77 (noting that it is the "province of the court" to "decide on the rights of individuals," while "[v]indicating the public interest . . . is the function of Congress and the Chief Executive") (citation omitted).

[93] *Id.* at 2206.

[94] The same is true of the second hypothetical, which imagines a law providing a right "to clean air and clean water, as well as a cause of action to sue and recover $100.00 in damages from any business that violates any pollution law anywhere in the U.S." *Id.* at 2207 n.3. As before, polluting someone's property constitutes a concrete harm, and the reason any unaffected person cannot file suit to remedy such harm is that they were not the ones who suffered it. And so once again, Justice Kavanaugh pivots back to the public/private distinction in which, far from being independent, concreteness and particularity are inextricably linked. *Id.*

all. In other words, either Article III standing is analyzed in terms of the nature of the right—whether it is particularized (private) or undifferentiated (public)—such that concreteness and particularity are linked as one subpart, or it is unavoidably a "value-laden" judgment call, and the question is simply whose judgment matters: Congress or the courts? By decoupling concreteness and particularity and requiring courts to decide whether a particularized invasion of a private right is sufficiently harmful (i.e., concrete), *TransUnion* holds that it is for the courts to make these policy-based judgment calls. And by declining to analyze examples of invasions of private rights, Justice Kavanaugh avoided admitting that's what the Court was holding.

B. State Courts Get Ready, There's a Case a-Comin'

Time and again, the Supreme Court has reiterated that the "law of Art. III standing is built on a single basic idea—the idea of separation of powers."[95] *TransUnion* claims that its limitation on Article III standing is necessary to protect the executive branch from encroachment by the legislative branch. But does the case even succeed on its own terms? Justice Kavanaugh's opinion notes that the standalone concrete-harm requirement in particular "is essential to the Constitution's separation of powers" because to permit "unharmed plaintiffs to sue defendants who violate federal law not only would violate Article III but also would infringe on the Executive Branch's Article II authority."[96] But that is not true where purely private rights are concerned. Precluding claimants from seeking vindication in federal court for violations of statutorily created rights does not mean the choice of "how aggressively to pursue legal actions against defendants who violate the law" will be left to "the discretion of the Executive Branch."[97] It merely means that state courts will adjudicate these alleged violations.

State courts "are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law."[98] As Justice Thomas pointed out in dissent, *TransUnion* leaves state courts "as the sole forum" for many statutory causes of action, "with defendants unable to seek removal to federal court."[99] This is ironic given that it was

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[95] Raines v. Byrd, 521 U.S. 811, 820 (1997) (internal quotation marks omitted).

[96] *TransUnion*, 141 S. Ct. at 2207. It is worth noting that the primary way the executive's power is protected against legislative encroachment is the executive's power to veto legislation passed by Congress.

[97] *Id.*

[98] ASARCO Inc. v. Kadish, 490 U.S. 605, 617 (1989).

[99] *TransUnion*, 141 S. Ct. at 2223 n.9.

businesses who pushed for passage of the Class Action Fairness Act (CAFA)[100] to make it easier for defendants to get into federal court to avoid local bias, constrain out-of-control attorney fee awards, and ensure uniformity.[101] Now, *TransUnion*, which Justice Thomas called a "pyrrhic victory" for the company,[102] means that for many class actions, CAFA is irrelevant—defendants will be unable to remove the cases for lack of jurisdiction. Indeed, this has already started occurring.[103] Similarly, after the Eleventh Circuit held that receipt of an unwanted text message does not suffice for Article III standing, several district courts remanded cases alleging such claims back to state court.[104]

Declining to adjudicate statutory causes of action does not protect separation of powers by ensuring the choice as to whether to enforce a law against private parties is left to the executive branch. It merely changes which court will be adjudicating the case. This is not an interesting side-effect—it fundamentally undercuts the *TransUnion* Court's reasoning. *TransUnion* did not justify its holding through textual or historical analysis. Instead, it appealed to the overall framework of how the Constitution contemplates government will function and how powers will be separated among the branches. The fact that the majority's approach creates a gaping flaw in the framework strongly indicates—dispositively so, in my view—that it is not the approach contemplated by the Constitution's drafters.

In any case, the *TransUnion* Court's approach to standing fails to achieve its stated purpose of protecting the executive branch's role and authority. *TransUnion* does not prevent litigants from suing to vindicate their private, statutorily created rights—it merely changes the forum.

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[100] Because of the relatively small damages, most statutorily-created causes of action are litigated as class actions.

[101] David Marcus, Erie*, The Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV. 1247 (2007).

[102] *TransUnion*, 141 S. Ct. at 2223 n.9.

[103] *See, e.g.*, Lagrisola v. North Am. Fin. Corp., No.: 21cv1222 DMS (WVG), 2021 U.S. Dist. LEXIS 192140 (S.D. Cal. Oct. 5, 2021); Voss v. Quicken Loans LLC, No. 1:20-cv-756, 2021 U.S. Dist. LEXIS 161380 (S.D. Oh. Aug. 26, 2021).

[104] *See, e.g.*, Mittenthal v. Fla. Panthers Hockey Club, Ltd., No. 20-60734-CIV-ALTMAN/Hunt, 2020 U.S. Dist. LEXIS 123127 (S.D. Fla. July 10, 2020); Jenkins v. Simply Healthcare Plans, Inc., 479 F. Supp. 3d 1282, 1286 (S.D. Fla. 2020).

C. From Deference to Usurpation

The Court's holding in *TransUnion* also forces judges to assume a legislative role. As Justice Scalia explained, albeit in the context of "prudential" standing:

> We do not ask whether in our judgment Congress *should* have authorized [a] suit, but whether Congress in fact did so. Just as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied . . . it cannot limit a cause of action that Congress has created. . . .[105]

In our tripartite government, it is Congress that has the authority to enact laws creating rights and protecting against harms and—if it so chooses—prescribing remedies.[106] As such, courts should hesitate to "substitute [their] judgment for Congress's" on whether an alleged harm is vindicable.[107]

Yet, under *TransUnion*, not only are courts permitted to do so, they must. If a court does not consider a harm sufficient for Article III, through reference to history and tradition and common-law analogues—and, theoretically, congressional judgment[108]—it must decline to exercise jurisdiction and dismiss the claim. If the court and Congress conflict on whether a harm is sufficient to give a plaintiff her day in court, it is the court's judgment that prevails.[109] As a result, courts must assume a power traditionally reserved to the People's representatives: identifying harms and creating rights to protect against such harms in an evolving society.

Note that *TransUnion* specifically asserts that to allow Congress to create legally vindicable private rights unaccompanied by what courts deem to be a sufficiently serious injury "*not only* would violate Article III *but also* would infringe on the Executive Branch's Article II authority."[110] Under *Lujan*, a

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[105] *Lexmark Int'l*, 572 U.S. at 128.

[106] *E.g.*, *Warth*, 422 U.S. at 500 ("The actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing. . . .'").

[107] *Jeffries*, 928 F.3d at 1070 (Rodgers, J., concurring) (cleaned up).

[108] *Spokeo* mentioned the latter as one of the factors courts should consider. *TransUnion*, however, having determined there was not a sufficient common-law analogue, did not evaluate congressional judgment at all. It is unclear, then, how congressional judgment is relevant under *TransUnion*, if at all.

[109] *TransUnion*, 141 S. Ct. at 2205 (although a court can consult congressional judgment, it must "independently decide whether a plaintiff has suffered a concrete harm under Article III").

[110] *Id*. at 2207 (emphasis added). This is incorrect even on its terms. As *Lujan* observed, "the province of the court is to decide on the rights of individuals." 504 U.S. at 576 (quoting *Marbury* 5 U.S. 137) (cleaned up).

court cannot exercise jurisdiction if doing so would encroach upon the exclusive authority of the executive branch. But *TransUnion* makes clear that even if it doesn't, Article III is a freestanding check on legislative authority to create private legal rights that can be *violated* by Congress. In the new regime established by *TransUnion*, the question of whether developments in technology, society, and culture necessitate new private rights and obligations between citizens resides with the judicial, not the legislative branch—it is for courts to make these "inescapably value-laden inquiry . . . into pure policy judgments."[111]

This directly contradicts *Lujan*, which observed that Congress can create legal rights "the invasion of which creates standing" and approvingly cited *Linda R.S.*,[112] where the Court had explicitly noted this principle is true even where there is "no injury" (other than the statutory violation).[113] *TransUnion* overturned *Linda R.S.*, notwithstanding that it was approvingly cited in *Lujan*. Now, Congress cannot create legal private rights the invasion of which creates standing even where no additional injury occurs; it cannot even determine what counts as an injury that confers standing. Under *TransUnion*, as Justice Thomas noted in dissent, "courts alone have the power to sift and weigh harms to decide whether they merit the Federal Judiciary's attention. In the name of protecting the separation of powers . . . this Court has relieved the legislature of its power to create and define rights."[114] *Lujan* observed that "the province of the court is, solely, to decide on the rights of individuals."[115] But now, if the individual's right is created by Congress and a court adjudges the right insufficiently important, the court cedes its province. Article III is a limit on the judicial power, yet it "has somehow been transformed into a check on the *legislature's* authority to pass substantive laws that create enforceable rights."[116] Pronouncing that the judicial branch has the final authority to determine what is and is not a harm sufficient to merit recourse against a lawbreaker for violating a private right is not to apply Article III, but to ignore Article I.

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[111] *TransUnion*, 141 S. Ct. at 2221 (brackets removed) (quoting *Sierra*, 996 F.3d at 1129).
[112] 504 U.S. at 578.
[113] *Linda R. S.*, 410 U.S. at 617 n.3.
[114] *TransUnion*, 141 S. Ct. at 2221.
[115] 504 U.S. at 576 (quoting *Marbury*, 5 U.S. 137) (cleaned up).
[116] *Sierra*, 996 F.3d at 1128.

IV. CONCLUSION

Justice Thomas called the *TransUnion* decision "remarkable" and predicted that it will have a novel and far-reaching effect. But it may not have much of an impact long term: Courts have been willing to find that what seem to be inconsequential annoyances nevertheless constitute cognizable harms: a single unwanted phone call, too many digits of a credit card on a receipt, etc. Finding as a threshold matter that such harms are concrete allowed those courts to rule on the cases before them and, in so doing, to recognize that it is the role of the judiciary "to apply, not amend"—nor ignore—"the work of the People's representatives."[117] It remains to be seen whether, after *TransUnion*, courts will be as willing to do so. As courts wrestle with how to interpret and apply *TransUnion*, it is worth considering that for courts to find a lack of Article III standing in the context of statutorily-created private rights—and therefore to decline to say what the law is in such cases—is to usurp legislative authority and to ignore the very separation-of-powers principle that Article III standing requirements are designed to enforce.

Other Views:

- TransUnion LLC v. Ramirez, 141 S. Ct. 2190 (2021), *available at* https://www.supremecourt.gov/opinions/20pdf/20-297_4g25.pdf.
- Cass R. Sunstein, *Injury In Fact, Transformed*, 2021 SUP. CT. REV. 349 (2021), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4055414.
- Thomas B. Bennett, *The Paradox of Exclusive State-Court Jurisdiction Over Federal Claims*, 105 MINN. L. REV. 1211 (2021), *available at* https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=4259&context=mlr.
- Brief for Washington Legal Foundation as Amicus Curiae Supporting Petitioner, TransUnion LLC v. Ramirez, 141 S. Ct. 2190 (2021), *available at* https://www.supremecourt.gov/DocketPDF/20/20-297/168397/20210208134135338_WLF%20Amicus%20-%20TransUnion%20v.%20Ramirez.pdf.

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[117] Henson v. Santander Consumer USA Inc., 137 S. Ct. 1718, 1726 (2017).

THE ORIGINAL UNDERSTANDING OF THE INDIAN COMMERCE CLAUSE: AN UPDATE[*]

ROBERT G. NATELSON[**]

The Congress shall have Power . . . ***To regulate Commerce*** *with foreign Nations, and among the several States, and* ***with the Indian tribes****.*[1]

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[*] Note from the Editor: The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. To join the debate, please email us at info@fedsoc.org.

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[1] U.S. CONST. art. I, § 8, cl. 3 (italics added).

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----, *The Original Understanding of the Indian Commerce Clause*, 85 DENVER U. L. REV. 201 (2007) [hereinafter Natelson, *ICC*];

----, *The Legal Meaning of "Commerce" in the Commerce Clause*, 80 ST. JOHN'S L. REV. 789 (2006) [hereinafter Natelson, *Commerce*];

----, *The Enumerated Powers of States*, 3 NEV. L.J. 469 (2003) [hereinafter Natelson, *Enumerated*];

Saikrishna Prakash, *Our Three Commerce Clauses and the Presumption of Intrasentence Uniformi-*

I. RECENT AND PENDING LITIGATION

Since 2019, the Supreme Court has issued four major decisions on Indian tribal sovereignty law issues. Perhaps this is a belated response to Justice Clarence Thomas's call for clarifying a body of jurisprudence long plagued by doctrinal confusion.[3] That confusion may be the reason for the fractured votes in all four recent cases: Three were decided by 5-4 margins, and one on a vote of 3-2-4.[4]

The Court has agreed to consider four more cases, now consolidated, in the October 2022 term.[5] They test the constitutionality of the federal Indian Child Welfare Act of 1978 (ICWA).[6] This statute purports to govern the removal and out-of-home placement of American Indian children, to override state jurisdiction, and to dictate procedures to state courts.[7]

There is fierce controversy among child advocates over the merits of the ICWA.[8] The pending cases, however, all focus on constitutional issues

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ty, 55 ARK. L. REV. 1149 (2003) [hereinafter Prakash];

THE RECORDS OF THE FEDERAL CONVENTION of 1787 (Max Farrand ed. 1911) [hereinafter FARRAND];

Adrian Vermeule, *Three Commerce Clauses? No Problem*, 55 ARK. L. REV. 1175 (2003) [hereinafter Vermeule].

[3] United States v. Lara, 541 U.S. 193, 214-22 (2004) (Thomas, J., concurring).

[4] Oklahoma v. Castro-Huerta, 142 S. Ct. 2486 (2022) (5-4) (recognizing state jurisdiction over crimes committed by non-Indians in Indian country); McGirt v. Oklahoma, 140 S. Ct. 2452 (2020) (5-4) (holding that Congress never dissolved a particular Indian reservation); Herrera v. Wyoming, 139 S. Ct. 1686 (2019) (5-4) (holding that admission of a state to the union did not abrogate an Indian treaty unless Congress clearly so stated, and construing the terms of the treaty); Washington State Dep't of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000 (2019) (decided 3-2-4) (holding that the terms of a federal treaty with an Indian tribe preempt state law).

[5] *Brackeen v. Haaland*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/brackeen-v-haaland/.

[6] 25 U.S.C. §§ 1901 - 1963.

[7] *E.g.*, 25 U.S.C. § 1911(a) ("An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law."); *id.* § 1911(c) ("In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.").

[8] For a generally positive view, see, e.g., Gabby Deutch, *A Court Battle Over a Dallas Toddler Could Decide the Future of Native American Law*, THE ATLANTIC, Feb. 21, 2019, https://www.theatlantic.com/family/archive/2019/02/indian-child-welfare-acts-uncertain-future/582628/; for a negative view, see, e.g., Lisa Morris, *The Indian Child Welfare Act: An Unconstitutional Attack on Freedom*, Christian Alliance for Indian Child Welfare, https://caicw.org/2022/03/08/the-indian-child-welfare-act-an-unconstitutional-attack-on-freedom/.

alone. They raise questions of Fifth Amendment equal protection and due process, delegation of legislative power, and federal commandeering of state officials. However, their most fundamental question is whether Congress's enumerated powers include authority to intervene in child placement decisions at all—even though family law is "an area that has long been regarded as a virtually exclusive province of the States."[9]

In one of the ICWA's recitals, Congress identifies the Indian Commerce Clause[10] as its principal constitutional justification.[11] The ICWA further recites that the Indian Commerce Clause and unspecified "other constitutional authority grants Congress plenary power over all Indian affairs."[12]

For reasons explained in this article, this recital is erroneous: The Constitution did not give Congress authority to enact the Indian Child Welfare Act.

II. Previous Scholarship

Struck by the incoherence of the law in this area, in early 2007 I decided that the first step toward clearing the tangle might be to ascertain what the Indian Commerce Clause really means. Accordingly, I researched and wrote *The Original Understanding of the Indian Commerce Clause*.[13] I learned that one reason the law of governmental-tribal relations was so chaotic was that there had been little worthwhile scholarship on the original meaning of the Indian Commerce Clause. The relatively few publications that addressed the issue usually (1) displayed little awareness of originalist sources or methodology, or of the wider context of the Constitution's adoption, and (2) were strongly agenda-driven.[14]

Felix S. Cohen's *Handbook of Federal Indian Law* may serve as an example. This work often is treated as the ultimate authority on Indian law. Yet Cohen was not a seasoned constitutional scholar, nor was he objective or independent. He was a political appointee in the administration of Presi-

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[9] Sosna v. Iowa, 419 U.S. 393, 404 (1975). During the debates over the Constitution's ratification, advocates for the Constitution specifically represented that family law would remain a state concern. Natelson, *Enumerated, supra* note 2, at 483.

[10] U.S. Const. art. I, § 8, cl. 3 ("The Congress shall have Power . . . to regulate Commerce . . . with the Indian Tribes.").

[11] 25 U.S.C. § 1901.

[12] *Id.*

[13] Natelson, *ICC, supra* note 2. Like my other investigations into constitutional meaning, I tried to keep this one as objective as possible.

[14] *Id.* at 212-13 (providing examples of agenda-driven writings).

dent Franklin D. Roosevelt. At the time he published (1942), the administration was promoting the position that the Commerce Clause granted the federal government vast power over areas previously seen as reserved to the states. So it is no surprise that Cohen contended that the Indian Commerce Clause, alone or in conjunction with the treaty power, granted Congress plenary authority over Indian affairs—even though this position dissolves under examination.[15]

Concluding that I could not rely on existing literature, I turned directly to Founding-era sources. Those sources compelled the conclusion that Congress's powers under the Indian Commerce Clause were not plenary. Rather, like Congress's powers under the Foreign and Interstate Commerce Clauses, they were limited to regulating certain economic activities. My resulting article created a stir. Justice Thomas cited it several times,[16] it prompted at least one academic response, and it may have provoked several challenges to the constitutionality of the ICWA.

III. GOALS OF THIS ARTICLE

Parts I-IV of this article are introductory in nature. Part V explains—I think more clearly than my previous study—the Constitution's "separation of powers" approach to Indian affairs. Part VI provides additional evidence of the Founding-era meaning of the phrase "Commerce . . . with the Indian Tribes." Part VII addresses some commentators' contention that the word "Commerce" has a more inclusive meaning in the Indian Commerce Clause than in the Foreign and Interstate Commerce Clauses, even though that word is used only once with respect to all three forms of commerce. Part VIII is a response to Professor Gregory Ablavsky and his admittedly "heterodox"[17] approach to interpreting the federal government's Indian affairs powers. Part IX concludes that the child placement provisions of the ICWA are indeed outside the scope of Congress's authority.

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[15] *Id.* at 203-12 (collecting and analyzing rationalizations for plenary authority).

[16] Adoptive Couple v. Baby Girl, 570 U.S. 637, 658-59, & *passim* (2013) (Thomas, J., concurring); Upstate Citizens for Equality v. United States, 140 S. Ct. 2587, 2588 (2017) (Thomas, J., dissenting from denial of certiorari).

[17] Ablavsky, *supra* note 2, at 1017 ("To determine the original constitutional Indian affairs power, this Article employs an alternate approach to reconstruct constitutional meaning. This approach uses heterodox methodologies and inclusive conceptions of constitutional actors and sources . . . .").

IV. Some Principles of Originalist Analysis

As noted earlier, much writing on the federal Indian powers appears to be agenda-driven,[18] and the flames of advocacy often consume appropriate methodology. Before examining the original meaning of constitutional terms, therefore, it may be helpful to review some aspects of originalist analysis.

First, the Constitution is a *legal* document—"the supreme Law of the Land."[19] Its framers drafted it, and its advocates explained it, with standard Anglo-American methods of documentary interpretation in mind. By way of illustration, both Alexander Hamilton's and James Madison's writings in *The Federalist* refer repeatedly to standard rules of documentary construction.[20] Adhering to those rules is necessary to preserve the integrity of the document. If judges and public officials can craft and apply unanticipated interpretive methods to the Constitution—thereby effectively changing its meaning—then they, and not the Constitution, are the "supreme Law of the Land."

Second, although some have claimed that originalism is a new creed, in fact it antedates the Constitution itself.[21] Well before the 18th century, the lodestar of most documentary interpretation had become the "intent of the makers."[22] When applied to the Constitution, the "intent of the makers" was the understanding of the ratifiers.[23] In default of a clear and consistent

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[18] *Supra* note 14 and accompanying text.

[19] U.S. CONST. art. VI, cl. 2.

[20] *E.g.*, THE FEDERALIST NO. 32 (Hamilton) (using the interpretative technique of the negative pregnant); THE FEDERALIST No. 41 (Madison) (using the presumption against superfluities). *See generally* Natelson, *Hermeneutic, supra* note 2 (explaining techniques of 18th-century documentary interpretation).

[21] Natelson, *Hermeneutic, supra* note 2 (tracing originalist methods of interpretation in English law to well before the Founding). Actually, originalist methods can be traced back even further. *E.g.*, Polybius, *Histories* 12.16.9 (reporting a defense that an interpretation was faulty because it was not the intent of the lawgiver).

[22] Natelson, *Hermeneutic, supra* note 2, at 1249-55.

[23] *Id.* For a defense of this approach, see Jack N. Rakove, *Joe the Ploughman Reads the Constitution, or, The Poverty of Public Meaning Originalism,* 48 SAN DIEGO L. REV. 575 (2011).

Chief Justice John Marshall's frequently misunderstood comment that "We must never forget that this is a constitution we are expounding" does not contradict originalist method. Marshall made the statement only to explain why the *Designatio unius* (today we would say *Expressio unius*) maxim had diminished force for determining the makers' intent. McCulloch v. Maryland, 17 U.S. 316, 406-07 (1819) (referring to "The men who drew and adopted" the Tenth Amendment). Marshall certainly didn't reject the maxim, even in the constitutional context. *See* Marbury v. Madison, 5 U.S. 137 (1803) (holding that Congress's grant to the Supreme Court of certain orig-

understanding, the original public meaning would suffice.[24]

Finally, a caveat about evidence of original understanding: The American people adopted the Constitution when it was ratified by state conventions elected for the purpose. The understanding of the ratifiers and of the wider public was informed by statements, events, and conditions previous to and contemporaneous with those conventions. It could not have been influenced by statements, events, or conditions that had not yet arisen. For this reason, post-ratification statements, events, or conditions generally are very weak—if any—evidence of the original understanding. Admittedly, there are rare exceptions to this rule.[25] But those exceptions certainly do *not* include statements and actions by self-interested politicians made after the ratification was complete. In nearly all cases, the originalist's best response to such so-called evidence is to ignore it.[26]

V. THE CONSTITUTIONAL SCHEME: SEPARATION OF POWERS

In 1789, the United States transitioned from the Articles of Confederation to the new federal Constitution. Like the Articles, the Constitution granted only enumerated powers to the central government and reserved the remainder in the states.[27] In general, the extent of powers granted by the Constitution was greater than under the Articles. Unlike the Articles, however, the Constitution did not bestow those powers on a single entity, such as Congress. Rather, the Constitution divided them among different federal actors, thereby creating countervailing checks and balances.[28]

The treatment of relationships with the Indians followed this pattern. The Articles bestowed on the Confederation Congress the power of "regu-

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inal jurisdiction exceeded its enumerated powers).

[24] Natelson, *Hermeneutic*, *supra* note 2, at 1286.

[25] Subsequent evidence is best admitted only to "liquidate" the meaning of truly unclear provisions. *Cf.* THE FEDERALIST NO. 37 (Madison) (referring to subsequent practice to liquidate "obscure and equivocal" laws).

[26] The Supreme Court recently disclaimed the misuse of post-ratification "evidence." New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2162-63 (2022) (Barrett, J., concurring):

> [T]oday's decision should not be understood to endorse freewheeling reliance on historical practice from the mid-to-late 19th century to establish the original meaning of the Bill of Rights. On the contrary, the Court is careful to caution "against giving postenactment history more weight than it can rightly bear."

[27] ARTS. CONFED., art. II; U.S. CONST. amend. X.

[28] *E.g.*, U.S. CONST. art. I, § 8, cl. 11 (granting Congress power to declare war), *but id.* art. II, § 2, cl. 2 (granting the President and Senate power to make treaties, including treaties of peace).

lating the trade and managing all *affairs* with the Indians."[29] "Indian affairs" was understood to include relations of all kinds[30]—economic, diplomatic, religious, and military—and the word "all" implied congressional authority over Indian affairs was exclusive. But the grant was cut down severely by two exceptions in favor of the states: The authority of the Confederation Congress extended only to "Indians[] not members of any of the States," and it was subject to the proviso "that the legislative right of any State within its own limits be not infringed or violated."[31] These exceptions preserved state supremacy over those Indians who had accepted state citizenship or were living within state boundaries.[32]

At the Constitutional Convention, James Madison suggested granting to the new federal Congress an unlimited "power to regulate affairs with the Indians."[33] However, the Convention rejected this suggestion. The finished Constitution did give federal officers and entities more authority over Indian relations than the Confederation Congress had enjoyed, but unlike the Articles, the Constitution divided that authority:

- The President would conduct diplomacy and military operations.[34]
- The President, with the approval of two-thirds of the Senate, could enter treaties with the tribes.[35] This may have been the most important Indian affairs power, because treaties were the usual way of resolving disputes between European Americans and Native Americans. Treaties could cover almost any subject,[36] including subjects other than those normally within the purview of the federal government.[37]

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[29] ARTS. CONFED., art. IX.

[30] Natelson, *ICC*, *supra* note 2, at 217-18 (providing examples of the meaning of Indian "affairs" *See also* "Federal Farmer." Letter No. 1, Oct. 8, 1787, *in* 19 DOCUMENTARY HISTORY, *supra* note 2, at 207, 213 (listing "commerce" and "affairs" separately).

[31] ARTS. CONFED., art. IX.

[32] Natelson, *ICC*, *supra* note 2, at 227-30.

[33] 2 FARRAND, *supra* note 2, at 324 (Aug. 18, 1787) (Madison).

[34] NATELSON, TOC, *supra* note 2, at 151, 159, & 166 (explaining that the President's diplomatic and warmaking powers derive partly from their explicit enumeration and partly from the then-recognized incidents of the explicitly enumerated powers).

[35] U.S. CONST. art. II, § 2, cl. 2.

[36] Including the highly significant subject of land. Paine Wingate to Samuel Lane, Jun. 2, 1788, *in* 28 DOCUMENTARY HISTORY, *supra* note 2, at 317, 318 (discussing potential land allocations by Indian treaties).

[37] *See generally*, KAPPLER, *supra* note 2, at 3-54 (reproducing treaties between Indian tribes and the United States from 1778 through 1798).

- Congress would (1) govern federal territories[38] (then inhabited by many tribes), (2) declare war,[39] (3) "define and punish . . . Offenses against the Law of Nations,"[40] (4) adopt legislation to execute treaties[41] under the Necessary and Proper Clause,[42] and (5) regulate "Commerce . . . with the Indian Tribes."[43]

- The states reserved police power over Indians within their boundaries on matters not duly preempted. The Constitution made this clear by dropping the Articles' word "all" from its grants of federal power over Indian affairs,[44] and it confirmed the reservation by the Ninth and Tenth Amendments. State exercise of police power over Natives was and remains controversial, but the states had exercised it before the Constitution and, despite occasional complaints from federal officials, continued to do so afterward.[45]

The passage of time has eroded the constitutional grounds for the federal government's powers over Indian affairs. Warfare between the United States and tribes has ended. Relatively few Natives now live in federal territories.[46] The fact that nearly all Indians are now U.S. and state citizens, with the privileges pertaining thereto, has rendered the law of nations irrelevant. And as a matter of choice—the product of a congressional declaration and presidential acquiescence—the government has entered into no Indian treaty

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[38] U.S. CONST. art. IV, § 3, cl. 2.

[39] *Id.* art. I, § 8, cl. 11.

[40] *Id.* art. I, § 8, cl. 10. During the Founding era, "the law of nations" was the usual term for international law.

[41] It has been argued that the Necessary and Proper Clause recognizes only congressional power to facilitate the making of treaties and not their execution, but this is an error. Treaties are the "supreme Law of the Land," the President must "take Care" to enforce them, and the Necessary and Proper Clause empowers Congress to enact legislation to assist him in that function. NATELSON, TOC, *supra* note 2, at 164-65.

[42] U.S. CONST. art. I, § 8, cl. 18.

[43] *Id.* art. I, § 8, cl. 2.

[44] Professor Ablavsky writes that the Constitution avoided the terms "sole" and "exclusive" for all its enumerated powers, "opting instead for broad federal authority through the Supremacy Clause." Ablavsky, *supra* note 2, at 1035. *But see* U.S. CONST. art. I, § 8, cl. 17 ("To exercise *exclusive* Legislation in all Cases whatsoever"); *id.* art. I, § 2, cl. 5 ("*sole* power of impeachment"); *id.* art. I, § 3, cl. 6 ("*sole* Power to try all Impeachments"); *see also id*. art. I, § 9, cl. 1 (assuring exclusive congressional or federal jurisdiction by denying states certain concurrent powers).

[45] Natelson, *ICC*, *supra* note 2, at 222-23. *Cf.* Matthew L. M. Fletcher, *Indian Tribes and Statehood: A Symposium in Recognition of Oklahoma's Centennial*, 43 TULSA L. REV. 73 (2007) (arguing for a retreat from the position that states' powers have no role in Indian affairs); *Castro-Huerta*, 142 S. Ct. 2486 (recognizing state jurisdiction over crimes committed by non-Indians in Indian country).

[46] Natelson, *ICC*, *supra* note 2, at 209.

since 1868.[47] As a result, the Indian Commerce Clause is the only federal Indian affairs power in active and significant use.

Yet advocates for congressional power over Indian affairs press their case as if these changes had not occurred. They commonly assert that the Indian Commerce Clause, although constitutionally but one component of the federal Indian affairs power, now grants all of it: that Congress, acting alone, may exercise all the authority the Constitution vests explicitly in other entities.[48] This claim is explored below.[49]

VI. The Meaning of the Indian Commerce Clause

A. Americans' Focus on the Regulation of Commerce

Regulation of commerce was a topic with which Americans of the Founding generation were very familiar. Until 1776, they had been subjects of the greatest commercial polity in the history of the world. The British government supervised commerce with foreign nations and among all of the (mostly self-governing) units of the Empire. For several years, the British government tried to regulate trade with Indians as well, before resigning that function to the individual colonies.[50]

From 1763 to 1775, pamphleteers expounding the colonial cause publicized the distinction between centrally-imposed commercial regulations (which the pamphleteers found acceptable) and centrally-imposed taxes and internal governance (which they did not).[51] The First Continental Congress adopted the same distinction.[52] After Independence, Americans deliberated about whether to amend the Articles of Confederation to grant Congress

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[47] 25 U.S.C.A. § 71:

> No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired.

[48] *E.g.*, Vermeule, *supra* note 2, at 1177 (reporting the claim that the Treaty Power expands the scope of, or works in tandem with, the Indian Commerce Clause); COHEN, *supra* note 2, at 91 (also coupling them).

[49] *Infra* Part VII.

[50] Natelson, *ICC*, *supra* note 2, at 219.

[51] Natelson, *Commerce*, *supra* note 2, at 836-38.

[52] *E.g.*, 1 J. CONT. CONG. 82-90 (Oct. 21, 1774) (stating, in a letter "To the People of Great-Britain," that the colonists accepted British regulation of trade/commerce while rejecting parliamentary taxation).

the power to regulate commerce.[53] They further deliberated on the topic during the constitutional debates of 1787-1790.[54] For Americans of the Founding generation, regulation of commerce was a central, rather than a peripheral, concern.

B. "Regulate Commerce" = "Regulate Trade"

In the 18th century, the word "commerce" could have different meanings. But as comprehensive usage surveys demonstrate, it usually was interchangeable with the word "trade."[55] This was particularly so when the context was government regulation of commerce.[56] The phrase "regulate commerce" was almost always interchangeable with the phrase "regulate trade."

The following extract from Madison's *Federalist* No. 42 illustrates this interchangeability:[57]

> The defect of power in the existing Confederacy to *regulate the commerce* between its several members, is in the number of those which have been clearly pointed out by experience . . . . [W]ithout this supplemental provision, the great and essential power of *regulating foreign commerce* would have been incompleat [*sic*] and ineffectual . . . . Were [the states] at liberty to *regulate the trade* between State and State, it must be foreseen that ways would be found out, to load the articles of import and export, during the passage through their jurisdiction, with duties. . . [I]t would stimulate the injured party, by resentment as well as interest, to resort to less convenient channels for their foreign *trade* . . . . The necessity of a *superintending authority over the reciprocal trade* of confederated States has been illustrated by other examples as well as our own . . . . The *regulation of commerce* with the Indian tribes is very properly unfettered from two limitations in the articles of confederation . . . And how the *trade* with

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[53] *E.g.*, 31 *id*. 494-95 (Aug. 7, 1786) (committee proposal for an amendment permitting Congress to "regulat[e] the trade of the States as well with foreign Nations as with each other"). Of course, Congress already had authority to regulate trade with the Natives under its Indian affairs power.

[54] *E.g.*, A Native of Virginia, *Observations Upon the Proposed Plan of Federal Government*, Apr. 2, 1788, *in* 9 DOCUMENTARY HISTORY, *supra* note 2, at 655, 670 (discussing details of the commerce power).

[55] *See generally* Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 CHI. L. REV. 101 (2001); Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847 (2003).

[56] Natelson, *Commerce*, *supra* note 2.

[57] Another illustration appears in the Constitution itself: the Port Preference Clause, U.S. CONST. art. I, § 9, cl. 6. *Infra* note 97 and accompanying text.

> Indians, though not members of a State, yet residing within its legislative jurisdiction, can be *regulated* by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible.[58]

C. "Regulate Commerce/Trade" = Lex Mercatoria

Like many of the Constitution's expressions,[59] the phrase "regulate Commerce" derives from contemporaneous Anglo-American law. The regulation of inter-jurisdictional trade/commerce was a recognized jurisprudential category—much as naturalization law and real estate law were recognized jurisprudential categories.

William Blackstone's *Commentaries* treated inter-jurisdictional commerce as such. He distinguished it from the regulation of domestic commerce (i.e., commerce within England) and identified inter-jurisdictional commerce with the distinct body of law known as the *lex mercatoria* or *law merchant*.[60]

With some modifications, the Constitution adopted the same distinction. To the state governments, it left supervision of domestic (intrastate) commerce. To Congress, it assigned governance of inter-jurisdictional commerce—that is, the lex mercatoria.

The Constitution made only two modifications on the traditional scheme. Both appear immediately after the Commerce Clause.[61] The first was a grant to Congress of a distinct power to adopt uniform bankruptcy laws.[62] Bankruptcy traditionally had been a component of the law merchant,[63] so this additional power would not have been necessary for Congress to regulate bankruptcy in inter-jurisdictional transactions. However,

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[58] Publius, *The Federalist No. 42*, N.Y. PACKET, Jan. 22, 1788, *in* 15 DOCUMENTARY HISTORY, *supra* note 2, at 427, 429-31 (italics added).

[59] NATELSON, TOC, *supra* note 2, at xxii.

[60] 1 WILLIAM BLACKSTONE, COMMENTARIES *263-64 ("[T]he affairs of [that] commerce are regulated by a law of their own, called the law merchant or *lex mercatoria*, which all nations agree in and take notice of.").

[61] U.S. CONST. art. I, § 8, cl 3.

[62] *Id.* art. I, § 8, cl. 4.

[63] 1 CUNNINGHAM, *supra* note 2, at v-xxx (listing numerous subtopics of bankruptcy in the index); JACOB, *supra* note 2, at 385 (providing for bankruptcy commissioners). Jacob's work, like Blackstone's *Commentaries*, was deemed sufficiently important to be included on the list of books recommended for acquisition by the Confederation Congress. The recommendation was contained in a report by a committee consisting of James Madison, Thomas Mifflin, and Hugh Williamson—all later among the Constitution's framers. 24 J. CONT. CONG. 84 & 89 (Jan. 24, 1783).

the additional grant ensured that any federal bankruptcy laws would have intrastate as well as interstate effect. The second modification was a grant to Congress of power over weights, measures, and money.[64] In England, regulation of weights, measures, and money were components of domestic (i.e., intrastate) commerce.[65] As in the case of bankruptcy, this additional power would enable Congress to regulate throughout the entire country and not merely in inter-jurisdictional transactions.

Aside from those modifications, the content of congressional jurisdiction over commerce was defined by the accepted scope of the lex mercatoria.[66]

D. The Scope of the Lex Mercatoria

The fact that the expressions "regulate commerce" and "regulate trade" were virtually synonymous has led some commentators to assume that the scope of commercial regulation was very narrow—in foreign trade, perhaps limited to custom-house regulations,[67] and in interstate trade, to eliminating barriers so as "to make commerce regular."[68]

These assumptions do not comport with the broad scope of the lex mercatoria, as revealed by 18th-century statutes and treatises devoted to the subject.[69] Although these sources give no comfort to those who contend that Congress's Commerce Power extends to all forms of intercourse or to all economic matters, they make clear that the lex mercatoria was far more extensive than custom-house regulations or removing trade obstructions. It encompassed:

- the law of bankruptcy,[70]

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[64] U.S. CONST. art. I, § 8, cl. 5.

[65] 1 WILLIAM BLACKSTONE, COMMENTARIES *264.

[66] Natelson, *Commerce, supra* note 2, at 813-15, 818-19, & 846.

[67] *E.g., Ablavsky, supra* note 2, at 1027 (referring to "the customs-focused understandings of the Interstate and Foreign Commerce Clauses").

[68] John McGinnis, in *Colloquium, Resolved: The Constitution is Designed for a Moral and Religious People and It is Wholly Unsuited for the Government of Any Other*, 49 CONN. L. REV. 995, 1005 (2017); Randy E. Barnett & Andrew Koppelman, *The Commerce Clause*, National Constitution Center, https://constitutioncenter.org/interactive-constitution/interpretation/article-i/clauses/752.

[69] Available treatises include MALYNES, *supra* note 2; JACOB, *supra* note 2; WYNDHAM BEAWES, LEX MERCATORIA REDIVIVA: OR, THE MERCHANT'S DIRECTORY (3d ed. 1771); CUNNINGHAM, *supra* note 2; & FORSTER, *supra* note 2. Other works also included aspects of the lex mercatoria in their discussions. *E.g.*, JOHN REEVES, A HISTORY OF THE LAW OF SHIPPING AND NAVIGATION (1792).

[70] 1 CUNNINGHAM, *supra* note 2, at v-xxx (listing subtopics of bankruptcy); JACOB, *supra* note 2, at 385-86 (providing for bankruptcy commissioners).

- regulation and licensing of merchants,[71] brokers (factors),[72] and others involved in trade,[73] including requirements of oaths,[74] bonds,[75] and recordkeeping;[76]
- the regulation of commercial paper—notes, drafts, and the like;[77]
- price controls;[78]
- all aspects of ships and navigation,[79]
- prohibitions on certain forms of trade and of activities associated with trade,[80] including territorial restrictions, both outside[81] and within[82] the legislature's jurisdiction;
- regulations of inventory, such as packing and shipping,[83] marking and

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[71] JACOB, *supra* note 2, at 157 (no alien may be an overseas merchant).

[72] *Id.* at 152-157 (general regulation of factors, including restrictions in overseas possessions) & 387 (licensing of brokers and penalty for practice without a license).

[73] *Id.* at 134-35 (licensing of "carmen"), 218 (referring to licenses of captains and capers), & 65-66 (regulation of pilots); 13 Geo. iii, c. 63 (1773) (extensive regulation of the East India Company).

[74] JACOB, *supra* note 2, at 387 (oaths of brokers) & 286 (oaths of traders); FORSTER, *supra* note 2, at 171 (oaths of regulatory employees).

[75] JACOB, *supra* note 2, at 218 (captains and capers required to post bonds), 387 (brokers required to post bonds), & 160 (bond required to take on board certain inventory).

[76] *Id.* at 286 (entering license on certain books); 13 Geo. iii, c. 63, § XX (1773) (transferring and maintaining records).

[77] JACOB, *supra* note 2, at 101 (regulations of promissory notes) & 94-100 (regulations of bills of exchange); 2 CUNNINGHAM, *supra* note 2, at i-v (index listing bills of exchange topics); *id.* at v-vi (index listing promissory note topics), vii (index listing other notes), & vii-viii (index listing marine insurance)

[78] JACOB, *supra* note 2, at 134-35 (controls on prices of porters and carmen).

[79] *Id*. at 57-58 (general navigation rules), 131 (times of unlading), 132 (license required to unlade), & 185 (prizes); FORSTER, *supra* note 2, at 173 (extra fee for non-conforming ships).

[80] JACOB, *supra* note 2, at 32-33 (restrictions on wine imports), 37 (protection against fraud), & 163 (altering mark for purposes of fraud); 20 Geo. iii, c. 42 (1780) (comprehensive regulation and duties on trade with the Isle of Man, which was located within the empire).

[81] *E.g.*, FORSTER, *supra* note 2, at 265-66 ("And 'tis made a high Crime and misdemeanor to go to the *East-Indies,* the Party not being qualify'd by Law so to do; and the Offender shall be liable to corporal Punishment, or a Fine, as the Court shall think fit."); JACOB, *supra* note 2, at 261 (barring subjects from trading in or traveling to Asia, Africa, or America without license) & 160 (restrictions on alien landownership abroad).

[82] 15 Geo. iii, c. 10 & c. 18 (1775) (restricting trade within the British Empire); 20 Geo. iii, c. 6 (1780) (lifting prior restraints pertaining to Ireland, then part of the British Empire); 20 Geo. iii, c. 18 (1780) (repealing earlier restrains on flow of money and traffic in hops with Ireland); *id.* c. 42 (1780) (comprehensive regulation and duties on trade with the Isle of Man, located within the empire).

[83] 10 Geo. iii, c. 17 (regulating the packing and shipping of China earthenware for export from

labeling[84]—and flat prohibitions on inter-jurisdictional trading of certain goods (contraband);[85]

- financial charges, including but not limited to customs and duties;[86]
- administration of commercial treaties;[87]
- marine insurance;[88]
- incorporation of trading entities;[89]
- certain criminal measures, such as penalties for piracy[90] and unauthorized mercantile activities;[91] and
- the appointment of commissioners (agents) to administer the system.[92]

As explained below, these categories are sufficient to comprehend the Founding-era understanding of "Commerce . . . with the Indian tribes."[93]

VII. THE PROTEAN COMMERCE CLAUSE HYPOTHESIS

In any scheme of commercial regulation, the precise mix of rules and their respective prominence differ according to the items traded and with whom they are traded. The rules of the Jamaican trade are never precisely the same as those of the French trade. Such variations are normal, and we do not understand them as affecting the scope of regulatory power granted.

However, some writers contend that the single constitutional phrase

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Britain to America).

[84] MALYNES, *supra* note 2, at 142 (requirement of marking or labeling).

[85] JACOB, *supra* note 2, at 27 (adulterating wine prohibited) & 229-30 (permitted and contraband goods); FORSTER, *supra* note 2, at 109-10 (bans on export of some goods outside British Empire); 25 Geo iii, c. 67 (barring export of tools from Britain, even to other units of the empire, Ireland excepted).

[86] FORSTER, *supra* note 2, at 193-354 (listing duties on goods); JACOB, *supra* note 2, at 117-24 (schedule of duties), 265 (percentage duties), & 282 (license fees). For the scope of terms such as "custom" and "duty," see Robert G. Natelson, *What the Constitution Means by "Duties, Imposts, and Excises"—and Taxes (Direct or Otherwise)*, 66 CASE WESTERN RES. L. REV. 297 (2015).

[87] JACOB, *supra* note 2, at 203-255 (reproducing commercial treaties).

[88] *Id.* at 84-92 (regulation of marine insurance).

[89] *Id.* at 256-98 (listing trading companies incorporated by Crown).

[90] *Id.* at 186-93 (piracy).

[91] FORSTER, *supra* note 2, at 121-90 (listing penalties for violations).

[92] JACOB, *supra* note 2, at 85 (commissioners of insurance), 285 (commissioners of the customs), & 385 (bankruptcy commissioners).

[93] *Infra* Part VII(B)(3).

"regulate Commerce" changes scope according to the persons or entities with whom the commerce is carried out. More specifically, they argue that "to regulate Commerce" takes on a far broader definition when modified by the phrase "with the Indian Tribes" than when modified by "with foreign Nations" or "among the several States." Thus, although they might concede that the Interstate Commerce Clause does not authorize Congress to prescribe family law for non-Natives, they maintain that the Indian Commerce Clause empowers Congress to prescribe family law for Natives.

This argument is popular,[94] but weak. It has two kinds of flaws: (1) it is textually improbable and (2) the evidence advanced to support it is defective.

A. Textual Difficulties

When the same term appears in different parts of the same legal document, we presume that the term means the same thing in all its appearances. This was the presumption during the Founding era,[95] just as it is today.[96] It reflects the observation that drafters of legal documents generally do not alter the meaning of terms within the same instrument. This is especially true of drafters as competent as the Constitution's framers.

Promoters of the protean Commerce Clause hypothesis almost universally overlook the fact that the Commerce Clause is not the Constitution's only reference to regulating commerce. The Port Preference Clause states:

> No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to,

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[94] *E.g.* Abel*, supra* note 2, at 437; Ablavsky*, supra* note 2, at 1026. The theory seems to have been adopted in *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989), although *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 62 (1996) avoided specifically endorsing it. *Compare* Vermeule*, supra* note 2:

> "Commerce," when used next to the words "with foreign Nations" or "with the Indian Tribes," might have had a different meaning in the founding era than "commerce" when used next to the phrase "among the several States." . . . I have no idea whether any of these possibilities are true.

Id. at 1181-82.

One must distinguish this contention from the (more plausible) position that the three different prepositional phrases following the word "Commerce" designate different people or entities with whom it is carried out. Christopher R. Green, *Tribes, Nations, States: Our Three Commerce Powers* (Aug. 22, 2020, rev'd Aug. 1, 2022), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3679265.

[95] Natelson, *ICC, supra* note 2, at 215.

[96] *See Prakash, supra* note 2 (discussing the rule and some applications).

> or from, one State, be obliged to enter, clear, or pay Duties in another.[97]

The references to "Ports," "Vessels," and "Duties" communicate a mercantile sense for the word "Commerce." This, in turn, triggers the presumption that the word's appearance in the Commerce Clause also is mercantile and does not encompass non-mercantile subjects such as family law.

When a clause contains a single appearance of a word or phrase (as the Commerce Clause does with the word "Commerce"), the presumption that the meaning remains constant should be even stronger. The framers could have written, "The Congress shall have Power to regulate Commerce with foreign Nations and among the several States *and also to regulate Affairs* with the Indian Tribes." But they did not. And if "Commerce" really did have a different meaning in the Indian setting, they could have written, "The Congress shall have Power to regulate Commerce with foreign Nations and among the several States *and to regulate Commerce* with the Indian Tribes." But they didn't do that either. Instead, they employed exactly the same appearance of the same phrase ("regulate Commerce") to refer to all three groups.

B. Evidentiary Weaknesses

Five kinds of evidence are proffered to rebut the presumption that the meaning of "regulate Commerce" remains constant with respect to all three listed commercial partners:

- evidence that the framers inserted the phrase "with the Indian Tribes" in the Commerce Clause later in the drafting process than "with foreign Nations and among the several States;"
- an essay written by a New York Antifederalist stating that, under the Constitution, Congress would enjoy plenary power over Indian affairs;
- evidence supposedly showing that the regulation of Indian commerce was understood to be more comprehensive than the regulation of other forms of commerce;
- a passage in Attorney General Edmund Randolph's 1791 opinion on the constitutionality of a national bank; and
- several post-ratification congressional statutes.

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[97] U.S. CONST. art. I, § 9, cl. 6.

I proceed to address each of these.

1. The Order of Drafting

One piece of evidence advanced to support the conclusion that the Indian Commerce Clause is broader than the Foreign and Interstate Commerce Clauses is that the Constitution's framers added the words "with the Indian Tribes" after the foreign and interstate portions of the clause had been drafted.[98]

Proponents of this evidence do not explain how the succession of events at a closed convention could affect the ratifiers' understanding of the completed document. They also overlook how the language came to be added: Madison moved to empower Congress to "regulate *affairs* with the Indians,"[99] but the Convention trimmed "affairs" to "Commerce"—the same word employed for other trade relationships.

Moreover, if the ratifiers had known about the temporal drafting order, the implications would have been exactly the opposite of what proponents claim. If an object is added to an existing category, the addition implies that persons adding it believe the new object is in the *same* category—not in a different one. Suppose I show Rita two animals and she says, "Those are both dogs." Then I present a third animal and she says, "That also is a dog." She is telling me she believes the third animal is in the same class as the first and second. If she thought the third animal was, say, a cat, then she would not have called it a dog.

In sum, to the extent that the framers' late addition of "with the Indian Tribes" has any probative power at all, it strengthens the conclusion that the framers thought commerce with the Natives was in the same general class as the two other forms of commerce.

2. An Antifederalist Screed

The second bit of evidence proffered to support the claim that the Indian Commerce Clause is broader than the scope of the Foreign and Interstate

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[98] Abel, *supra* note 2, at 437-38. Ablavsky and his sources contend that in the Constitutional Convention, late additions of enumerated powers—including the Indian Commerce Clause—were mostly uncontroversial and accepted, and that this suggests the clause was "open-ended." Ablavsky, *supra* note 2, at 1038-39. Quite the contrary: On August 16, 1787, both Madison and Charles Pinckney proposed additional powers, a substantial number of which the delegates rejected. 2 FARRAND, *supra* note 2, at 324-26 (Aug. 16, 1787) (Madison). And as the text states, Madison's proposed Indian affairs power was reduced in scope.

[99] 2 FARRAND, *supra* note 2, at 324 (Aug. 18, 1787) (Madison).

Commerce Clauses is an essay written in opposition to the Constitution. It appeared in the June 14, 1788, *New York Journal* over the name "Sydney." The piece has been ascribed both to Abraham Yates and Robert Yates.[100]

The author complained that the Confederation Congress had interfered with the Indian affairs prerogatives of the states. He feared the Constitution would make federal intrusion worse. Here is the relevant passage:

> If this was the conduct of [the Confederation] Congress and their officers, when possessed of powers which were declared by them to be insufficient for the purposes of government, what have we reasonably to expect will be their conduct when possessed of the powers "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes," when they are armed with legislative, executive and judicial powers . . . .
>
> It is therefore evident that this state, by adopting the new government, will enervate their legislative rights, and totally surrender into the hands of Congress the management and regulation of the Indian affairs, and expose the Indian trade to an improper government . . . .[101]

The words emphasized by advocates of the protean Commerce Clause hypothesis are "totally surrender into the hands of Congress the management and regulation of the Indian affairs."

However, "Sydney" did not say the Indian Commerce Clause would be the sole source of congressional authority. He may well have drawn his conclusion from the entire collection of Congress's Indian affairs powers, including the Define and Punish Clause,[102] the Necessary and Proper Clause,[103] and the Territories and Property Clause.[104] Indeed, one early congressional Indian-intercourse law apparently was based on the Territories and Property Clause, not on the Indian Commerce Clause.[105]

More likely, though, "Sydney" was not thinking about the new Congress

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[100] "Sydney," N.Y. J., June 13-14, 1788, *in* 20 DOCUMENTARY HISTORY, *supra* note 2, at 1153. The editor attributes it to Abraham Yates; *but see* 6 THE COMPLETE ANTI-FEDERALIST 107 (Herbert J. Storing ed., 1981) (noting a conflict between one scholar who attributed it to Robert Yates and another who attributed it to Abraham Yates).

[101] 20 DOCUMENTARY HISTORY, *supra* note 2, at 1158.

[102] U.S. CONST. art. I, § 8, cl. 10 ([The Congress shall have Power . . .] To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations; . . .).

[103] *Id*. art. I, § 8, cl. 18.

[104] *Id*. art. IV, §3, cl. 2.

[105] 3 ANNALS OF CONG. 751 (Dec. 20, 1792) (justifying the 1792 Indian Intercourse Act by stating that "the power of the General Government to legislate in all the territory belonging to the Union, not within the limits of any particular State, cannot be doubted").

alone, but about the federal government as a whole. Observe how he transitioned from a complaint about the Confederation Congress "and their officers" to the new federal establishment "armed with legislative, executive and judicial powers." The perceived threat came from the aggregate of *all* federal powers.

If so, then "Sydney's" statement that the Constitution would "totally surrender" the management of Indian affairs to "Congress" arose from habit: The Confederation was still in existence when he wrote, and people referred to the central authority as "Congress." It was understandable if the usage continued when mentioning the new federal government.

One last point: In my experience, Antifederalist expositions of constitutional meaning are not very reliable evidence of the Constitution's actual meaning. They often contradict each other, ignore conventions of legal construction, misrepresent the text, or reflect ignorance of the goals behind the text they critique. Antifederalist representations are particularly weak in comparison with those issued by the Constitution's sponsors.[106]

3. The Claim that the Regulation of Indian Commerce was Broader than the Regulation of other Forms of Commerce

The next category of evidence advanced in support of a protean Commerce Clause consists of material supposedly showing that the Founding generation understood the regulation of Indian commerce/trade to be more inclusive than the regulation of foreign or interstate commerce/trade.[107]

Those advancing the claim seem to assume that regulation of foreign commerce consisted primarily of custom-house regulations; they do not consider the wide scope of the lex mercatoria.[108] Yet the lex mercatoria included the subjects of trade regulations established in early Indian treaties.[109] It also accommodated even the most ambitious regulations of Indian commerce then extant—those adopted by South Carolina. The South Carolina scheme included:

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[106] Natelson, *Founders, supra* note 2, at 60 (explaining why the representations of meaning from a measure's sponsors are considered authoritative).

[107] *E.g.,* Ablavsky, *supra* note 2, at 1028-32.

[108] *Supra* Part VI(D).

[109] *E.g.,* KAPPLER, *supra* note 2, at 10 (right of traders to enter into Indian territories), 16 (same), & 20 (traders must be licensed); 18 EARLY AMERICAN INDIAN DOCUMENTS 551 (Colin G. Calloway ed., 1994) (quoting Art. VI of a Sept. 23, 1789, proposed treaty with the Creeks as saying, "into which, or from which, the Creeks may import or export all the articles of goods and merchanise [*sic*] necessary to the Indian commerce").

- definitions and licensing of those permitted to carry out trade;
- restrictions on their activities, including geographic restrictions on trading or navigating in foreign places;
- regulations on the conduct of trade;
- price controls and credit restrictions;
- regulations of inventory, including the designation of some goods as contraband;
- appointment of commissioners to supervise the system and adjudicate disputes;
- administrative details, such as oaths and record keeping; and
- fees to pay for administration of the system.[110]

Nothing on this list exceeds the understood scope of the lex mercatoria applied to foreign commerce.

One writer points out, as further evidence that Indian commerce was broader than other forms of commerce, that Indian commerce encompassed trade in slaves.[111] True, but so also did the lex mercatoria.[112] The same writer observes that Americans used the Indian trade as a diplomatic tool[113] and that captured or traded children sometimes were adopted.[114] True, but international commerce also was (and is) a diplomatic tool. And the fact that children sometimes were adopted *after* they were traded does not render adoption policy an element of commercial regulation.[115]

4. Edmund Randolph's National Bank Opinion

Advocates of the protean Commerce Clause hypothesis offer as evidence a passage in Attorney General Edmund Randolph's 1791 opinion on the

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[110] Natelson, *ICC, supra* note 2, at 220-22.
[111] Ablavsky, *supra* note 2, at 1031.
[112] *Cf.* JACOB, *supra* note 2, at 12 (referring to "Negroes" as cargo), 171-72 (same), & 265 (exempting "Negroes" as "merchandise" from certain financial duties).
[113] Ablavsky, *supra* note 2, at 1030.
[114] *Id.* at 1031.
[115] *Cf.* Natelson, *Commerce, supra* note 2, at 841-45 (explaining that the Founders understood the interrelationship between commerce and other activities, but still elected to divide the power to regulate commerce from the power to regulate other activities).

constitutionality of a national bank.[116] It reads:

> Congress have also power to regulate commerce with foreign Nations, among the several states, and with the Indian tribes. The heads of this power with respect to foreign nations, are;
>
> 1. to prohibit them or their commodities from our ports.
> 2. to impose duties on them, where none existed before, or to increase existing Duties on them.
> 3. to subject them to any species of Custom house regulations: or
> 4. to grant them any exemptions or privilages [sic] which policy may suggest.
>
> The heads of this power with respect to the several States, are little more, than to establish the *forms* of commercial intercourse between them, & to keep the prohibitions, which the Constitution imposes on that intercourse, undiminished in their operation: that is, to prevent taxes on imports or Exports; preferences to one port over another by any regulation of commerce or revenue; and duties upon the entering or clearing of the vessels of one State in the ports of another.
>
> The heads of this power with respect to the Indian Tribes are
>
> 1. to prohibit the Indians from coming into, or trading within, the United States.
> 2. to admit them with or without restrictions.
> 3. to prohibit citizens of the United States from trading with them; or
> 4. to permit with or without restrictions.[117]

This passage is cited to show that Randolph thought "regulate Commerce" created different powers for each of its three objects.

But Randolph's opinion merely lists the "heads" of each branch of the commerce power. It does not tell us whether Randolph thought those "heads" were the *exclusive* exercises of each power, or their *most likely* exercises, or the *motivations* for inserting each into the Constitution. The relevant 18th-century definitions of "head" do not resolve this question, since

[116] Ablavsky, *supra* note 2, at 1027-28.

[117] *See* Notes on Edmund Randolph's Opinion on the Constitutionality of an Act to Establish a Bank, Founders Online, https://founders.archives.gov/documents/Hamilton/01-08-02-0045 (reproducing Randolph's opinion in the editor's notes).

the word could mean either a principal element or a defining one.[118]

I believe Randoph used "head" to mean a purpose or expected exercise, rather than a definition.[119] Modern writers sometimes underestimate Randolph, but he was a lawyer of very high reputation. He certainly knew that his four listed "heads" of foreign commerce, for example, fell far short of defining the scope of the law merchant.

Randolph's opinion would have been better evidence for the protean Commerce Clause hypothesis if (1) his opinion purported to state the full extent of each commerce power and (2) it had been presented before May 29, 1790, the date the 13th state (Rhode Island) ratified the Constitution. If both had been true, it might have contributed to the understanding of the ratifiers. In the real world, it could have had no such effect.

5. Early Indian Intercourse Laws

During the 1790s, Congress passed a series of laws regulating relations with the Indians. The later acts repeated and refined the earlier ones and added supplemental regulations. Advocates of a protean Commerce Clause assume that the only constitutional justification for these laws was the Indian Commerce Clause. They therefore argue that these measures evince an understanding that "regulating Commerce" had a broader meaning when modified by "with Indian tribes" than when modified by "with foreign Nations" or "among the several States."[120]

Initially, I should note that these statutes are not timely evidence of the ratifiers' understanding. One was adopted several months after the ratifica-

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[118] *E.g.*, SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1756) (unpaginated) (offering, in addition to other meanings of "head," the definition, "Principal topicks of discourse"); THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (1789) (unpaginated) (same definition).

[119] *See* Prakash, *supra* note 2, at 1163:

> Yet the well-known differences in motivation and in the expected uses of the power to regulate commerce across the three subparts hardly prove the existence of two or three different meanings for "regulate commerce." As is well understood even where intrasentence uniformity is not an issue, whatever the particular motivation for granting authority, the textual grant may go beyond the particular concern sought to be addressed.

[120] *E.g.*, COHEN, *supra* note 2, at 92 (citing these laws as evidence for the scope of the Indian Commerce Clause). *See also* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 107-08 (2005) (arguing that "Commerce" includes "all forms of intercourse in the affairs of life" and that certain provisions of the Indian Intercourse Act of 1790 support this broad understanding).

tion was complete and the rest were enacted years later. The members of Congress who adopted them were not necessarily either framers or ratifiers, and their incentives—to interpret their own powers expansively—were quite different.

Moreover, the assumption that the Indian Commerce Clause was the only possible basis for these laws is simply false. They actually were supported by multiple constitutional clauses. The statutes included:

- Ordinary lex mercatoria regulations, including licensing requirements for traders, bonding requirements, rules imposed on the regulators, inventory control, and associated penalties for violation.[121] These regulations would, of course, be supported by the Indian Commerce Clause.
- Criminal penalties on Indians who harmed whites and on whites who harmed Indians.[122] Depending on the details of these laws, they were justified as exercises of the lex mercatoria, as "necessary and proper" to the execution of treaties, and by the Define and Punish Clause.[123]
- Restrictions on land settlement and land purchase. The text of the statutes tells us that these provisions were "necessary and proper" to the making or execution of treaties.[124]
- Authorization to "ascertain[]" and "mark[]" boundaries determined by treaty,[125] and penalties associated with violating treaty bounda-

[121] *E.g.*, 1 Stat. 137-38, c. 34, §§ 1-3 (1790); 1 Stat. 329-30, c. 19, §§ 1-3 & 6 (1793); *id.* § 7; 1 Stat. 471-72, c. 30, §§ 8-11 (1796); 1 Stat. 745-46, c. 46, §§ 7-11 (1799).

[122] *E.g.*, 1 Stat. 138, c. 34, § 5 (1790); 1 Stat. 329, c. 19, § 4 (1793); 1 Stat. 470-71, c. 30, §§ 4 & 6 (1796); 1 Stat. 472-73, c. 30, § 14 (1796); 1 Stat. 744-45, c. 46, §§ 4 & 6 (1799).

[123] Natelson, *ICC, supra* note 2, at 252-56 (stating that an extra-territorial criminal regulation in the 1790 act was justified both by the lex mercatoria and as "necessary and proper" to the execution of the Hopewell treaties). Actually, I understated my case. As to any persons within federal territories, such provisions also could be sustained under the Territories and Property Clause. Additionally, control of the movement of peoples across national lines—*e.g.*, in and out of Indian country—was a recognized element of "defin[ing] the Law of Nations." *See* Robert G. Natelson, *Where Congress's Power to Regulate Immigration Comes From*, https://i2i.org/where-congresss-power-to-regulate-immigration-comes-from/ (collecting Founding-era sources classifying cross-border movement as a subject for the law of nations).

[124] *E.g.,* 1 Stat. 138, c. 34, § 4 (1790) (limiting the sale of lands "unless the same shall be made and duly executed at some public treaty"). *See also* 1 Stat. 330-31, c. 19, §§ 5 & 8 (1793) (restricting land sales unauthorized by treaty); 1 Stat. 475, c. 30, § 5 (1796) (banning settlement in violation of treaty); 1 Stat. 472, c. 30, § 12 (1796) (banning land sales except under treaty); 1 Stat. 744-46, c. 46, §§ 3-8 (1799) (regulating traffic and activity on lands secured by treaty).

[125] 1 Stat. 469, c. 30, § 1 (1796).

ries.[126] These provisions also were "necessary and proper" to treaty enforcement.

- Authorization to the President to present gifts to Natives.[127] Gifts were part of normal diplomatic practice, both in European diplomacy[128] and in relations with non-Europeans.[129] The constitutional authorization was, again, the Necessary and Proper Clause—to enable the President to carry out his diplomatic responsibilities.[130]

- Judicial enforcement procedures,[131] as authorized by Congress's power to constitute tribunals inferior to the Supreme Court.[132]

As to Indians living in the federal territories, all these regulations could be supported by the Territories and Property Clause as well.[133]

Because all the provisions in these statutes are readily justified under other constitutional provisions, there is no reason to assume they rested on an expansive reading of the Indian Commerce Clause and remain relevant to federal power over Indian affairs today.[134]

Given the defects in all these forms of evidence, those advancing the implausible proposition that a single appearance of the word "Commerce" in a single clause changes meaning in response to its different objects have fallen

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[126] *E.g.,* 1 Stat. 330, c. 19, § 5 (1793); 1 Stat. 470, c. 30, § 5 (1796); 1 Stat. 745, c. 46 § 5 (1799).

[127] *E.g.*, 1 Stat. 331, c. 19, § 9 (1793); 1 Stat. 472, c. 30, § 13 (1796); 1 Stat. 746-47, c. 46, § 13 (1799).

[128] *See generally* Robert G. Natelson, *The Original Meaning of "Emoluments" in the Constitution*, 52 GA. L. REV.1 (2017).

[129] Henry Knox to George Washington, Jan. 4, 1790, *available at* https://founders.archives.gov/documents/Washington/05-04-02-0353 ("It seems to have been the custom of barbarous nations in all ages to expect and receive presents from those more civilized—and the custom seems confirmed by modern Europe with respect to Morocco, Algiers, Tunis and Tripoli. The practise [sic] of the British Government and its colonies of giving presents to the indians [sic] of North America is well known . . . .").

[130] The President's foreign affairs powers derive from the enumeration in Article II, supplemented by the normal incidents thereof, as understood during the Founding. *Supra* note 34 and accompanying text.

[131] *E.g.*, 1 Stat. 138, c. 34, § 6 (1790); 1 Stat. 331, c. 19, §§ 10-11 (1793); 1 Stat. 473, c. 30, § 15 (1796).

[132] U.S. CONST. art. I, § 8, cl. 9.

[133] *Cf.* 3 ANNALS OF CONG. 751 (Dec. 20, 1792) (justifying the 1792 Indian Intercourse Act by "the power of the General Government to legislate in all the territory belonging to the Union, not within the limits of any particular State").

[134] One might point out that the 1790 statute's commercial regulations applied not merely to trade but to "intercourse." 1 Stat. 137, c. 34 (1790). *See also* 1 Stat. 329, c. 19 (1793). This was cured in the 1796 statute, which applied them only to "traders." 1 Stat. 471, c. 30, § 7 (1796).

far short of proving their case.

VIII. Comments on Professor Ablavsky's *Beyond the Indian Commerce Clause*

In *Beyond the Indian Commerce Clause*, Professor Gregory Ablavsky relies heavily on usages and statements that he says are derived from the period during the administration of President George Washington, but at the expense of evidence (such as the content of the lex mercatoria and pre-existing regulatory statutes) that could have been within the contemplation of the Constitution's framers and ratifiers. He justifies the use of this evidence as part of his "heterodox"[135] and "holistic" method of interpretation, which he contrasts with methods he labels "clause bound."[136]

Ablavsky's article is marred by a disturbing number of misleading or otherwise defective citations, which I have itemized elsewhere.[137] When those citations are corrected, the usages and views during the Washington administration sometimes turn out to be different, or the context different, from how describes them.[138] This Part VIII, however, focuses on his methodology alone.

As an initial matter, it is problematic to apply "heterodox" interpretive methods to a document designed to be construed according to orthodox ones. If interpreters can craft and apply unanticipated interpretive methods to the Constitution, then they, and not the Constitution, become the "supreme Law of the Land."[139]

Ablavsky does not define what he means by a "holistic" interpretive approach. The word "holistic" can have either of two meanings,[140] which,

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[135] Ablavsky, *supra* note 2, at 1017.

[136] He repeats the epithet "clause bound" on five separate occasions. *Id.* at 1040, 1044, 1050, 1051, & 1052 n.210.

[137] *See Cite-Checking Professor Ablavsky's "Beyond the Indian Commerce Clause," available at* https://i2i.org/wp-content/uploads/ICC-addendum-final.pdf.

[138] *Id.*

[139] *Supra* notes 19-20 and accompanying text.

[140] The online version of Merriam-Webster's Dictionary defines "holistic" as "of or relating to holism." Holistic, Merriam-Webster, https://www.merriam-webster.com/dictionary/holistic (last accessed Jun. 10, 2022). It defines "holism" as follows:

> 1: a theory that the universe and especially living nature is correctly seen in terms of interacting wholes (as of living organisms) that are more than the mere sum of elementary particles
>
> 2 : a study or method of treatment that is concerned with wholes or with

when applied to constitutional interpretation, translate into a wider and a narrower version. In the wider version, the interpreter fills in the blanks between constitutional provisions, thereby making the whole greater than the sum of the parts. A famous example is the "emanations and penumbras" approach suggested by the Supreme Court in *Griswold v. Connecticut*,[141] but never integrated into the Court's jurisprudence. One problem with this procedure is that when we insert words that aren't in the text, we upset the balance of values the framers adopted when composing that text.[142] Another problem is that when applied to enumerated powers such as the Indian Commerce Clause, this method directly violates the mandates of the Ninth and Tenth Amendments, which leave power-gaps to be filled by the states and the people, not by creative constitutional interpretation.[143]

When the narrower sense of "holistic" is applied to constitutional interpretation, it means only that in construing a provision, we consider all relevant evidence and view the provision within the context of the remainder of the document. "Holism" in this sense is uncontroversial.

It may be that Ablavsky's reliance on putative practices and views of the Washington administration derive from the wider version of "holism." One difficulty with including these practices and views is that they could not have been known to those who ratified the Constitution. Another is that the Washington administration's understanding of the Constitution's full range of Indian affairs powers cannot justify continued federal plenary power when, as Ablavsky acknowledges, all the "props that once supported exclusive federal power have been knocked out, [and] only a single slender pillar [the Indian Commerce Clause] survives to support the edifice."[144] The classic legal response to this development would be to say, "The reason for the

complete systems : a holistic study or method of treatment

Holism, Merriam-Webster, https://www.merriam-webster.com/dictionary/holism (last accessed, Jun. 10, 2022).

[141] 381 U.S. 479, 484 (1965). The approach has been widely ridiculed. *See, e.g.*, Andrew P. Morriss & Richard L. Stroup, *Quartering Species: The "Living Constitution," the Third Amendment, and the Endangered Species Act*, 30 J. ENVIR. L. 769 (2000) (satirically applying a similar "fill in the blanks" approach to conclude that the Endangered Species Act violates the Third Amendment").

[142] *Cf.* New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2131 (2022) (stating that the words of the Second Amendment are the product of balancing, and that courts should not replace that balance with their own).

[143] *See* NATELSON, TOC, *supra* note 2, at 239-49 (discussing the intended roles of the Ninth and Tenth Amendments).

[144] Ablavsky, *supra* note 2, at 1051.

law having ended, the law itself ends."[145]

Whichever holistic approach is applied, however, both require consideration of all significant evidence. It is not sufficient to conclude that the framers intended the Indian Commerce Clause to be "open-ended"[146]—a conclusion that would require overlooking their rejection of Madison's proposal to grant Congress authority over all Indian "affairs."[147] Likewise, it is not sufficient to focus on statements and actions by self-interested parties *after* the ratification and neglect key evidence—such as the content of the lex mercatoria—arising *before* the ratification. An interpretive exercise that neglects important evidence is not holistic.

Finally, in arguing for his broad reading of Congress's Indian affairs authority, Ablavsky draws an analogy to the federal government's early interpretation of its foreign affairs authority, suggesting that this interpretation was broader than a strict reading of the Constitution's enumerated powers would seem to authorize.[148] However, the Constitution's enumerated foreign affairs powers—like all of its other enumerated powers—carry with them certain incidental powers. Those incidental powers, like all others, were the product of precedent and reasonable necessity,[149] not of mere creativity or usurpation. There seems to be nothing in the early interpretation that exceeded those incidents.[150]

IX. Conclusion: The Indian Child Welfare Act

The ICWA was not the product of a treaty nor does it implement a treaty. It is not a regulation of federal land. It is not an exercise of diplomatic or war powers or a feature of the law of nations. As this article has demonstrat-

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[145] The maxim—in Latin, *Cessante ratione, cessat et ipsa lex*—was part of Founding-era jurisprudence. 2 William Blackstone, Commentaries *391 & 4 *id.* at 330.

[146] Ablavsky, *supra* note 2, at 1033-39.

[147] James Madison proposed an Indian affairs power on the Convention floor, 2 Farrand, *supra* note 2, at 324 (Aug. 18, 1787), and the committee of detail also considered one. *Id.* at 143, 159.

[148] Ablavsky, *supra* note 2, at 1052 n.210. Ablavsky relies on Andrew Kent, *The New Originalism and the Foreign Affairs Constitution*, 82 Fordham L. Rev. 757 (2011), which fails to acknowledge the role of the Founding-era incidental powers doctrine and its application to the Constitution's foreign affairs powers.

[149] Robert G. Natelson, *The Legal Origins of the Necessary and Proper Clause* in Gary Lawson, Geoffrey P. Miller, Robert G. Natelson, & Guy I. Seidman, The Origins of the Necessary and Proper Clause 60-68 (2010).

[150] Natelson, *TOC*, *supra* note 2, at 159-66 (discussing foreign affairs powers and their incidents).

ed, it is not a regulation authorized by the Indian Commerce Clause.

This conclusion is buttressed by another form of evidence. During the ratification debates, leading advocates for the Constitution—mostly lawyers of high reputation—publicly represented the federal government's limits by issuing lists of activities the government could *not* regulate.[151] These lists were remarkably consistent with each other. They included criminal law, property law, governance of education and religion, contract law, regulation of infrastructure, welfare policy—and family law.

The sponsors' representations of constitutional meaning to the ratifying public are reliable evidence of that meaning. The lists tell us that, in the absence of a treaty to the contrary, family law is not within the purview of the federal government, but of the states. Although the federal government could have negotiated treaties with the tribes embodying the terms of the ICWA, it never has. Congress has no power to impose those terms unilaterally.

Other Views:

- Brief of Amicus Curiae Professor Gregory Ablavsky in Support of Federal Parties and Tribal Defendants, Brackeen v. Haaland, No. 21-376 (Sup. Ct. Aug. 22, 2022), *available at* https://sct.narf.org/documents/haaland_v_brackeen/amicus_ablavsky.pdf.
- Stephen Andrews, *In Defense of the Indian Commerce Clause*, 9 AM. INDIAN L.J. 182 (2021), *available at* https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1229&context=ailj.
- Christopher R. Green, *Tribes, Nations, States: Our Three Commerce Powers* (Aug. 1, 2022), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3679265.
- Lorianne Updike Toler, *The Missing Indian Affairs Clause*, 88 U. Chi. L. Rev. 413 (2021), *available at* https://chicagounbound.uchicago.edu/uclrev/vol88/iss2/3/.

[151] They are collected in these three works: *More News on the Powers Reserved Exclusively to the States*, 20 FEDERALIST SOC'Y REV. 92 (2019); Natelson, *Founders, supra* note 2, at 60, & Natelson, *Enumerated*, *supra* note 2.

REVITALIZING THE NONDELEGATION DOCTRINE[*]

PAUL J. LARKIN[**]

A Review of *The Administrative State Before the Supreme Court: Perspectives on the Nondelegation Doctrine* (Peter J. Wallison & John Yoo eds., Am. Enter. Inst. 2022).

Administrative law lies at the intersection of civics, political science, and constitutional law, with each field contributing to the structure of and justification for the administrative state that governs much of contemporary life. Fortunately, administrative law attracts some of the brightest and most prolific scholars in the academy and legal profession. Through books, articles, and blog posts, they regularly debate the competing positions on how the regulatory state should be structured and how a particular architecture advances the public interest while remaining faithful (or not) to the tenets of the three fields noted above. There is an enormous body of literature in this field, and, given the subject's importance, there is no reason to believe that this scholarly output will slow down in the foreseeable future.[1]

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[*] Note from the Editor: The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. To join the debate, please email us at info@fedsoc.org.

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[1] Numerous excellent books and articles grace the shelves in law libraries. For a very small sample of them, see RICHARD A. EPSTEIN, THE DUBIOUS MORALITY OF MODERN ADMINISTRATIVE LAW (2020); PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014); LIBERTY'S NEMESIS: THE UNCHECKED EXPANSION OF THE STATE (Dean Reuter & John Yoo eds. 2016); CASS R. SUNSTEIN & ADRIAN VERMEULE, LAW & LEVIATHAN: REDEEMING THE

A recently published book—*The Administrative State Before the Supreme Court: Perspectives on the Nondelegation Doctrine*—is a timely and valuable contribution to that literature.[2] It addresses a subject of intense scrutiny in today's administrative law scholarship: the Nondelegation Doctrine.[3] Nondelegation literature focuses on the issue of what limits, if any, there are on Congress's ability to delegate to agencies the power to adopt rules that bind the public.[4] The editors, Peter Wallison and John Yoo, persuaded more than

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ADMINISTRATIVE STATE (2020); PETER WALLISON, JUDICIAL FORTITUDE: THE LAST CHANCE TO REIN IN THE ADMINISTRATIVE STATE (2018); Christopher DeMuth, *The Regulatory State*, 31 NAT'L AFFAIRS 70 (Summer 2012); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992); Gillian E. Metzger, Foreword: *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017); Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852 (2020); Antonin Scalia, Vermont Yankee: *The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345; Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421 (1987); James Q. Wilson, *The Rise of the Bureaucratic State*, 31 PUB. INTEREST 77 (Fall 1975).

[2] THE ADMINISTRATIVE STATE BEFORE THE SUPREME COURT: PERSPECTIVES ON THE NONDELEGATION DOCTRINE (Peter J. Wallison & John Yoo eds. Am. Enter. Inst. 2022) (hereafter NONDELEGATION PERSPECTIVES).

[3] Several other issues are also the subject of ongoing debate. One is what deference, if any, should the courts afford an agency's interpretation of a statute or agency rule. *See*, *e.g.*, Chevron U.S.A. Inc v. Nat. Res. Def. Council, 467 U.S. 837 (1984) (statute); Kisor v. Wilkie, 139 S. Ct. 2400 (2019) (agency rule). Another is what limitations, if any, may Congress place on the President's authority to remove agency officials. *See*, *e.g.*, Collins v. Yellen, 141 S. Ct. 1761 (2021) (presidential removal); Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477 (2010) (same). A third issue is the clarity and specificity required of Congress to grant agencies broad authority to decide major economic- and social-policy issues. *See*, *e.g.*, West Virginia v. EPA, 142 S. Ct. 2587 (2022); Nat'l Fed'n Indep. Business (NFIB) v. OSHA, 142 S. Ct. 661 (2022); Ala. Ass'n of Realtors v. HHS, 141 S. Ct. 1485 (2021); Utility Air Reg'y Grp. v. EPA, 573 U.S. 302 (2014). Still another issue is the application of the Seventh Amendment civil jury trial guarantee to common law actions that an agency seeks to litigate before an administrative law judge rather than in federal district court. *See* Jarkesy v. SEC, 34 F.4th 445, 451-59 (5th Cir. 2022). Finally, there is the issue of what, if any, limitations there are on a legislature's power to delegate lawmaking authority to private parties. *See*, *e.g.*, Carter v. Carter Coal, 298 U.S. 238 (1936); Eubank v. Richmond, 226 U.S. 137 (1912). For a sample of the literature discussing those issues, see THOMAS W. MERRILL, THE *CHEVRON* DOCTRINE: ITS RISE AND FALL, AND THE FUTURE OF THE ADMINISTRATIVE STATE (2022); Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908 (2017); Paul J. Larkin, Jr., *The Private Delegation Doctrine*, 73 FLA. L. REV. 31 (2021). These topics are beyond the scope of this book review.

[4] A classic work in this field is DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993). For supporters of a revitalized Nondelegation Doctrine, see, for example, THEODORE J. LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES 125-26 (2d ed. 2009); Larry Alexander &

a dozen scholars and practitioners to examine the Nondelegation Doctrine and draft predictions about its future. The authors do not disappoint. The collection of essays brings to mind a remark made by President John F. Kennedy at a White House dinner for Nobel laureates. With his typical eloquence, President Kennedy said that "this is the most extraordinary collection of talent . . . that has ever been gathered together at the White House, with the possible exception of when Thomas Jefferson dined alone."[5] The same could be said about *Nondelegation Perspectives*. The goal of this book review is to do justice to the essayists and their work in this valuable book.

The vitality of the Nondelegation Doctrine is an important public policy issue. Statutes and rules reflect a tradeoff between often-conflicting values, such as "human health versus economic growth."[6] Different people balance those interests differently, and the theory of our system is that the electorate chooses representatives to express its different views. But the citizenry elects none of the executive agency officials whom Congress vests with the authority to manage the national government's business, which perennially raises

Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297 (2003); Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J.L. & PUB. POL'Y 147 (2017); Aaron Gordon, *Nondelegation*, 12 N.Y.U. J.L. & LIBERTY 718 (2019); Gary Lawson, *"I'm Leavin' It (All) Up to You":* Gundy *and the (Sort of) Resurrection of the Subdelegation Doctrine*, 2018-2019 CATO SUP. CT. REV. 33; Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463 (2015); David Schoenbrod, *Consent of the Governed: A Constitutional Norm that the Court Should Substantially Enforce*, 43 HARV. J.L. & PUB. POL'Y 213 (2020); Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490 (2021). For some critics of the doctrine who would prefer to see it dead (or prefer that the courts be honest about its demise and give it a decent burial), see Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, 56 GA. L. REV. 81 (2021); Douglas H. Ginsburg & Steven Menashi, *Nondelegation and the Unitary Executive*, 12 U. PA. J. CONST. L. 251, 264 (2012); Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021); Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288 (2021); Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379 (2017). *Compare* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000) (arguing that nondelegation principles are relevant to statutory interpretation, but should not serve as a freestanding constitutional challenge to statutes).

[5] Univ. of Calif. at Santa Barbara, The American Presidency Project, President John F. Kennedy's Remarks at a Dinner Honoring Nobel Prize Winners of the Western Hemisphere, Apr. 29, 1962, https://www.presidency.ucsb.edu/documents/remarks-dinner-honoring-nobel-prize-winners-the-western-hemisphere (last accessed May 24, 2022).

[6] Douglas H. Ginsburg, *Reviving the Nondelegation Principle in the US Constitution*, *in* NONDELEGATION PERSPECTIVES, *supra* note 2, at 26 (footnote omitted).

questions about the administrative state's legitimate role in governance.[7] Moreover, "[a]dministrative agencies are issuing about 3,000 regulations with the force of law each year, roughly 28 times the number of public laws enacted annually by the Congress."[8] The legitimacy of delegated administrative governance, therefore, is no small potatoes matter. The Supreme Court has allowed Congress to use broadly and imprecisely written laws to substitute appointed for elected officials as policymakers. A vibrant Nondelegation Doctrine would return to the public a sizeable portion of its ability to choose its lawmakers.

Part I of this review will summarize the Nondelegation Doctrine for the benefit of readers who are unfamiliar with it. (Administrative law professors, scholars, practitioners, and buffs can skip ahead to Part II). Part II will summarize the essays in *Nondelegation Perspectives* and discuss how they hope not only to advance the ball down the field, but also to persuade the most important potential participants—the Justices of the Supreme Court of the United States—to play the game. Part III will offer an observation from a fan of the game.

I. NONDELEGATION STIRRINGS

The Constitution is a delegation of "Powers"[9] from "We the People of the United States"[10] to three different branches of a newly created national government.[11] Article I vests "all legislative Power" over specified issues[12] in a Congress comprised of a Senate and a House of Representatives;[13] both chambers must agree to pass a law, and then persuade the President to sign it.[14] To ensure that most law-making happens in state legislatures and state courts, Article I makes the federal legislative process slow, deliberate, and

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[7] *See generally*, *e.g.*, JAMES O. FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT (1978).

[8] Ginsburg, *supra* note 6, at 28 (footnote omitted).

[9] U.S. CONST. art. I, § 1 ("All legislative powers herein granted shall be vested in a Congress of the United States[.]"); *id*. art. II, § 1 cl. 1 ("The executive Power shall be vested in a President of the United States of America."); *id*. art. III, § 1 ("The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

[10] U.S. CONST. Pmbl.

[11] U.S. CONST. arts. I-III. For a good telling of the story of the drafting, adoption, and ratification of the Constitution, see JACK RAKOVE, ORIGINAL MEANINGS (2010).

[12] U.S. CONST. art. I, § 8.

[13] U.S. CONST. art. I, § 1.

[14] U.S. CONST. art. I, § 7; INS v. Chadha, 462 U.S. 919 (1983).

onerous. To ensure that the electorate can hold legislators accountable for their votes, Article I also requires transparency by forcing each legislator's votes to be made public and requiring each chamber to keep a publicly available "Journal of its Proceedings."[15] The predominant 18th-century legal theory also held that a legislature could not hand its lawmaking responsibilities over to an executive official.[16] The theory was that the people had delegated that authority to elected officials, and those officials could not abandon their post by vesting it—and its attendant accountability—in someone else. At least that was the theory.[17]

From its earliest days, however, Congress empowered executive officials to find facts that triggered or eliminated the need for application of a particular law.[18] The Supreme Court saw no constitutional objection to that practice. As Chief Justice William Howard Taft wrote in *J.W. Hampton, Jr., & Co. v. United States*, Congress may delegate to the executive the power to find facts or apply the law to the facts as long as Congress affords the President an "intelligible principle" that he or she must use.[19] Over time, however,

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[15] U.S. CONST. art. I, § 5, cl. 3.

[16] *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 381 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) ("The Power of the *Legislative* being derived from the People by a positive voluntary Grant and Institution, can be no other, than what that positive Grant conveyed, which being only to make *Laws*, and not to make *Legislators*, the *Legislative* can have no power to transfer their Authority of making Laws, and place it in other hands."); *see also, e.g.*, Marshall Field & Co. v. Clark, 143 U.S. 649, 692-94 (1892) ("That Congress cannot delegate legislative power . . . is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution . . . . 'The true distinction . . . is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion *as to its execution,* to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made."' (emphasis added) (quoting Cincinnati, Wilmington etc. R.R. v. Commissioners, 1 Ohio St. 88 (1852))); Shankland v. Mayor of Wash., 30 U.S. (5 Pet.) 390, 395 (1831) (noting "the general rule of law is, that a delegated authority cannot be delegated").

[17] *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 131-32 (1980); SCHOENBROD, *supra* note 4, at 99.

[18] *See* Larkin, *supra* note 3, at 32 & n.3. For example, the Non-Intercourse Act of 1809, ch. 24, § 11, 2 Stat. 528, 530–31, imposed an embargo on trade with England and France but empowered the President to lift the embargo if he found that they had ceased to violate the declared neutrality of the United States in their war. *See* The Cargo of the Brig Aurora v. United States, 11 U.S. (7 Cranch) 382 (1813) (upholding that delegation). Congress later empowered the President to suspend the tariff-free importation of certain goods if he found that the exporting nation did not allow the tariff-free entry of those goods from the United States. *See Field*, 143 U.S. 649 (same).

[19] 276 U.S. 394, 409 (1935) (upholding over a delegation challenge a tariff act that empowered the President to waive customs duties on imported merchandise if their foreign production costs equaled those of like goods produced in this country); *see also*, *e.g.*, Whitman v. Am. Trucking

Congress began to expand the authority of executive officials beyond the fact-finding and law-applying responsibilities at issue in the Supreme Court's early decisions. Now, Congress sought to palm off difficult policy choices by delegating its lawmaking power to federal agencies with only the vaguest guidance as to how they should exercise it. Some delegations merely provide that an agency must act "in the public interest," a requirement that would seem to apply without Congress even saying it.[20] Despite the tectonic shift in the practice of delegation, the Supreme Court did not enforce separation of powers principles by demanding that Congress itself use its legislative power. In fact, but for two 1935 decisions holding unconstitutional delegations to executive officials,[21] the Court has sustained every federal law challenged on this ground.[22] The Court explained why in *Mistretta v. United States*, where it reasoned (if starting from a premise that assumes the conclusion counts as "reasoning") that "Congress simply cannot do its job absent an ability to

Ass'ns, 531 U.S. 457, 472 (2001) ("In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency. Article I, § 1, of the Constitution vests '[a]ll legislative Powers herein granted . . . in a Congress of the United States.' This text permits no delegation of those powers . . . and so we repeatedly have said that when Congress confers decisionmaking authority upon agencies *Congress* must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'") (emphasis added in *Whitman*) (citations omitted).

[20] *See* Nat'l Broad. Co. v. United States, 319 U.S. 190, 194, 226 (1943) (upholding over a nondelegation challenge a law empowering the FCC to regulate in the "public interest, convenience, or necessity"); N.Y. Cent. Sec. Corp. v. United States, 287 U.S. 12, 20–21, 27–29 (1932) (upholding a statute allowing the Interstate Commerce Commission to approve acquisitions that were "in the public interest").

[21] *See* Panama Refining Co. v. Ryan, 293 U.S. 388, 418, 433 (1935) (holding unconstitutional a provision in the National Industrial Recovery Act of 1933 (NIRA) granting the President authority to prohibit the distribution of oil produced in excess of a production quota (so-called "hot oil"); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 542 (1935) (holding unconstitutional a different NIRA provision delegating to trade or industrial groups the authority to define "unfair methods of competition" if the President subsequently approved the proposal). A third case holding a delegation unconstitutional—*Carter v. Carter Coal Co.*, 298 U.S. 238 (1936)—involved a delegation to private parties. *See* Larkin, *supra* note 3, at 48-50.

[22] *See*, *e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. at 473–76 (2001); American Power & Light Co. v. SEC, 329 U.S. 90, 104 (1946); Yakus v. United States, 321 U.S. 414, 420 (1944); Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940); Panama Refining, 293 U.S. 388; Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42–43 (1825); Sunstein, *supra* note 4, at 322 ("We might say that the conventional doctrine has had one good year, and 211 bad ones (and counting).").

delegate power under broad general directives."[23] The Nondelegation Doctrine looked dead.[24]

Nonetheless, several commentators have attempted to revive the doctrine over the last few decades.[25] They have argued that the Nondelegation Doctrine can and should address the economic, social, and political ills that result from the relentless growth of the administrative state. Among those ills are the continually expanding power regulators have over public and private life; the unwillingness of Congress to do anything other than shovel more responsibility over to unelected executive officials to avoid taking responsibility for making hard choices; and the ceaseless parade of Presidents succumbing to their desire to undertake ever more regal governance of what they treat as *their* kingdom. Those baneful consequences, this insurgency notes, followed from the Supreme Court's willful refusal to enforce the separation of powers principles that a vital Nondelegation Doctrine would protect.

In 1980, the Supreme Court offered a tantalizing suggestion that there might be life left in the Nondelegation Doctrine.[26] Perhaps, the doctrine would become a phoenix rather than a corpse. But that hint was all we saw; there was nary a holding.[27] The Court declined several later opportunities to

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[23] 488 U.S. 361, 372 (1989); *see also*, e.g., Opp Cotton Mills, Inc. v. Admn'r, 312 U.S. 126, 145 (1941) ("In an increasingly complex society Congress obviously could not perform its functions if it were obliged to find all the facts subsidiary to the basic conclusions which support the defined legislative policy"). As Professor Gary Lawson tartly but correctly put it, "Presumably, according to the Court, Congress's 'job' is to facilitate regulations with which a majority of the Court agrees rather than to exercise the powers actually granted to Congress by the Constitution. Just so we are clear." Lawson, *supra* note 4, at 68 n.70.

[24] Most of the academy formally pronounced it as such. *See*, *e.g.*, Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002); *see supra* note 4.

[25] *See supra* note 4.

[26] In *Industrial Union Dep't v. Am. Petrol. Inst.*, 448 U.S. 607 (1980) (*Benzene Case*), then-Associate Justice William Rehnquist provided the fifth vote necessary to hold invalid a standard governing benzene issued by the Secretary of Labor under the Occupational Safety and Health Act of 1970 (OSHA). A plurality of the Court ruled that the standard was not supported by substantial evidence. *Id*. at 630-62 (plurality opinion). Justice Rehnquist concurred only in the judgment. He concluded that Congress had impermissibly delegated to the Secretary responsibility for defining the term "infeasible" in a provision of the Occupational Safety and Health Act of 1970. *Id.* at 671-88 (Rehnquist, J., concurring in the judgment).

[27] One year after the *Benzene Case*, a majority of the Court in *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490 (1981) (*Cotton Dust Case*), upheld a different OSHA standard, this one addressing cotton dust, under the same "feasibility" provision discussed in the *Benzene Case*. In the course of doing so, the *Cotton Dust Case* majority implicitly rejected Justice Rehnquist's position that a "feasibility" standard was unconstitutional. *See id*. at 548 (Rehnquist, J., dissenting).

revive the doctrine.[28] The Court did so even in a case asking whether Congress could delegate taxation authority to an agency, a subject of particular interest to the Founding Generation.[29] At the beginning of the new century, Justice Antonin Scalia seemed to dash all hope for a rebirth of the Nondelegation Doctrine. Writing for the Court in 2001 in *Whitman v. American Trucking Associations*, he rejected the argument that Congress had unconstitutionally delegated lawmaking power to the Environmental Protection Agency Administrator by allowing her to set an ambient air quality standard containing "an adequate margin of safety" that is "requisite to protect the public health."[30] With the *American Trucking* decision, whatever hope there was for a rebirth of the Nondelegation Doctrine seemed to have vanished.

But in 2019, five Justices expressed a willingness in two different cases—*Gundy v. United States*[31] and *Paul v. United States*[32]—to reconsider the Court's Nondelegation Doctrine precedents. *Gundy* was a nondelegation challenge to a provision in the Sex Offender Registration and Notification Act (SORNA)[33] directing the U.S. Attorney General to decide whether the act's provisions should apply to offenders convicted before the act became law.[34] The nondelegation issue arose because SORNA did not identify any factors that the Attorney General should consider or any finding that the Attorney General must make when deciding whether to apply SORNA

[28] *See* Loving v. United States, 517 U.S. 748 (1996) (upholding Congress's delegation of authority to the President to define aggravating factors for use at capital sentencing); Touby v. United States, 500 U.S. 160 (1991) (upholding a delegation to the U.S. Attorney General of authority to list new controlled substances on an emergency basis); Skinner v. Mid-America Pipeline Co., 490 U.S. 212 (1989) (upholding Congress's delegation to the Secretary of Transportation of the power to adopt a system of user fees to underwrite pipeline safety programs); *Mistretta*, 488 U.S. 361 (upholding Congress's delegation to the U.S. Sentencing Commission of the power to adopt binding sentencing guidelines). *See generally* Lawson, *supra* note 4, at 48-49 & nn.78-79.

[29] *See Mid-America Pipeline Co*., 490 U.S. at 223-24 ("We find no support, then, for Mid–America's contention that the text of the Constitution or the practices of Congress require the application of a different and stricter nondelegation doctrine in cases where Congress delegates discretionary authority to the Executive under its taxing power.").

[30] 531 U.S. 457. *See* 42 U.S.C. § 7409(b)(1) (2018).

[31] 139 S. Ct. 2116, 2130–31 (2019) (Alito, J., concurring in the judgment); *id.* at 2131–48 (Gorsuch, J., joined by Roberts, C.J., & Thomas, J., dissenting).

[32] 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., statement respecting the denial of certiorari).

[33] 34 U.S.C. 20901-20962 (2018).

[34] SORNA required parties convicted of particular sex offenses to provide certain identifying information (name, address, etc.) in every state where they live, work, or study. 34 U.S.C. §§ 20913(a), 20914(a). The House of Representatives and the Senate disagreed over whether the registration requirements should apply to those convicted before the act took effect, and Congress directed the U.S. Attorney General to answer that question. *Id.* § 20913(d).

retroactively. Put into Nondelegation Doctrine terms, SORNA identified no "intelligible principle" for the Attorney General to use, even though the presence of some such standard had been critical to the Supreme Court's jurisprudence. Only eight Justices participated in the *Gundy* decision because Justice Brett Kavanaugh had not yet joined the Court. The Court upheld the SORNA delegation to the Attorney General by a 5-3 vote, but Justice Samuel Alito, who voted with the majority, wrote separately to express his willingness to reconsider the Nondelegation Doctrine in a different case.[35] The three dissenters would have struck down this provision of SORNA as a violation of the Nondelegation Doctrine.[36] That made four Justices willing to breathe life into the doctrine. *Paul* was a different case involving the same statute, but this time Justice Kavanaugh had joined the Court. In an opinion accompanying the denial of review in *Paul* given the Court's ruling in *Gundy*, Justice Kavanaugh also signaled a willingness to reconsider the Nondelegation Doctrine. That made five Justices willing to revisit the subject. Atop that, another new member, Justice Amy Coney Barrett, joined the roster in 2020, and she has not yet expressed her views on the subject. As a result, there is reason to believe that the Court is now willing to decide whether the Nondelegation Doctrine is a living part of our law or just a phantasm like Jacob Marley's ghost.

Nondelegation Perspectives therefore appears at an auspicious time. It no longer is a hopeless task to argue the Nondelegation Doctrine should be given new life.[37] The book's essayists make an impressive case that the Court should do just that.

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[35] *Gundy*, 139 S. Ct. at 2130–31 (Alito, J., concurring in the judgment).

[36] *Id.* 2131–48 (Gorsuch, J., joined by Roberts, C.J., & Thomas, J., dissenting).

[37] *Compare* Cynthia R. Farina, *Deconstructing Nondelegation*, 33 HARV. J.L. & PUB. POL'Y 87, 87 (2010) ("If Academy Awards were given in constitutional jurisprudence, nondelegation claims against regulatory statutes would win the prize for Most Sympathetic Judicial Rhetoric in a Hopeless Case."), *with* Pojanowski, *supra* note 1, at 855–56 ("Rumblings at the Supreme Court also suggest that the current balance is becoming unstable. . . . All told, hornbook doctrine on judicial review is under fire for being both too timid and too intrusive.").

II. Laying Out the Playing Field, Defining the Rules of the Game, and Encouraging People to Play

The essays in *Nondelegation Perspectives* fit neatly into three categories. Two of them—the ones by Professors Jonathan Adler and John Harrison[38]—demarcate the playing field within which the Nondelegation Doctrine should operate, thereby limiting its reach. Another group of essays—by Professors Gary Lawson, Michael Rappaport, and David Schoenbrod, as well as by litigators Todd Gaziano and Ethan Bevins of the Pacific Legal Foundation (PLF) and Mark Chenoweth and Richard Samp of the New Civil Liberties Alliance (NCLA)—offer different rules by which the game should be played.[39] The remaining essays—by Professors Saikrishna Bangalore Prakash and Joseph Postell (along with brief repeat performances by Schoenbrod, Gaziano, and Blevins)—encourage people (read: Supreme Court Justices) to play the game by arguing that the consequences of revitalizing the Nondelegation Doctrine would not be as disastrous as supporters of today's administrative state would claim.[40]

A. Laying Out the Playing Field

Rather than start by suggesting an alternative to the *J.W. Hampton* "intelligible principle" test, Professor Adler takes a step back to consider what should be the boundaries of the Nondelegation Doctrine. Borrowing language from the analysis used in cases applying the *Chevron* Doctrine, he proposes that the Supreme Court start its nondelegation analysis at what he calls "Step Zero" and ask whether Congress intended to authorize an agency to

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[38] Jonathan H. Adler, *A "Step Zero" for Delegation*, *in* NONDELEGATION PERSPECTIVES, *supra* note 2, at 161; John Harrison, *Executive Administration of the Government's Resources and the Delegation Problem*, *in* NONDELEGATION PERSPECTIVES, *supra* note 2, at 232.

[39] Mark Chenoweth & Richard Samp, *Reinvigorating Nondelegation with Core Legislative Power*, *in* NONDELEGATION PERSPECTIVES, *supra* note 2, at 81-122; Gary Lawson, *A Private-Law Framework for Subdelegation*, *in* NONDELEGATION PERSPECTIVES, *supra* note 2, at 123; Michael B. Rappaport, *A Two-Tiered and Categorical Approach to the Nondelegation Doctrine*, *in* NONDELEGATION PERSPECTIVES, *supra* note 2, at 195; Todd Gaziano & Ethan Bevins, *The Nondelegation Test Hiding in Plain Sight: The Void-for-Vagueness Doctrine Gets the Job Done*, *in* NONDELEGATION PERSPECTIVES, *supra* note 2, at 45.

[40] Saikrishna Bangalore Prakash, *The Sky Will Not Fall: Managing the Transition to a Revitalized Nondelegation Doctrine*, *in* NONDELEGATION PERSPECTIVES, *supra* note 2, at 274; Joseph Postell, *Can the Supreme Court Learn from the State Nondelegation Doctrines?*, *in* NONDELEGATION PERSPECTIVES, *supra* note 2, at 315. The Gaziano-Bevins essay also serves the same goal.

For the reader's ease, henceforth I will forgo Bluebook conventions, citing only the author and appropriate page references.

engage in *internal* or *external* regulation. That is, the threshold question should be whether Congress merely empowered government officials to regulate their own performance of the government's business or instead empowered an agency to regulate the conduct of private parties or the private market. The first kind of delegation concerns the internal operation of (for example) the Postal Service, while the other allows officials to direct the conduct of private parties so that the Post Office can execute its mail delivery responsibilities.[41] The former would allow a Postmaster to decide when to be open for business and whom to hire as a Pony Express rider; the latter, to fix the size and sturdiness of mailboxes for home delivery.[42] The latter is far more intrusive, so it makes sense for courts to decide whether Congress intended to allow agencies to order compliance with federal dictates and, if so, just how far agencies may go.

Professor Harrison steps back even further. Like Prof. Adler, he wants courts to distinguish between regulations governing the conduct of government officials and regulations directing the actions of nongovernment parties in the private sector. But he simply would not apply the Nondelegation Doctrine to the former type of actions. The federal government owns and manages property just as private individuals do, as the Constitution recognizes.[43]

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[41] Professor Adler also would have Congress address the back end of the regulatory process by using sunset provisions to force Congress to re-examine whether regulatory programs make sense given new technological, societal, and legal developments since the members last voted on the relevant regulatory scheme. Adler 166-71. Professor Adler elaborated on that point in Jonathan H. Adler & Christopher J. Walker, *Delegation and Time*, 105 IOWA L. REV. 1931 (2020). For example, by 2022, the internet has completely upended the foundation of the Telecommunications Act of 1996, Pub. L. No. 101-104, 110 Stat. 56 (codified at 47 U.S.C. ch. 5 (2018)). Adler argued that Congress should reconsider whether that law remains a sensible regulation of private conduct. The same is true in the area of environmental law. Congress last revised the Clean Air Act in 1990. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2468 (codified at 42 U.S.C. ch. 85 (2018)). At that time, Congress did not adopt rules specifically governing greenhouse gases such as carbon dioxide. Nonetheless, a 5-4 majority of the Supreme Court held that the EPA could regulate greenhouse gases under that act in *Massachusetts v. EPA*, 549 U.S. 497 (2007). Sunset provisions in regulatory schemes would force Congress to revisit such governing statutes on a regular basis and update or repeal them as necessary. A sunset provision is an excellent idea, but the Supreme Court cannot impose it on Congress under the Nondelegation Doctrine or any other. The Constitution contains but one statutory sunset provision: appropriations for the army cannot extend more than two years. U.S. CONST. art. 1, § 8, cl. 12. Congress itself must adopt any others.

[42] A Brief History of Mailboxes, National Mailboxes, https://www.nationalmailboxes.com/learn/ (last visited June 20, 2022).

[43] Article I empowers Congress to "lay and collect Taxes, Duties, Imposts and Excises," as well as to "coin Money." U.S. CONST. art. I, § 8, cls. 1 & 5. Article IV states that the federal government may own real estate and personal property. U.S. CONST. art. IV, § 3, cl. 1 ("New States may be admitted by Congress into this Union . . . ."); *id*. cl. 2 ("The Congress shall have Power to dispose

Professor Harrison asks whether it makes sense for the Nondelegation Doctrine—developed to address Congress's decisions to vest executive officials with the power to regulate *private conduct and private property*—to govern how the national government regulates *public conduct and public property*. He answers that question, "No."[44]

Professors Adler and Harrison are spot-on about their proposals.

Consider the way Professor Adler's Step Zero proposal is analogous to the common law. The laws of contracts, torts, and crime affect how individuals live and work, but the rules of civil and criminal procedure do not have that effect unless someone is involved in litigation. While it makes sense for Congress to adopt substantive legal rules, Congress could reasonably empower the courts to regulate their own operations, even when the rules they make affect private parties. Deciding what should be contained in a complaint or indictment, an answer or arraignment, or a judgment is precisely the type of task that the Framers might reasonably have believed the judiciary is better suited to than are members of Congress, who are not all lawyers. Professor Adler's Step Zero proposal asks the Supreme Court to pursue just that type of analysis. It also helps make sense of two Marshall Court decisions that went in different directions regarding delegation. On the one hand, in *Wayman v. Southard*, Chief Justice John Marshall found unobjectionable a provision in the Judiciary Act of 1789[45] that delegated to the courts the authority to define the necessary elements and format of a judgment;[46] on the other hand, Justice William Johnson, Jr., concluded in *United States v. Hudson and Goodwin* that the federal courts could not define federal crimes.[47] Step Zero analysis resolves

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of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ."). Try to steal the government's coins or other property, and you will learn the hard way who owns it. *See*, *e.g.*, 18 U.S.C. § 641 (2018) (making it a crime to steal "any . . . money . . . of the United States or of any department or agency thereof"). Article II implicitly directs the President to serve as a trustee of federal property for the public's benefit. U.S. CONST. art. II, § 1, cl. 1 (vesting "the executive Power" in the President); *id*. § 3 (directing the President to "take care that the Laws be faithfully executed"); *see* GARY LAWSON & GUY SEIDMAN, "A GREAT POWER OF ATTORNEY": UNDERSTANDING THE FIDUCIARY CONSTITUTION (2017).

[44] "Spending programs and government services are not rules about private conduct. Executive agents that implement such programs fill in many details, but not in rules that tell private parties what they may and may not do." Harrison 235. *See generally id*. at 232-73.

[45] Judiciary Act of 1789, ch. 20, 1 Stat. 73, § 17 (authorizing the federal courts "to make and establish all necessary rules for the orderly conducting [*sic*] business in the said Courts").

[46] Wayman v. Southard, 23 U.S. (10 Wheat.) 1 (1825).

[47] 11 U.S. (7 Cranch) 32 (1812).

the apparent tension between these decisions by applying the Nondelegation Doctrine to defining substantive crimes, but not to creating procedural rules.

Professor Harrison's essay also offers a valuable insight. Congress's purpose is to exercise the authority vested in its members to create new federal law to govern the private conduct of the entire nation or some subset of its members in one of the categories set forth in Article I, Section 8 of the Constitution. Once Congress has completed its task, executive officials carry those laws into effect, and courts adjudicate disputes arising under them.[48] But when an executive official manages federal property or money, he or she is not regulating the conduct of private parties. On the contrary, that official is acting as a landlord, caretaker, or trustee charged with the proper management of whatever property the national government holds in the public's name for its use. That property might be real estate in the form of a forest or open land that will be used to construct federal ships or buildings, or it might be the ships and buildings after they are built. Congress can tell executive officials not to allow that property to waste away, which is a sufficiently intelligible principle for that purpose. Indeed, Congress might not need to do even that because that duty would be an implicit requirement of the responsibility for managing it. Either way, as Professor Harrison explains, the *J.W. Hampton* intelligible principle standard (and a healthy dose of common sense) is a sufficient guideline for the President to know what to do in this regard.

The issue is more complicated when the property is characterized as a "license," as it is in the case of radio and television broadcast licenses, or as the "intangible right" to freely navigate interstate waterways, rather than as realty or personalty. Nonetheless, as Professor Harrison maintains, the same principle should govern.[49] If the Privileges and Immunities Clause of Article IV[50] guarantees the freedom to travel by water from one state to another,[51] to the 18th-century mind, that right would be protected as a communal form of

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[48] Harrison 239.

[49] *Id.* at 247-59; *see, e.g.*, Penn. v. Wheeling & Belmont Bridge Co., 59 U.S. 421 (1855).

[50] U.S. CONST. art. IV, § 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities in the several States.").

[51] And it certainly does; otherwise, the prohibition on discriminating against citizens of other states would be senseless.

"property" that the national government would manage for the benefit of all.[52]

Adler and Harrison do the helpful preliminary work of establishing where a revived Nondelegation Doctrine should and should not apply—of setting the foul lines. The doctrine is meant to protect citizens from an overzealous executive branch hampering their freedom without democratic warrant or accountability, not to make it difficult for the executive branch to set rules for itself.

B. Defining the Rules of the Game

The English and American common law was the canvas upon which the Framers painted. Professor Lawson extracts from that canvas principles of agency law that distinguish between what the principals—members of the public—expect that their agents—Representatives and Senators—must carry out themselves and what those agents may subdelegate to others—executive and judicial branch officials.[53]

As Professor Lawson explains, the Constitution contains a delegation from "We the People" of the "legislative Power" to the "Congress." Eighteenth-century law governing the relationship between principals and agents was strict. An agent could not subdelegate his or her responsibilities to third

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[52] Paul J. Larkin, Jr., *The Original Understanding of "Property" in the Constitution*, 100 MARQ. L. REV. 1, 18-19 (2016) (footnotes omitted):

> The term "right" acquired its modern understanding in the seventeenth century. Originally, that term referred only to a valid title of ownership, such as the title to real estate. The terms "liberty" or "privilege" were more commonly used than "right." They referred either to the protections all enjoyed against the arbitrary actions of the Crown or to a benefit bestowed on particular individuals by the king. Yet, the modern-day notion of a "right" as an enforceable legal guarantee arose during the great religious and political battles between the Crown and Parliament during the seventeenth century. Parliament, for example, opposed the efforts of the Stuart kings to raise revenue without authorization from Parliament by arguing that the king's actions undercut the right of the people to be governed by their elected representatives. Defenders of religious and political dissenters also argued that individuals have a fundamental right of freedom of conscience that disabled the government from coercing them to adopt a particular belief.
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> The understanding of a "right" therefore changed in two important ways during that period. The first was that the concept of "right" had expanded "to embrace and even subsume the variety of claims and activities formerly classified as 'liberties and privileges.'" The second change was that "the notion of ownership that lay at the core of the original meaning of right now described just what it was that the holders of rights enjoyed." Unlike a liberty or privilege that the state could withdraw, a right was something that its possessor owned, just as he owned land.

[53] Lawson 123-60.

parties whom the principal did not select for an assigned job.[54] There was, however, a small amount of wiggle room. Atop their assigned powers, agents possessed certain ancillary powers, limited in number and scope, that were necessary to complete their assigned tasks.[55] Assign John Doe the job of building a barn or a ship, and he may hire carpenters and purchase supplies.[56] Chief Justice Marshall drew on those principal-agent rules in his opinion in *Wayman*, which upheld a delegation allowing the federal court to draft rules of procedure.[57]

Applying these principles to the Constitution, Professor Lawson explains, Congress could assign nonlegislative tasks to executive officials and judges for the proper execution and smooth operation of the government's business.[58] Among them would be making factual findings (such as deciding whether Tom Roe was a soldier in General George Washington's colonial army and therefore is entitled to a pension); applying the law to the facts (such as determining the amount of customs due to the government from a particular shipment[59]); and deciding what to do when the facts and law are clear but do not answer a given question (such as deciding what to do with people convicted of a crime and sentenced to incarceration[60]). Relying on common-law agency principles might not provide as bright a line for delegation purposes as might be available in other areas of constitutional law—the Sixth Amendment begins with the phrase "In all criminal prosecutions," so its

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[54] "Generally speaking, the principal would specify what the agent was entrusted to do, and the agent could not pass that responsibility on to someone else because the principal chose a particular assignment for a specific task." *Id.* at 143.

[55] "But the agency agreement could expressly or impliedly allow for Subdelegation given the nature of the instrument, the task, or both." *Id.*

[56] "Under founding-era agency-law principles, agents could authorize subagents to 'fill up the details' of powers granted to the agents, but only with respect to incidental matters, and under founding-era principles of government, federal executive and judicial officials applying congressional laws were subagents to the background rules of agency law." *Id.* at 126 (citation omitted).

[57] *Supra* text accompanying notes 45-47.

[58] "The Marshallian formulation [in *Wayman*] can be seen as a shorthand reference to this private-law doctrine." Lawson 143.

[59] Congress might set the rate per ton, but somebody else must weigh the cargo and calculate the payment.

[60] Congress must pass criminal laws that authorize imprisonment, but somebody else must decide where a prisoner should be confined and when to let him go. That was not as readily answerable a question as it would be today. Early in our history, there were no federal prisons. Federal courts sentenced convicted offenders to confinement in any in-state prison willing to accept them. Otherwise, the federal marshal had to rent space elsewhere as a temporary jail until other arrangements could be made. Paul J. Larkin, Jr., *Parole: Corpse or Phoenix?*, 50 AM. CRIM. L. REV. 303, 308 & nn.21-22 (2013).

requirements do not apply to ordinary civil contract disputes—but it is miles from drawing an arbitrary line and also from the type of line-drawing that divided Judges Benjamin Cardozo and William Andrews in *Palsgraf*.[61]

Professor Rappaport offers a two-tiered approach to delegation questions, an approach that will be familiar to anyone who has dealt with equal protection law. Just as equal protection law applies strict scrutiny for classifications based on race or lineage and a less exacting review to economic legislation,[62] the professor would employ strict or lenient review for different types of delegations. Strict review is appropriate for "rules that regulate the private rights of individuals in the domestic sphere."[63] The effect of applying strict scrutiny would be to bar executive officials from "exercising *any* policymaking discretion."[64] Three types of activities lie outside of "policymaking": (1) finding the facts, (2) interpreting the law, and (3) applying the law to the facts.[65] Those exceptions, in my opinion, certainly make sense. After all, the Constitution and Bill of Rights require a jury trial in criminal and (most) civil cases, and the first and third categories just mentioned are the classic roles for a jury to fill.[66] The second activity is inherent in the President's sworn obligation to enforce the law.[67] To do so, he must decide, with the advice of his chief lieutenants, what that law is.[68] Accordingly, the category for which strict nondelegation review is appropriate is internally coherent. It also parallels the "private rights" doctrine under which a party is entitled to have an Article III

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[61] *Compare* Palsgraf v. Long Island R. Co., 248 N.Y. 339, 340-47 (1928) (majority opinion of Cardozo, J.), *with* 248 N.Y. at 347-56 (opinion of Andrews, J., dissenting).

[62] *See*, *e.g.*, United States v. Vaello Madero, 142 S. Ct. 1539, 1542-44 (2022); Wis. Legis v. Wis. Elections Comm'n, 142 S. Ct. 1245, 1248 (2022). Classifications based on sex are subject to an intermediate standard of review that is closer to strict scrutiny than to rational basis review. *See*, *e.g.*, United States v. Virginia, 518 U.S. 515, 524, 531 (1996).

[63] Rappaport 196.

[64] *Id*. Professor Rappaport does not say whether his rule would apply when lives are at stake and there is literally no opportunity and time to await congressional action. I agree with his general rule, but would not go so far as to preclude such an exception. Professor Rappaport also says that ordinary statutory interpretation by executive officials is permissible, but the *Chevron* Doctrine would not survive under his test. *See id*. at 208.

[65] *Id*. at 196, 203.

[66] *See* Sparf v. United States, 156 U.S. 51, 102-03 (1895) ("We must hold firmly to the doctrine that in the courts of the United States it is the duty of juries in criminal cases to take the law from the court, and apply that law to the facts as they find them to be from the evidence. Upon the court rests the responsibility of declaring the law; upon the jury, the responsibility of applying the law so declared to the facts as they, upon their conscience, believe them to be.").

[67] U.S. CONST. art. II, § 1, cl. 6 (presidential Oath of Office); *id*. § 3 (Take Care Clause).

[68] U.S. CONST. art. II, § 2, cl. 1 (Opinion Clause).

judge act as ultimate decisionmaker, rather allow an Article II official to have the final say.[69]

By contrast, lenient review is appropriate for subjects that fall within traditional executive responsibilities.[70] Among them are regulation of the military;[71] the conduct of foreign affairs, including foreign commerce;[72] managing federal property;[73] and spending appropriated funds.[74] Professor Rappaport's approach avoids requiring the type of undirected line-drawing that has scared off the Supreme Court for nearly 90 years, and it also has the virtue of exempting subject matters that fit comfortably with the powers that the Framers expressly vested in the President.

NCLA's Chenoweth and Samp offer a similar proposal. They say that the "intelligible principle" test has "gradually expanded with repeated use—like a worn-out elastic band"—so that every imaginable statutory formulation satisfies it.[75] They propose instead a three-step inquiry. First, if Congress has literally or effectively provided the agency with no standard at all other than a vacuous goal, the delegation should be held per se invalid. A directive to regulate "in the public interest," say Chenoweth and Samp, is equivalent to having no standard at all because an agency would be obliged to pursue that goal even if Congress wrote nothing in the statute to focus the agency's conduct.[76]

Second, they would require Congress to provide guidance to executive officials that is sufficiently clear that a reviewing court can discern whether the agency has complied with its directive. That "clear statement principle" would "shift the focus from whether Congress has given an 'intelligible principle' *to the executive* (which judges may be ill-equipped to ascertain) to ask

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[69] Rappaport 200-02 (referring to Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 566 (2007)); *see also*, *e.g.*, Oil States Energy Servs., LLC v. Greene's Energy Group, LLC, 138 S. Ct. 1365, 1372-79 (2018) (discussing the "private rights" and "public rights" doctrines).

[70] Rappaport 199-203.

[71] The Article II Commander-in-Chief Clause authorizes the President to manage the armed forces even in the absence of any legislation. U.S. CONST. art. II, § 2, cl. 6.

[72] The Article II Ambassadors Clause authorizes the President to "receive Ambassadors and other public Ministers," which also empowers him to decide whether to recognize a foreign government as legitimate. U.S. CONST. art. II, § 2; Zivotofsky v. Kerry, 576 U.S. 1 (2015).

[73] *Supra* notes 41-43 & 48 and accompanying text.

[74] Postell 199. Appropriated funds, as noted above, are federal property until disbursed. *Supra* text following note 48.

[75] Chenoweth & Samp 89.

[76] *Id*. at 89-92.

instead whether Congress has provided sufficient standards *to the judiciary*" for judges to determine whether an agency has gone off on a frolic and detour of its own devise.[77]

Finally, they argue certain core legislative powers should be deemed nondelegable. Rather than ask whether an issue is sufficiently important that a court would expect that Congress would have resolved it rather than delegate it to an agency—the essence of the Supreme Court's Major Questions Doctrine[78]—Chenoweth and Samp urge the Court to identify "core legislative functions" that Congress cannot hand over to executive officials. The taxing power, the spending power (at least as to the amount and source of appropriated funds), the power to define criminal laws, the authority to make policy-based tradeoffs, the ability to engage in oversight of the executive branch—those are core legislative functions that Congress should not be allowed to pass off to the executive, regardless of whether an agency has superior expertise in the field at issue or the members want to avoid accountability for taking a politically unpopular position.[79]

PLF's Gaziano and Blevins argue that the answer to our nondelegation conundrum has been standing there right before our eyes all along. The Void-for-Vagueness Doctrine is the offspring of the marriage of criminal and constitutional law. The century-plus-old doctrine provides that a statute must afford "ordinary people"[80]— people of "common"[81] or "ordinary" intelligence[82]—fair notice of what is a crime.[83] A criminal law is impermissibly vague when its text "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application"[84] or its "mandates are so uncertain that they will reasonably admit of different constructions."[85] The Void-for-Vagueness and Nondelegation Doctrines share a common denominator: "A law must

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[77] *Id*. at 93 (emphasis in original); *see also id*. at 93-95.

[78] *See*, *e.g.*, King v. Burwell, 576 U.S. 473, 484-86 (2015); *Utility Air Reg'y Grp.*, 573 U.S. at 323-34; FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000); *infra* text accompanying notes 123-25.

[79] Chenoweth & Samp 98-107.

[80] *Id.*

[81] Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926).

[82] Harriss v. United States, 347 U.S. 612, 617 (1954).

[83] *See, e.g.*, Paul J. Larkin, *The Clean Water Act and the Void-for-Vagueness Doctrine*, 20 GEO. J.L. & PUB. POL'Y 639 (2022).

[84] *Connally*, 269 U.S. at 391.

[85] *Id.* at 393; *see also*, *e.g.*, United States v. Davis, 139 S. Ct. 2319, 2325 (2019).

not allow those enforcing it to essentially make it up as they go along."[86] An added feature of this argument is that, if a regulatory scheme can be enforced through the criminal law, the Supreme Court must apply the Void-for-Vagueness Doctrine to the substantive provisions of the underlying statute to satisfy the notice concerns that doctrine enforces.[87]

Finally, Professor Schoenbrod, a 30-year student of the Nondelegation Doctrine, comes at the issue from a unique direction. Rather than address nondelegation concerns by tightening the "intelligible principle" standard or by enhancing the degree of scrutiny that the courts should use to review delegated rulemaking, he suggests that courts approach the problem by capping the costs that an agency should be able to impose on the nation at $100 million. That amount didn't come from nowhere. Under the last five Presidents, any rule that would have an annual effect on the national economy of $100 million or more is a "significant regulatory action" that must be submitted to the Office of Information and Regulatory Affairs for review.[88] That standard also defines a "major" rule for purposes of the Congressional Review Act,[89] which requires new agency rules to be submitted to Congress for its review.[90] Schoenbrod urges the Supreme Court to use that dollar amount as the limit of a permissible delegation. If the President and Congress have made it clear by executive order and statute that they—the political branches—must review "significant" or "major" rules before they can take effect, the Court will only be enforcing what the other branches of government have already found to be a reasonable dividing line.

The bottom line is this: The essays discussed above offer the Supreme Court a handful of different nondelegation standards to use to ensure that Congress and agencies respect the limitations on Articles I and II. The Court could even combine two or more of them. Collectively, they answer the argument that there is no principled way to decide which delegations are in the field of play and which are out of bounds.

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[86] Gaziano & Blevins 55.

[87] *See* Larkin, *supra* note 83.

[88] Schoenbrod 358-59 & 372 n.89 (discussing Exec. Order No. 12,866, § 3(f)(1), 3 C.F.R. 638, 641-42 (1994)).

[89] The Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, Tit. II, Subtit. E, 110 Stat. 871 (1996) (codified at 5 U.S.C. §§ 801-08 (2012)). Some members of Congress have proposed that remedy in legislation known as the Regulations from the Executive in Need of Scrutiny Act (REINS Act), S.68, 117th Cong. (2021). The bill would require Congress to pass every agency rule with an effect on the economy of $100 million or more.

[90] *See* Paul J. Larkin, Jr., *Reawakening the Congressional Review Act*, 44 HARV. J.L. & PUB. POL'Y 187 (2018) (discussing the operation of the CRA).

C. Encouraging People to Play the Game

The essays discussed above matter little if a majority of Supreme Court Justices proves unwilling to awaken the slumbering Nondelegation Doctrine. As I noted earlier, the Court has not held unconstitutional any congressional delegation to an executive agency since *Panama Refining* and *Schechter Poultry* in 1935, but five of the current Justices have signaled a willingness to reconsider the Court's precedents. Add in the fact that the newest member—Justice Barrett—has not opined publicly on the issue, and you see a possibility that the Court might revisit the doctrine. The burden of the remaining essays is to give the Court a reason to take that step. They do so by addressing a claim that always arises whenever the Court is asked to reject or modify a longstanding body of case law: namely, that the roof will fall in if the Court removes even one of the columns supporting it.

It is sensible for the courts to be concerned about the potentially destabilizing consequences of revitalizing the Nondelegation Doctrine. But the risk that Congress's ability to do its job would collapse is not a severe one.

There is federal precedent to support that conclusion. The Supreme Court has ample experience deciding when a legislature has punted its responsibility to draft an easily understandable law under the Void-for-Vagueness Doctrine.[91] The successful application of that doctrine shows that the Court is capable of making reasoned judgments of this kind, and that the sky won't fall when the Court holds a statute unconstitutional.

Besides, says Professor Postell, chaos hasn't befallen the states that have enforced their own versions of a Nondelegation Doctrine. Professor Postell reaches that conclusion after surveying what state courts have done when resolving nondelegation claims.[92] In his opinion, the state decisions have generally adopted a standard similar to the "intelligible principle" test adopted in *J.W. Hampton* and found in the Supreme Court's later case law.[93] Moreover, the "prevailing" approach in the "vast" majority of the states has been to follow the U.S. Supreme Court's practice of applying a rather "lax" review to

[91] *See generally* Paul J. Larkin, Jr., *The Folly of Requiring Complete Knowledge of the Criminal Law*, 12 LIBERTY U. L. REV. 335, 343–45 & n.35 (2018) (collecting cases).

[92] Postell 315-45.

[93] *Id.* at 323. The states have, however, been far less willing to allow their legislatures to vest taxing authority in private parties. *Id.* at 321-22.

state legislative delegations.[94] What is different is that some states have been more willing to examine critically whether "statutes seem to have been carelessly drafted and have contained no limits on agency discretion" and whether "statutes adequately define an agency's scope of authority by examining whether the persons subject to the agency's authority are carefully identified in the statute."[95] State courts in Alaska, Florida, Illinois, Montana, Oklahoma, and Vermont have been more willing to scrutinize state legislative delegations. Even then, those states that use a slightly more rigorous analysis have not demanded the impossible from their legislatures.[96] Contra Justice Elena Kagan, those state courts have not declared that most of state government is unconstitutional.[97] Most importantly, nothing in Professor Postell's discussion of state law suggests that the sky has fallen in those states.

Professor Prakash offers a variety of ways that the Supreme Court could prevent the "chaos" that allegedly would arise from tasking Congress with doing its job.[98] To begin with, the Court could proceed incrementally, making clear that its initial ruling striking down a particular act on nondelegation grounds does not doom a host of other statutes.[99] A modest beginning might force the Court to consider a large number of cases, but the Court recently has been willing to follow that case-by-case or statute-by-statute course when deciding which agency appointment and removal provisions satisfy the Article II Appointments Clause.[100] That slow-but-steady approach does not mean that the Court is just putting off the inevitable, or that the roof will eventually collapse. In 1995, in *United States v. Lopez*, the Court held unconstitutional an act of Congress making it a crime to possess a firearm in the vicinity of a school, ruling that Congress had exceeded its authority under the Commerce

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[94] *Id*. at 323. "Most states apply a weak nondelegation doctrine, similar to that of the US Supreme Court, which simply looks to statutes for vague standards or statements of policy to uphold them." *Id.* at 324.

[95] *Id*. at 323.

[96] *Id*. at 327-38.

[97] *Id*. at 338 (quoting *Gundy*, 139 S. Ct. at 2130 (plurality opinion) ("Indeed, if SORNA's delegation is unconstitutional, then most of Government is unconstitutional—dependent as Congress is on the need to give discretion to executive officials to implement its programs.")).

[98] *Id*. at 274-307.

[99] Prakash 280.

[100] *See*, *e.g.*, Collins v. Yellen, 141 S. Ct. 1761 (2021) (removal); Seila Law LLC v. Cons. Financial Prot. Bureau, 140 S. Ct. 2183 (2020) (appointment); Lucia v. SEC, 138 S. Ct. 2044 (1018) (appointment); Dep't of Transp. v. Ass'n of Am. R.R., 575 U.S. 43 (2015) (appointment); Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477 (2010) (removal).

Clause in criminalizing intrastate conduct.[101] Despite prophecies of impending doom, ten years later the Court held in *Gonzales v. Raich* that Congress could make it unlawful to possess cannabis grown and used entirely in-state.[102] A revived Nondelegation Doctrine does not mean that all statutes with delegations will be struck down. Some will; some won't.[103]

The Supreme Court also could delay the issuance of a nondelegation judgment to give Congress time to consider revising the offending statute and adopting all or some of the existing corpus of agency rules. The Court used its remedial power in this way when it held bankruptcy laws unconstitutional in 1982 in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*[104] The Court issued its opinion on June 28, but stayed the issuance of its judgment until October 4 to "afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws."[105] On the latter date, the Court further stayed the issuance of its judgment until December 24.[106] The two stays gave Congress nearly six months to revise the bankruptcy laws in light of the Court's ruling in *Northern Pipeline*. The Court could do the same if it were to hold a congressional delegation unconstitutional to avoid potential deleterious disruption. Congress could then decide not only whether and how to revise the relevant statute, but also which agency rules to adopt as an act of Congress to avoid future challenges.[107]

Professor Prakash also reminds us that members of Congress and the President will be under intense political pressure from the electorate and

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[101] 514 U.S. 549 (1995).

[102] 545 U.S. 1 (2005).

[103] Prakash 280-81.

[104] 458 U.S. 50 (1982).

[105] *Id.* at 88 (plurality opinion); *see also*, *e.g.*, Buckley v. Valeo, 424 U.S. 1, 144 (1976).

[106] N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 459 U.S. 813 (1982). The Court later declined a third extension of the stay past December 24. United States v. Marathon Pipeline Co., 459 U.S. 1094 (1982).

[107] Prakash 277-79, 282-84. Professor Prakash also suggests that Congress could adopt those rules as an act of Congress for Nondelegation Doctrine purposes only, and leave to the courts the authority to decide whether the underlying statute gave the agency the authority to promulgate those rules. *Id.* at 297. I doubt that the courts would allow Congress to slice the baloney that way because Article I, § 7, does not allow Congress and the President to decide what effect legislation should have. *Cf.* City of Boerne v. Flores, 521 U.S. 507, 516-36 (1997) (Congress cannot reverse a Supreme Court ruling by statute); Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 217-40 (1995) (Congress cannot alter the effect of an Article III court's judgment); United States v. Klein, 80 U.S. (13 Wall.) 128, 146 (1872) (Congress cannot direct the Supreme Court how to enter judgment by manipulating the Court's appellate jurisdiction). No court, however, has resolved that issue.

various interest groups to prevent chaos and significant societal harm by allowing agency rules to disintegrate.[108] Both political branches will have a strong interest in responding quickly to a rebirth of the Nondelegation Doctrine by passing some legislation that codifies some of thousands of existing agency rules for some period of time, even if only as a stop-gap measure so that members and the President can negotiate a reasonable response to the Supreme Court's ruling. Congress and the President could take that burden up themselves or create a bipartisan and bicameral regulatory commission to offer its suggestions about which existing rules Congress ought to codify into law.

In making those decisions, Congress could consider all of an agency's rules in one omnibus bill—a "Congressional Adoption Act"[109]—or Congress could group rules into separate categories across multiple bills. Congress could also adopt agency rules for a limited period—say, one year, which is the standard life for an appropriations bill—rather than in perpetuity. That course would effectively sunset those rules.[110] To make matters easier for Congress, agencies could identify statutes they believe need clarification and postpone new rulemakings until the status of their current rules has been clarified.

Critics will contend that Congress could never pass legislation as clear, specific, and multifarious as would be necessary to consider an entire tranche of regulations, particularly in the Senate given the filibuster. But Professor Schoenbrod correctly notes that Congress has succeeded in that regard before by using a "fast-track" procedure that requires an "up or down" vote on an entire package of proposals. The Trade Act of 1974[111] and the Defense Base Closure and Realignment Act of 1990[112] use just such a procedure when Congress must vote on international trade agreements or the closure of domestic military bases. Another example is the Congressional Review Act, which gives the members of each chamber the opportunity to hold an up-or-down vote after limited debate on an agency's new rules.[113] That is a complete legal answer to the critics' argument that Congress could not expedite its consideration and hold a vote on an overall package of agency rules.

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[108] Prakash 296-98, 303.

[109] *Id*. at 300-01.

[110] *Id*. at 303. Professor Adler independently suggested this. *See supra* note 41.

[111] Pub. L. No. 93-618 (codified as amended at 19 U.S.C. ch. 12 (2018)).

[112] Pub. L. No. 101-510, Tit. XXIX, Pts. A & B, §§ 2901-2911, 2921, 104 Stat. 1808 et seq. (codified as amended at 10 U.S.C. § 2687 (2018)).

[113] *See* Larkin, *supra* note 90.

Is there a guarantee that Congress would adopt predicate legislation establishing such an expedited procedure and up-or-down vote? No, of course not. Congress would need to pass that legislation before voting on a package of agency rules, and anyone who does not want to cast a vote on the latter bill certainly would use every available tool and trick, legitimate or not, to keep the predicate bill from becoming law. But if that were to happen, the blame for any ensuing chaos would fall on the members of Congress, not the Justices, for it would be the members who would be responsible for scuttling the agency rules.

Would the absence of a guarantee that Congress will act responsibly influence how the Justices vote? The Justices' job is to give the public their honest interpretation of what the Constitution demands, not to anticipate whether members of Congress will engage in shenanigans to avoid having to cast a vote that would anger their constituents and cost them their sinecures. Still, the Justices could try to peer over the horizon to guess how Congress would respond and let that guess influence their decisionmaking. Only time will tell how that possibility plays out.

III. SUGGESTIONS FROM A FAN OF THE GAME

I have but three points to add to the perspectives of the fine essays discussed above. The first one is this: It makes sense to consider the potential relevance of Article 39 of Magna Carta to the mix of considerations discussed in *Nondelegation Perspectives*.[114]

Magna Carta was a peace treaty between the English barons and King John adopted to end a rebellion against the crown because of the king's abusive exercise of royal powers. The best-known provision of the Great Charter is Article 39, once described as "a plain, popular statement of the most elementary rights" of Englishmen.[115] It provided that "no free man is to be imprisoned, dispossessed, outlawed, exiled or damaged without lawful judgement of his peers or by the law of the land."[116] Chapter 39 placed the king under the "rule of law" by prohibiting him from taking the law into his own

[114] For a discussion of the background, provisions, and significance of Magna Carta, see DAVID CARPENTER, MAGNA CARTA (2015); J.C. HOLT, MAGNA CARTA (2d ed. 1992); A.E. DICK HOWARD, THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA (1968).

[115] Charles E. Shattuck, *The True Meaning of the Term "Liberty" in Those Clauses in the Federal and State Constitutions Which Protect "Life, Liberty, and Property,"* 4 HARV. L. REV. 365, 373 (1891).

[116] HOLT, *supra* note 114, at 2.

hands. It achieved that goal by guaranteeing that the Crown would be subject to "the law of the land,"[117] which, according to Sir Edward Coke, was "the Common Law, Statute Law, or Custome of England."[118] The First Congress carried that obligation forward in the Fifth Amendment Due Process Clause.[119] The phrases "law of the land" and "due process of law," integral to the English law, became equally central to the American understanding of the rule of law.[120] The First Congress incorporated those principles by including the Due Process Clause in the Fifth Amendment, added via the Bill of Rights.

Magna Carta bolsters the argument that the Constitution limits the type of lawmaking that nonelected federal officials may undertake. Would the English barons have understood the term "law of the land" to include diktats from King John, the very person that Chapter 39 was designed to restrain? If he could unilaterally change the common law by his own pronouncements, what good would Chapter 39 have been? Given the circumstances surrounding its adoption, Chapter 39 would have made no difference if the crown could make new law simply by signing a piece of parchment containing an order and the king's signature. When executive officials make new law without adequate congressional warrant, they are acting as King John did apart from the restraint of Magna Carta. Our Constitution—the descendant of the Great Charter—should be held to prevent them from doing so.

Second, a principal explanation for why the Court has been reluctant to hold congressional delegations invalid is the line-drawing problem that an aggressive application of that doctrine would require. At bottom, the Court does not want to substitute judicial lawmaking for executive lawmaking

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[117] See JOHN PHILIP REED, RULE OF LAW 12 (2004).

[118] Ellis Sandoz, *Editor's Introduction: Fortescue, Coke, and Anglo-American Constitutionalism*, *in* THE ROOTS OF LIBERTY: MAGNA CARTA, ANCIENT CONSTITUTION, AND THE ANGLO-AMERICAN TRADITION OF RULE OF LAW 1, 25 (Ellis Sandoz ed., 1993). Coke thought that the terms "due process of law" and "the law of the land" were interchangeable. *See* 1 EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 50 (London, W. Clarke & Sons 1817); *see also* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1679 (2012) ("Fundamentally, 'due process' meant that the government may not interfere with established rights without legal authorization and according to law, with 'law' meaning the common law as customarily applied by courts and retrospectively declared by Parliament, or as modified prospectively by general acts of Parliament."). So too did the Founders. *See* Daniels v. Williams, 474 U.S. 327, 331 (1986); Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 368 (1911); Larkin, *supra* note 3, at 72-73.

[119] U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."). Most discussion of the clause focuses on the words "due process" and ignores the equally important words "of law."

[120] *See*, *e.g.*, Larkin, *supra* note 3, at 72-73.

because the public cannot boot the courts out of office when they go too far. Deciding which delegations are just right and which ones are a tad too much is like deciding whether Helen Palsgraf proved her negligence claim.[121] There is no easy, neat, clean, and subjectivity-free way to slice that pie, the Supreme Court has concluded, so why even try?[122]

The answer is that it is the judiciary's job to force Congress and the President to do theirs. The Framers created a system that would compel elected officials to make the difficult policy decisions, tradeoffs, and compromises necessary for our government to make law, and to do so in a manner that allows the public to hold those officials electorally accountable for their votes. The judiciary must refrain from doing the work assigned to the elected branches and also avoid giving the public the impression that it has substituted government by judicial order for government by executive lawmaking. The essays in *Nondelegation Perspectives* give the Justices multiple nonexclusive options to force Congress to do its job, to prevent the President from doing Congress's work, and to avoid taking on that responsibility themselves. That's a trifecta worth accomplishing for the public's benefit.

My third point is this: In several decisions rendered over the last decade, including one handed down on the last day of the Supreme Court's October 2021 Term, the Court has restrained the adventurous campaigns of some federal agencies via what it has called the Major Questions Doctrine.[123] Under that doctrine, agencies cannot pursue regulatory initiatives with vast economic or social effects unless Congress has clearly authorized them to do so.[124] In other words, the doctrine directs the courts not to read broad, generally phrased statutory provisions as empowering agencies to make decisions of tremendous economic or social importance.[125] The effect of that doctrine is much the same as the effect of the Nondelegation Doctrine. Both require Congress to legislate with some level of specificity if it seeks to delegate power, both prevent agencies from manufacturing congressional authority by stretching the meanings of terms past their breaking point, and both send back to Congress the lawmaking responsibility that every member of

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[121] *Compare Palsgraf*, 248 N.Y. at 340-47 (majority opinion of Cardozo, J.), *with id*. at 347-56 (opinion of Andrews, J., dissenting).

[122] *See supra* text accompanying note 61.

[123] *See*, *e.g.*, *West Virginia*, 142 S. Ct. 2587; *NFIB v. OSHA*, 142 S. Ct. 661; *Ala. Ass'n of Realtors*, 141 S. Ct. 1485; *King v. Burwell*, 576 U.S. 473; *Utility Air Reg'y Grp.*, 573 U.S. 302; *Brown & Williamson*, 529 U.S. 120.

[124] *See*, *e.g.*, *NFIB v. OSHA*, 142 S. Ct. at 664-66; *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489.

[125] *See*, *e.g.*, *NFIB v. OSHA*, 142 S. Ct. at 664-66.

Congress voluntarily sought and assumed. The Major Questions Doctrine only strikes down agency rules rather than holding statutory provisions unconstitutional, but it could force Congress to make the important but potentially unpopular decisions that our nation needs it to make. Even if it is only a second-best option, the Major Questions Doctrine gets us at least halfway to nondelegation.

IV. Conclusion

Nondelegation Perspectives deserves a place in the library of anyone interested either in the development of administrative law or in any of the three rivers that run together to create it. The authors who wrote the essays it contains are accomplished scholars or litigators, and their chapters illuminate a variety of different ways that the Supreme Court could revive the Nondelegation Doctrine without causing the administrative law world to come to an end. If you believe that the administrative state has grown too large for effective oversight and too powerful for a democratic republic to justify because Congress has grown too reluctant to do the heavy lifting that modern-day governance demands and too willing to punt difficult problems to regulators, you will find that *Nondelegation Perspectives* is an excellent discussion of how the Supreme Court could become re-engaged in the review of congressional delegations. The wisdom found in this book is well worth the time spent reading it.

Other Views:

- Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, 56 GA. L. REV. 81 (2021), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3654564.
- Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021), *available at* https://columbialawreview.org/content/delegation-at-the-founding/.
- Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379 (2017), *available at* https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=9565&context=penn_law_review.

CHEVRON—COMPLICATED, START TO FINISH[*]

BY RONALD A. CASS[**]

A Review of Thomas W. Merrill, *The* Chevron *Doctrine: Its Rise and Fall, and the Future of the Administrative State* (Harvard Univ. Press 2022)

I. THE *CHEVRON* ATTRACTION

The Supreme Court's *Chevron* decision[1] is the most talked about, most written about, most cited administrative law decision of the Supreme Court. Ever.

Chevron has fierce defenders and implacable critics. It is credited with simplifying judicial review of administrative agency actions and blamed for complicating it. For many in the law-and-policy community, *Chevron* is synonymous with granting more leeway to agencies, thereby increasing deference to officials who are more expert respecting specific issues or more accountable to the public than life-tenured judges. For others, *Chevron* is notable for empowering unaccountable bureaucrats as their rulemaking supplants lawmaking by Congress and moves ever further afield from statutory directives.

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[*] Note from the Editor: The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. To join the debate, please email us at info@fedsoc.org.

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[1] For those who have stumbled onto this review by accident (perhaps coming from a non-legal background or from another planet), the reference is to *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Chevron has prompted virtually every American administrative law professor—and more than a few commentators outside the academy as well—to offer opinions on how the decision and its progeny have violated or validated critical aspects of governance, especially governance in an era when a vast administrative apparatus controls or influences so much of our lives.[2] *Chevron* connects to so many different strands of administrative law that it provides an almost inexhaustible number of avenues for analysis and commentary on law, government, structure, and the legal and practical issues that touch on these topics.

Writings about the *Chevron* decision don't merely reveal different views of its benefits or detriments; they also display disparate views of what *Chevron*'s rule *is*. *Chevron* either provides one simple two-step rule for looking at a wide swath of administrative actions, a one-step rule, a three-step rule, or a sliding scale of different rules for different settings based on an expansive array of considerations. And it may be a durable precedent or one that is approaching the end of its reign.

II. Along Comes Merrill

Professor Tom Merrill, along with so many others, has written about *Chevron*. Often. At this stage, one might ask, what's left to say and what's worth the saying?

It turns out, quite a bit remains to be said. And Merrill's book does an admirable job of saying a great deal of it. Not that I agree with all it says, but even for those who are thoroughly familiar with the decision, the book's

[2] *See*, *e.g*., Nicholas R. Bednar & Kristin E. Hickman, Chevron*'s Inevitability*, 85 GEO. WASH. L. REV. 1392 (2017); Kent Barnett & Christopher J. Walker, Chevron *Step Two's Domain*, 93 NOTRE DAME L. REV. 1441 (2018); Clark Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of* Chevron*'s Step Two*, 2 ADMIN. L.J. AM. U. 255 (1988); Ronald A. Cass, *Vive la Deference? Rethinking the Balance Between Administrative and Judicial Discretion*, 83 GEO. WASH. L. REV. 1294 (2015); Cynthia Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989); Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under* Chevron, 6 ADMIN. L.J. AM. U. 187 (1992); Kristin E. Hickman & Aaron L. Nielson, *Narrowing* Chevron*'s Domain*, 70 DUKE L.J. 931 (2021); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118 (2016); Ronald M. Levin, *The Anatomy of* Chevron*: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253 (1997); Richard J. Pierce, Jr., Chevron *and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301 (1988); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511; Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era*, 3 YALE J. ON REG. 283 (1986); Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight*,*"* 112 COLUM. L. REV. 1143 (2012).

peregrinations—through the law before and after *Chevron*, the way the *Chevron* doctrine relates to governmental decisionmaking, and the academic literature about these and cognate subjects—make for both a thoughtful and an interesting read. It has new insights for old hands but takes a long enough lens to be accessible to *Chevron* newbies, too. There is, in short, something here for everyone interested in how government works and how the roles of courts and agencies intersect.

The book covers several interrelated discourses about *Chevron* and judicial review.[3] At one level, Merrill's book is a history of judicial review of administrative actions. That is where an account of the book should start.

III. *CHEVRON* IN HISTORICAL PERSPECTIVE

The Chevron *Doctrine* takes readers through the background cases, giving an especially careful and edifying account of notable precedents decided in the years leading up to the adoption and initial implementation of the Administrative Procedure Act, which provides the basic rules for agency proceedings and for judicial review of them. Merrill also explains the prevailing attitude among leading administrative law scholars and judges between that era and the *Chevron* decision, discusses the decision itself, recounts the difference between what the Supreme Court actually said and what the case has been taken to mean, and suggests the most likely explanation for what the Justices understood about their disposition of the *Chevron* case.

Merrill takes care in going through the factual, statutory, and judicial background for *Chevron*, the attitudes of the Justices in voting on and working through the case—on which only six Justices participated—how the Justices coalesced on the opinion for the Court, and what the decision said. Looking, among other things, at notes from Justice Harry Blackmun on the draft opinion from Justice John Paul Stevens, Merrill paints a persuasive picture of a Court that was tentatively trying to resolve a difficult issue of statutory construction without intervening in the policy prerogatives committed to the EPA. Interestingly, the Justices were nearly all doubtful about resolution of the specific dispute in *Chevron*—the question whether the agency's "bubble concept" fit within the scope of its statutory authority in the particular part of the law concerned.

[3] This review does not follow the exact order of Professor Merrill's book or mirror the divisions among topics presented in the book. It does, however, attempt faithfully to present the central arguments of the book and the issues raised by them.

The Justices were not, however, endeavoring to change the law respecting how judges decide such matters, although that is what *Chevron* has come to stand for. While much of this tracks Merrill's earlier scholarship, it is presented in a clearer and more accessible manner in this book.

Merrill also takes pains to walk readers through the decision's evolution from an uncertain Supreme Court's effort at applying *established rules* on judicial review to the centerpiece for debates over *what rules* should govern that review. As Merrill relates, the focus of the Justices' efforts is clear not only from their drafts and comments during the discussion of the disposition of the case but also from the opinion itself.

The *Chevron* decision spans 25 pages in the U.S. Reports. What is discussed in commentary about it, as Merrill emphasizes repeatedly, is almost entirely drawn from only two paragraphs (and a footnote).

Taken as a whole—as Merrill explains—*Chevron* expects courts to make their own decisions respecting the ambit of statutory commands and to determine the outer bounds of agency authority without deference to agency views unless the law specifically says to defer. But when a court finds that a statute, fairly read, gives discretion to an agency, the court should review agency exercises of discretion deferentially. *Chevron* says that courts, in that context, should ask if an agency action stays within the bounds of the law rather than if the action fits what a court would think is the best policy to implement the law. Put differently, properly delegated discretion is to be reviewed for *reasonableness*, not for *correctness* in the sense of the best exercise of discretion according to a judge's views.

Merrill's view of the decision is not merely reasonable. It accords with a wide array of scholarly accounts of what *Chevron* did.

IV. Becoming *Chevron*—From Case to Legend and Beyond

The aftermath of *Chevron*, explained in the book, is also instructive, though not as free from question as the explanation of *Chevron* itself. As Gary Lawson and Steve Kam, Merrill himself (writing with and without Kristin Hickman), and others have recounted,[4] the *Chevron* doctrine as we know it is as much a creation of the D.C. Circuit of the U.S. Court of Appeals as of

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[4] *See*, *e.g.*, Gary Lawson & Stephen Kam, *Making Law Out of Nothing at All: The Origins of the* Chevron *Doctrine*, 65 ADMIN. L. REV. 1 (2013); Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 833–34 (2001); Thomas W. Merrill, *The Story of* Chevron*: The Making of an Accidental Landmark*, *in* ADMINISTRATIVE LAW STORIES 398, 398–402 (Peter L. Strauss ed., Foundation Press 2006).

the Supreme Court. The doctrine *followed*, rather than flowed directly from, the eponymous decision. That is, *Chevron*, as the term is used, is what was built around the decision, not what the decision itself did.

Merrill gives much of the credit—or, as explained in a moment, blame—for this development to former D.C. Circuit Judge, and then long-serving Supreme Court Justice, Antonin Scalia. Scalia and his colleagues on the D.C. Circuit found a version of the *Chevron* formula congenial, taking from the decision a particular vision of when courts would decide matters *de novo* and when they would defer to an agency's views. To his credit, Merrill, agreeing with Lawson and Kam's account of the rise of *Chevron*, does not make the story political. He notes that D.C. Circuit Judge Patricia Wald, a liberal Democrat appointee, was as much the progenitor of the *Chevron* doctrine as her conservative, Republican-appointed colleagues Scalia and Judge Ken Starr.[5]

As Merrill explains, making the *Chevron* doctrine a simple, two-step test served the interest of D.C. Circuit judges whose caseload includes a high proportion of appeals from agency decisions. The two-step reading of *Chevron* replaces the difficult task of plumbing a number of considerations respecting the agency's decision with two questions: (1) whether there is ambiguity in the statutory directive and, if so, (2) whether the agency construction of its mandate is reasonable.

Of course, as those familiar with *Chevron*-in-practice know, those two questions are anything but straightforward, judgment-free, and self-defining. Even if it is true that D.C. Circuit judges aimed to use *Chevron* to simplify administrative law appeals, in practice the doctrine has proved complex. Merrill makes that point clear, carefully analyzing the test's ambiguity in his discussion of what is required to implement it.[6] Jack Beermann makes this point along with explaining other problems attending the *Chevron* doctrine, using a catchy and emphatic title imploring the Supreme Court to "End the Failed *Chevron* Experiment Now."[7] Many other scholars also, under less memorable cover, have criticized the doctrine for inevitably calling for judgments that are not easily made by judges or allowing leeway for deference to judgments not

[5] THOMAS W. MERRILL, THE *CHEVRON* DOCTRINE 83–87 (2022) (hereinafter Merrill).

[6] *Id*. at 100–19.

[7] Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779 (2010).

properly made by agency officials.[8] Merrill's book adds to a voluminous body of scholarship exploring the twists and turns, debates and doctrinal puzzles that *Chevron* the legend (as opposed to *Chevron* the case) has generated.[9] Viewed as a body, the literature on *Chevron*-in-practice at a minimum demonstrates a solid basis for Professor Beermann's plea. And Merrill ably exposes much of the argument supporting the development of the *Chevron* doctrine and the reasons behind both sides of various strands of commentary. He also shows how at least some essential parts of the developing *Chevron* doctrine could have been characterized simply as elements of much earlier law, a point made, for example, in Merrill's discussion of the *Cardoza-Fonseca* decision.[10]

From my view, however, Merrill spends too much time critiquing Justice Scalia's position on *Chevron*, diverting attention from other aspects of *Chevron*'s development. He asserts that Scalia too boldly championed *Chevron* as a new panacea for judicial review, overlooked the ambiguity in the doctrine as articulated by D.C. Circuit opinions, too blatantly asserted his own views as a junior Justice, and too uncritically jettisoned the benefits of legislative history and administrative practice (consistency aside) as aids to interpretation.

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[8] For an able and accessible review of various criticisms, see Christopher J. Walker, *Attacking* Auer *and* Chevron *Deference: A Literature Review*, 16 GEO. J.L. & PUB. POL'Y 103 (2018).

[9] In addition to the works cited in notes 2 and 4, *supra*, see Kenneth A. Bamberger & Peter L. Strauss, Chevron*'s Two Steps*, 95 VA. L. REV. 611 (2009); Aditya Bamzai, *Judicial Deference and Doctrinal Clarity*, 82 OHIO ST. L. J. 585 (2021); Ronald A. Cass, *Is* Chevron*'s Game Worth the Candle? Burning Interpretation at Both Ends*, *in* LIBERTY'S NEMESIS: THE UNCHECKED EXPANSION OF THE STATE 57 (Dean Reuter & John Yoo eds. 2016); William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretation from* Chevron *to* Hamdan, 96 GEO. L.J. 1083 (2008); Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How* Chevron *Misconceives the Function of Agencies and Why It Matters*, 59 ADMIN. L. REV. 673 (2007); Michael Healy, *Spurious Interpretation Redux:* Mead *and the Shrinking Domain of Statutory Ambiguity*, 54 ADMIN. L. REV. 673 (2002); Daniel J. Hemel & Aaron L. Nielson, Chevron *Step One-and-a-Half*, 84 U. Chi. L. Rev. 757 (2017); Connor N. Raso & William N. Eskridge, Jr., Chevron *as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727 (2010); Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597 (2009); Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187 (2006); Justin Walker, *The Kavanaugh Court and the* Schechter-*to*-Chevron *Spectrum: How the New Supreme Court Will Make the Administrative State More Democratically Accountable*, 95 IND. L.J. 923 (2020).

[10] *See* Merrill at 88–91, explaining how *Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421 (1987), could be viewed either as an application of *Chevron* Step One or of the pre-*Chevron* understanding that courts as a rule do not give deference to agencies in pure questions of law.

So far as his *Chevron* jurisprudence goes, Scalia kept his eye on the difference between the exercise of delegated discretion and of arrogated power. And he also was among the most insistent of the judges and Justices in scrutinizing the language and context of a law before pronouncing on the scope of administrative discretion the law authorized. To be sure, Scalia admitted—along with virtually every careful jurist and scholar—that seeing in statutory ambiguity an implicit delegation of discretion was legal fiction. But he also understood that this fiction fit better with an understanding of constitutional command and legitimately assigned roles for government officials than most alternative conceptions of *Chevron* deference.

More broadly, Scalia had a profound effect on interpretive practices and administrative law, from my perspective far more to the good than the bad.[11] He certainly deserves better than he is given in this book. That is especially true as others, such as Judge Wald, are given more credit for the evolution of *Chevron* from a modest exercise in applying existing deference doctrines to the creation of a new doctrine, divorced from clear statutory directive.

Nonetheless, Merrill's treatment of the history of deference and of the brand now associated with *Chevron* is overall thoughtful, meticulous, and enlightening on the way law unfolds as well as on both the problems and the benefits that came with this particular chapter in administrative law. These qualities are evident in his analysis of the run-up to *Chevron*, its adoption, and its establishment as a widely recognized doctrine. They are evident, too, in Merrill's discussions of the problems and complexities of *Chevron*'s implementation over time.

Merrill recounts the history of post-*Chevron* decisions—including the Supreme Court Justices' interpretation and application of *Chevron* in the *Brand X* case,[12] *Chevron*'s reformulation and complication in the Supreme Court's *Mead* decision,[13] and its general affirmation in *City of Arlington*[14]—at sufficient length and in sufficient detail (and across a sufficiently large cross-section of cases) to cover numerous strands of deference-and-review analysis.[15] In what is the mark of an able scholar, Merrill also presents each subpart of

[11] *See* Ronald A. Cass, *Administrative Law in Nino's Wake: The Scalia Effect on Method and Doctrine*, 32 J. L. & POL'Y 277 (2017).

[12] National Cable & Telecoms. Assn. v. Brand X Internet Servs., 545 U.S. 967 (2005).

[13] United States v. Mead Corp., 533 U.S. 218 (2001).

[14] City of Arlington v. Federal Communications Comm'n, 569 U.S. 290 (2013).

[15] Merrill weaves the history of *Chevron*'s aftermath through most of chapters 5 through 11, liberally using discussion of deference problems and judicial decisions across a range of cases to make his points.

his discussions in sufficiently parsimonious fashion (picking and choosing among the cases and details of analysis) to maintain readers' attention without compromising his care in respect of numerous details regarding the Court's treatment of the essential arguments respecting judicial review. The same is true in much of Merrill's interlineated discussion of the unfolding scholarship on *Chevron* and deference. All in all, readers should find much to appreciate and to learn from in these discussions.

V. Broader Jurisprudential Musings on *Chevron*'s Place in the Law

From the outset, Merrill makes clear that his book is about more than *Chevron*. It presents the doctrine of *Chevron* and the developments leading up to and following the *Chevron* decision as vehicles for understanding what judicial decisions in particular and actions articulating or implementing law more generally should do. Merrill's understanding of the yardsticks that should be used to measure the success of law and of legal decisionmaking provides the framework for his critiques of the *Chevron* doctrine and other approaches to deference and interpretation.

In exploring broader themes, Merrill posits four values that should be used to assess "institutional practices," including doctrines respecting judicial review.

First, he references "rule of law values." So far as the book goes, rule of law mainly denotes the ability of individuals to rely on settled expectations respecting law and its enforcement. The term "rule of law" is used in different ways by different people—and in public parlance often means only something that directs conversation toward a particular, desired outcome, even if the something is a mere catchphrase such as "no one is above the law." Merrill is right to focus invocation of rule of law values on predictability of governing rules. I have advocated a version of this under the label "principled predictability," distinguishing predictability based on considerations such as personal animus or personal preferences from predictability based on rules accessible to those who would be bound by them.[16] I take Merrill's more general

[16] Ronald A. Cass, The Rule of Law in America 4–5, 7–12 (2001). Similar views have been expressed by, among others, Randy E. Barnett, The Structure of Liberty: Justice and the Rule of Law 89–90 (1998); F. A. Hayek, The Road to Serfdom 80–81 (1994); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1179 (1989). *See also* Lon L. Fuller, The Morality of Law 38–39 (rev. ed. 1969); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 14–17, 19 (1959).

terminology as meaning exactly the same thing. Merrill also rightly explains that these values are not the only ones a society should pursue, as predictability of rules does not guarantee the justice of the rules themselves. Yet, it is better to keep a meaningful definition of the rule of law, as Merrill does, than to warp it into meaning other things as well (a failing that describes much "rule of law" discourse). Here, as in many other details, Merrill is to be commended.

Second, Merrill advocates grounding evaluation of particular practices and doctrines in their consistency with what he calls "constitutional values." It is difficult to conceive of a basis for disagreement with this point. That is, until one gets into the details of what Merrill means.

After articulating potential categories of constitutional values and addressing what each might entail, Merrill focuses on the category most important to *Chevron* deference analysis: separation of powers values.[17] In his discussion of these values, Merrill sides with those who take the view that the U.S. Constitution does not prohibit delegations of authority to the President and administrative agencies to make broad decisions of policy, including policy choices that constrain acts of private citizens.[18] This decidedly revisionist view of the Constitution and the history of its implementation has profound implications for rules respecting both administrators' authority and judicial review of their determinations. It puts a very large rabbit in the hat of any decisionmaker respecting the rules for judicial review.

My view is decidedly to the contrary, as are the views of many thoughtful scholars and jurists.[19] Moreover, as Merrill notes, his view runs counter to

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[17] Merrill refers to "federalism values"—those addressing the spheres of national and state authority—as a separate category, though noting that they could be seen as a subcategory of separation of powers values. Given that the original Constitution had Senators selected by state legislatures and the President selected largely by state officials as well, it is obvious why the Constitution did not spend much time elaborating on devices to secure federalism values in the same way it addressed separation of powers among the branches of the national government.

[18] Merrill at 22–23. *See* Merrill at 198–233 (discussion consistent with legislative authority to delegate virtually any powers of its choosing to executive officers and, similarly, to constrain judicial review of those decisions). *See also* CASS R. SUNSTEIN & ADRIAN VERMEULE, LAW AND LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE at chap. 3 (2020); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002).

[19] *See, e.g.*, Larry Alexander & Saikrishna Prakash, *Delegation Really Running Riot*, 93 VA. L. REV. 1035, 1042–43 (2007); Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1311–12 (2003); Louis J. Capozzi III, *The Past and Future of the Major Questions Doctrine*, forthcoming in 84 OHIO ST. L. REV. (2023); Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J.L. & PUB. POL'Y 147, 141–61 (2016); Christopher C. DeMuth,

that held by what is likely to be a majority of current Supreme Court Justices. Conclusive proof of this last point, however, still lies ahead.

Third, Merrill urges adopting approaches that place decisions—including decisions on interpretation of legal instructions—in the hands of more politically accountable officials. He defends this value as consistent with democratic ideals. After exploring the ways in which neither agency officials nor judges are directly accountable to the public and the ways in which there is some form of accountability, Merrill concludes, "if we want interpretations that involve discretionary interpretive choice to be made by the relatively more accountable decision maker, and the relevant choice is between an agency and a court, the agency wins hands down."[20] This is a completely defensible statement if democratic accountability is an appropriate value in deciding what a law means. Yet Merrill does relatively little to satisfy skeptical readers on that score. If one is looking for consistency with *law* as a value, rather than consistency with current *political judgments*, the opposite conclusion would hold. I return to this matter below.

The fourth value Merrill says should guide selecting which entity should have primacy in interpreting law is identified as "better agency decisions."[21] That is, who will make the better decision and under what decision rules. Here, Merrill is not asking what the law says about these *who* and *how* questions. Instead, he is asking for a much more practical set of judgments. His answers are fairly simple and will appeal to many readers.

As Merrill says, agency officials generally have expertise in subjects that come before them, sometimes in quite abstruse technical and scientific matters. Merrill does not posit a strong form of the agency-officials-as-disinterested-experts argument. He recognizes that agency officials operate in a politically constrained and influenced milieu. But he argues that agency officials

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Can the Administrative State Be Tamed?, 8 J. LEGAL ANALYSIS 121 (2016); Douglas H. Ginsburg & Steven Menashi, *Our Illiberal Administrative Law*, 10 N.Y.U. J.L. & LIBERTY 475 (2016); PHILIP A. HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 83–110 (2014); Philip A. Hamburger, *Delegating or Divesting?*, 115 NW. U. L. REV. ONLINE 88, 91–101 (2021); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 335–53 (2002); Gary Lawson, *Discretion as Delegation: The "Proper" Understanding of the Nondelegation Doctrine*, 73 GEO. WASH. L. REV. 235 (2005); Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463 (2015); David Schoenbrod, *Separation of Powers and the Powers That Be: The Constitutional Purposes of the Delegation Doctrine*, 36 AM. U. L. REV. 355 (1987); PETER J. WALLISON, JUDICIAL FORTITUDE: THE LAST CHANCE TO REIN IN THE ADMINISTRATIVE STATE 109-136 (2018); Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490 (2021).

[20] Merrill at 26.

[21] *Id*. at 28.

nonetheless tend to have greater expertise than judges or others on the subjects their agencies address and that these officials' decisions generally are influenced more by that expertise than by political directives.

Merrill further asserts that two procedures should be required for agencies to benefit from a strong form of deference: public participation (preceding agency decision on what its interpretation of a given statutory command will be) and reason giving (explaining why the agency chose a given interpretation).

Merrill surely is right that such procedures often can improve agency decisionmaking. But why is that the test for deference? If a statute assigns unreviewable authority over a matter to an agency—say, authority to make decisions in light of national security considerations that may be known to the head of the CIA but not to judges—should courts determine whether the process the official used suffices to make it a substantively better decision than if a different process was employed? And better by whose lights?[22] Merrill recognizes that courts cannot command agencies to employ procedures that are not legislatively mandated or, in some instances, voluntarily selected, but he still finds it appropriate to tailor deference rules to the attractiveness of agency decision processes.

If congressional assignment of unreviewable authority is to be respected—and I can't see why it would not be so long as the assignment does not transgress limits on delegation—it is by no means clear what reason would support denying whatever measure of deference is consistent with statutory commands. If the argument is over what should be done when statutes are ambiguous as to what level of deference should be given to particular decisions, shouldn't the answer depend on what the *best reading of the statute* is as to the scope of deference assigned?

Putting that question off the table and turning directly to questions about what seems (or is predicted) to produce substantively better outcomes looks like a softer form of substituting *judicial* judgment for *congressional* judgment. If congressional judgment is paramount, the right inquiry isn't how to balance different values for decisionmaking, however normatively attractive those values are. Instead, it's how to decide what boundaries the *law* puts around official judgment, what degree of discretion the *law* grants, and what standards for review accord with those statutory rules.

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[22] The hypothetical, of course, is based on the legal provision at issue in *Webster v. Doe*, 486 U.S. 592 (1988).

Merrill is too smart, too modulated, and too knowledgeable boldly to stake out territory that substitutes judicial weighing and balancing of personally held values in place of adherence to legislative directives. He also is too familiar with the difficulties of plumbing statutory meaning to choose either the simple narrative that ambiguity invariably *equals* delegated discretion or the polar opposite view that *any* delegation of discretion must be given in unequivocal terms. But his third and fourth values necessarily smuggle into the deference calculus a substantial degree of judges' personal preferences disguised as thoughtful consideration of legal commands.

In some measure, this may be an accusation properly leveled at any of us who endeavor to parse what courts rightfully can derive from statutes. But from my vantage, that charge is minimized by keeping courts' focus on what discretion a law actually grants by its terms—explicitly or implicitly—and then asking if an agency has exceeded the bounds of its discretion by going outside the scope of its authority or by exercising that authority unreasonably. And, of course, keeping within the law also means asking whether the discretion granted exceeds what Congress constitutionally can give.

Those questions can be made consistent with *Chevron*, particularly if it is coupled with a non-delegation doctrine. But it is better to ask courts to focus on the *language of the relevant law* setting the bounds and terms of review authority than to focus on the language of the *Chevron* decision. Generally, the relevant law respecting review authority will be the APA, though in *Chevron*'s case it was the Clean Air Act's restated version of APA review authority. *Chevron*-the-case became *Chevron*-the-legend largely because judges failed to focus as clearly on the *statutory language* respecting *review* as on the *substantive* question: the meaning of statutory commands respecting emissions from stationary sources. Merrill makes this clear in his discussion of the decision, but his prescriptions for moving forward—with an improved *Chevron* or a substitute for *Chevron*—also are grounded more on value judgments than on exploration of legal language. He does not hide this, but he also does not fully justify it, much as that seems to be a primary aim of the book.

VI. Concluding Observations—Bell, Book, and Candle

Despite the attention to and disagreement over it, *Chevron*'s rule may not have made that much of a difference to how agencies behave and what decisions courts reach. One well-known study of *Chevron*'s impact concluded that it slightly increased prospects for judicial affirmance of agency decisions

before the win-lose rate settled back to roughly its pre-*Chevron* level.[23] In contrast, another study determined that *Chevron*'s implementation not only increased the rate of affirmance but also encouraged more aggressive assertions of agency authority in anticipation of greater judicial deference.[24] Yet another empirical study concluded that *Chevron*, whatever its impact, has functioned more or less as a guide for courts to make fair (apolitical) judgments separately on the ambit of discretion given to an agency respecting its decisions and on the reasonableness of its exercise of discretion.[25]

Overall, it is far from clear how much the decision itself changed agency and court behavior, as opposed to altering the language used to reach similar results—that is, *Chevron* may have changed the lyrics but not the song. Still, the decision should be seen as important for what it has been taken to mean, what it has facilitated, and what the law respecting judicial review should be going forward.

In the same vein, Tom Merrill's book should be appreciated as a vastly instructive, well-considered, and scholarly examination of what rules for deference have been, how they were evolving before *Chevron*, what *Chevron*-the-case did, how *Chevron*-the-doctrine evolved, and where the trends of that evolution may lead. It is a thoughtful plea for many subtle changes in our understanding of deference, of the ambit of judicial authority over interpretation of law, and of the ways in which the scope of judges' and administrators' judgments should be divided. It is a call that some will want to heed and others will want to resist.

Despite my admiration for Merrill as a scholar, I depart from Merrill's formula for changing how judges, lawyers, scholars, and others think about the intersection of governing and legal doctrine. His preference for moving from more legal-doctrinal approaches to comparative analytical approaches seems to me to be heading in the wrong direction, even if his explanations on each point and on the reasons for choosing his preferred guideposts are anything but dogmatic and excessively certain.

In the end, however, the book should be judged not by whether one would answer this bell but by the caliber of the research, thinking, and writing

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[23] Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: Am Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984.

[24] E. Donald Elliott, Chevron *Matters: How the* Chevron *Doctrine Redefined the Roles of Congress, Courts and Agencies in Environmental Law*, 16 VILL. ENVTL. L.J. 1 (2005).

[25] Orin S. Kerr, *Shedding Light on* Chevron*: An Empirical Study of the* Chevron *Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1 (1998).

the work represents. No matter what happens to *Chevron*—whether it survives as the lodestar for deference decisions, or is modified, abandoned, or replaced—Professor Merrill has provided anyone interested in the topics associated with that decision an informative, careful, subtle, and wide-ranging exploration of deference and governance from thought-provoking angles. The judgments offered may not light the way to a better future, but Merrill's understanding and analysis more than justify paying attention to the book's critical inquiries into the past and its descriptions of where the decisions that have been made and are being made might yet lead. I recommend this book enthusiastically for the sympathetic reader and the skeptical reader as well.

Other Views:

- Cass R. Sunstein, *Who Should Regulate?*, N.Y. REV., May 26, 2022, https://www.nybooks.com/articles/2022/05/26/who-should-regulate-the-chevron-doctrine-thomas-merrill/.
- Jennifer L. Mascott & Eli Nachmany, *'The "Chevron" Doctrine' Review: Federal Agencies and the Law*, WALL ST. J., Aug. 23, 2021, https://www.wsj.com/articles/the-chevron-doctrine-review-federal-agencies-and-the-law-11661292087.
- Adam White & Jace Lington, *Major Questions About the Future of the Chevron Doctrine*, GRAY MATTERS PODCAST, July 20, 2022, *available at* https://administrativestate.gmu.edu/podcasts/.
- James Kunhardt & Anne Joseph O'Connell, *Judicial Deference and the Future of Regulation*, BROOKINGS, Aug. 18, 2022, https://www.brookings.edu/research/judicial-deference-and-the-future-of-regulation/.

BRUEN'S PRELIMINARY PRESERVATION OF THE SECOND AMENDMENT*

NELSON LUND**

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.[1]

In *District of Columbia v. Heller*,[2] decided in 2008, the Supreme Court held for the first time that the Second Amendment protects a private, individual right rather than a right to maintain or serve in a state militia. This was also the first time the Court invoked the Second Amendment to invalidate a law, in this case a federal ban on the civilian possession of handguns in D.C. Two years later, in *McDonald v. City of Chicago*,[3] the Court held that the Fourteenth Amendment makes the Second Amendment applicable to the states. This past June, *New York State Rifle & Pistol Association v. Bruen*[4] held that the Constitution protects not just the right to keep a handgun in one's home for self-defense (as *Heller* and *McDonald* established), but also the right to carry a weapon in public for that purpose.

The text of the Second Amendment expressly and unequivocally protects the right of the people to bear arms. New York, however, generally allowed that right to be exercised only if one persuaded a government official that one had "proper cause," which had been judicially defined to mean that one had been subjected to "particular threats, attacks or other extraordinary danger to

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* Note from the Editor: The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. To join the debate, please email us at info@fedsoc.org.

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[1] U.S. Const. amend. II.

[2] 554 U.S. 570 (2008).

[3] 561 U.S. 742 (2010).

[4] 142 S. Ct. 2111 (2022).

[one's] personal safety."[5] An official's decision to reject an application for permission to carry a weapon in public would be upheld by New York courts so long as "the record shows a rational basis for [the rejection]," or in another formulation, so long as the decision was not "arbitrary and capricious."[6]

Confronted with a similar regime in California several years ago, Ninth Circuit Judge Diarmuid O'Scannlain succinctly noted:

> To reason by analogy, it is as though [the government] banned all speech, but exempted from this restriction particular people (like current or former political figures), particular places (like private property), and particular situations (like the week before an election). Although these exceptions might preserve small pockets of freedom, they would do little to prevent destruction of the right to free speech as a whole. As the [Supreme] Court has said: "The Second Amendment is no different." *District of Columbia v. Heller*, 554 U.S. at 635. It too is, in effect, destroyed when exercise of the right is limited to a few people, in a few places, at a few times.[7]

Part I of this Article explains why *Bruen* was an easy case, which the Court resolved correctly. Part II explains why the Court was justified in repudiating the interpretive approach adopted by a consensus of the circuit courts after *Heller*. Part III explores some serious difficulties that will arise in applying the new approach that *Bruen* adopts. Part IV suggests some measures that could supplement *Bruen*'s effort to steer courts toward a jurisprudence that appropriately respects the original meaning of the Second Amendment.

I. New York's Defense of Its Statute was Untenable

Judge O'Scannlain's analogy makes it obvious why New York had an enormous burden to overcome in defending its statute. The state argued that the Second Amendment's "right of the people to . . . bear arms" permits the government to prohibit anyone and everyone from bearing arms, at least wherever people typically congregate. In support of this counterintuitive proposition, New York collected examples of regulations, going back to 14th-century England and continuing into 20th-century America, that supposedly proved the existence of a long tradition of severe legal restrictions on bearing

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[5] N.Y. Penal Law Ann. § 400.00(2)(f); In re Martinek, 294 App. Div. 2d 221-222, 743 N.Y.S. 2d 80-81 (2002).

[6] In re Kaplan*,* 249 App. Div. 2d 199, 201, 673 N.Y. S. 2d 66, 68 (1998); In re Bando, 290 App. Div. 2d 691, 692. 735 N.Y.S. 2d 660, 661 (2002).

[7] Peruta v. Cty. of San Diego, 742 F.3d 1144, 1169–70 (9th Cir. 2014), *vacated,* 824 F.3d 919 (2016) (en banc).

arms in public. As Justice Samuel Alito noted at oral argument, New York's brief was not a model of scrupulous historical accuracy, which was a telling sign of the weakness of the state's position.[8]

The state's theory was that the Second Amendment merely codified that putative tradition. Justice Clarence Thomas's majority opinion thoroughly analyzes the evidence advanced by the state and its amici in defense of the New York statute. That review demonstrates that the state's evidence was overwhelmed by contrary evidence proving that no such tradition ever existed in America, at least not until long after the Second and Fourteenth Amendments were adopted. Even without going through Thomas's painstaking analysis, one can easily see how far-fetched New York's thesis was. It is hard to imagine that anyone who has even a passing familiarity with history could believe that Americans living in 1791 or 1868,[9] whether or not they resided in populated areas, needed the government's permission to step outside their homes with a gun in their hands, or that they needed an extraordinary justification for doing so.

Justice Stephen Breyer's dissent (joined by Justices Sonia Sotomayor and Elena Kagan) rather half-heartedly tries to refute the majority's historical argument. The dissent responds in part by attacking a straw man. It says, for example that "it is difficult to see how the Court can believe that English history fails to support legal restrictions on the public carriage of firearms."[10] The majority, however, never denies that legal restrictions existed in England, and the majority affirmatively agrees that the Second Amendment allows legal restrictions in the United States.

When the dissent tries to establish that the Second Amendment incorporates a traditional exception to the right to bear arms that would swallow the rule, it extrapolates wildly from narrow restrictions to the radically sweeping New York statute. It also gives unwarranted weight to practices (or in some

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[8] *See* Transcript of Oral Argument at 84-87.

[9] As the Court recognizes, and as Justice Amy Coney Barrett emphasizes in a concurrence, the right to arms that is protected against action by the states derives in a technical sense from the Fourteenth Amendment, not the Second Amendment. The Supreme Court long ago decided that Bill of Rights provisions "incorporated" into the Fourteenth Amendment have exactly the same scope whether applied to the federal or state governments. *See Bruen* 142 S. Ct. at 2137-38. As *Bruen* acknowledges, the Court has repeatedly assumed that the scope is "pegged to the public understanding of the right when the Bill of Rights was adopted in 1791." *Id.* That assumption has been the subject of an academic debate, as the Court and Barrett point out. Because the Court concluded that it would make no difference it this case, *Bruen* does not take up that debate. *Id.* at 2138.

[10] *Bruen*, 142 S. Ct. at 2184 (Breyer, J., dissenting).

cases alleged practices) remote in time from the adoption of the relevant constitutional provisions. The dissent's best evidence is a small handful of outlier decisions by state and territorial governments, many of which proved to be evanescent. These regulations, moreover, were adopted long *after* the Bill of Rights was enacted, and long *before* the Supreme Court started to apply various provisions of the Bill of Rights to the states. Such outliers imply nothing about the original meaning of the Second Amendment.

Toward the end of his dissent, Justice Breyer asks a rhetorical question: "[I]f the examples discussed above, taken together, do not show a tradition and history of regulation that supports the validity of New York's law, what could?"[11] Well, here are some possibilities: Perhaps a consensus of state laws, in force in 1791 or even in 1868, that forbade the general population from carrying a weapon in public without an extraordinary reason for doing so. Or perhaps a long tradition, maintained without serious objection during the eras in which the Second and Fourteenth Amendments were adopted, in which American citizens were required to get the government's permission before carrying weapons in public. Breyer does not point to anything remotely resembling such examples. But he does ask one good question: "[W]ill the Court's approach permit judges to reach the outcomes they prefer and then cloak those outcomes in the language of history?"[12] His dissent in this case offers a convenient model for the result-oriented judges of the future.

To be fair, or perhaps charitable, maybe Breyer and the other dissenters do not actually care whether New York's statute is supported by a tradition and history of regulation. Perhaps what they really believe is that the constitutional right of the people to keep and bear arms is one that legislatures should be free to curtail up to the point (if such a point exists) at which the Supreme Court is satisfied that a given restriction has no rational basis.

This interpretation of the dissenting opinion is supported by two of its leading features. First, the opinion opens with a lengthy recitation of various incidents and statistics establishing that guns are sometimes misused. As Justice Alito points out in a concurring opinion, much of this information is irrelevant to the question at issue in the case, and the little that might be relevant is based on dubious evidence.[13]

Second, Justice Breyer repackages the kind of deference to legislative choices that he advocated in his *Heller* dissent. Although he had tried to sell

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[11] *Id*. at 2190.
[12] *Id*. at 2178.
[13] *Id*. at 2157-59.

that approach under the rubric of "intermediate scrutiny," Justice Antonin Scalia's majority opinion rightly rejected that characterization.[14] *Heller*'s reasons for rejecting that approach apply equally in *Bruen*. Indeed, *Heller* itself had indicated that these reasons would apply in cases involving the right to bear arms.[15] Although Breyer's *Bruen* dissent disclaims an intent to "relitigate" *Heller*, he unmistakably proposes to give as much deference to legislatures as he did in that case, if not more. Just as his *Heller* dissent would effectively have eliminated any meaningful right to keep arms, Breyer's rationale for upholding the New York statute at issue in *Bruen* would effectively read the right to bear arms out of the Constitution.

II. *BRUEN* RESETS SECOND AMENDMENT JURISPRUDENCE

If *Bruen* had done nothing more than confirm that there is a meaningful right to carry weapons for self-defense outside one's home, which the New York statute violated, it would be a significant decision. But the Court went further, repudiating a settled consensus among the federal circuit courts about the meaning of *Heller* and the appropriate analytical framework for resolving Second Amendment cases. *Bruen* wipes away a large body of circuit precedent and instructs the lower courts to start over with a new interpretive method. This applies not only to regulations of public carry, but to a wide range of other gun control laws. This reset could have real effects. The circuit courts have spent more than a decade ensuring that almost every form of gun control survives constitutional scrutiny, and *Bruen* should make it harder for those courts to do so again.

In order to understand this development, one must begin with the baseline set by *Heller*. Justice Scalia's majority opinion is an exquisite tapestry of sound textual and historical arguments interspersed with fallacious lapses, ambiguous and inconsistent obiter dicta, self-confident ipse dixits, and mischaracterizations of precedent.[16] Most importantly for understanding *Bruen*, *Heller* equivocated about the appropriate way to determine the scope of the protection implied by the Second Amendment's absolute language.

Some passages focus exclusively on the text and history of the Constitution. "[W]e find that [the text] guarantee[s] the individual right to possess

[14] *See Heller*, 554 U.S. at 628-29.

[15] *See id.* at 592, 595, 634-35.

[16] For a detailed analysis, see Nelson Lund, *The Second Amendment,* Heller*, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343 (2009); Heller *and Second Amendment Precedent*, 13 LEWIS & CLARK L. REV. 335 (2009).

and carry weapons in case of confrontation. This meaning is strongly confirmed by the historical background of the Second Amendment."[17] Accordingly, the Court considered and dismissed the relevance of a few founding-era regulations that did not remotely resemble a handgun ban.[18]

But when explaining why D.C.'s law was unconstitutional, the Court did *not* rely on the absence of historical precedents. Instead, it held that there is a specific constitutional right to possess handguns, even if the challenged law allows one to keep other guns for self-defense. *Heller* justified that specific holding by pointing to the popularity of handguns in the 21st century.[19]

What's more, the Court *approved* a variety of gun control regulations without providing historical support of any kind for their validity.[20]

Heller rejected what it called the "freestanding 'interest-balancing' approach" that Breyer's dissent would have applied.[21] But it did not reject the "tiers of scrutiny" framework that is familiar from other areas of constitutional law such as the First Amendment, to which *Heller* repeatedly likened the Second Amendment. Instead, *Heller* said that D.C.'s handgun ban would not survive scrutiny under that framework.[22] Thus, *Heller* neither adopted nor rejected the tiers of scrutiny framework, or the kind of interest-balancing generally applied under that framework.

Presented with *Heller*'s equivocations, the federal circuit courts adopted a two-step legal test.[23] A reviewing court would first decide whether the challenged law regulated conduct that is categorically unprotected by the Second Amendment. If not, courts were supposed to apply either strict scrutiny (to regulations that affected the core of the right recognized in *Heller*) or intermediate scrutiny (to all other regulations).[24]

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[17] *Heller*, 554 U.S. at 592.

[18] *Id*. at 631-32.

[19] *Id*. at 628-29.

[20] *Id*. at 626-27, 635.

[21] *Id*. at 634.

[22] *Heller* stated that Breyer's freestanding interest-balancing approach was not among "the traditionally expressed levels [of review] (strict scrutiny, intermediate scrutiny, rational basis)." *Id.* The Court specifically rejected the use of the rational basis test in the context of the Second Amendment. *Id.* at 628 n.27.

[23] The seminal case is *United States v. Mazzarella*, 614 F.3d 85, 89 (3d Cir. 2010). With relatively minor variations, all the other courts of appeals except the Eighth Circuit adopted its test.

[24] Strict scrutiny requires the government to prove that a challenged regulation is the least restrictive means of pursuing a compelling government interest. Intermediate scrutiny requires the government to prove that its interest is important, significant, or substantial, and that the means is not substantially broader than necessary to achieve the government's interest.

In practice, this meant that almost every challenged regulation was upheld. Courts often relied on one of several ipse dixits in *Heller* that approved regulations such as "longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."[25] In other cases, courts purported to apply intermediate scrutiny, or something similar, and concluded that the regulation was a reasonable means of pursuing an important government interest such as preventing the misuse of weapons.[26]

In a small handful of cases, courts found that a regulation violated the Second Amendment. The D.C. Circuit, for example, enjoined the enforcement of a discretionary licensing scheme similar to the one at issue in *Bruen*.[27] The Seventh Circuit invalidated a ban on carrying loaded firearms in public, which did not provide any opportunity to obtain a carry license.[28] The same court enjoined a ban on firing ranges, as well as some of the regulations that were subsequently imposed on ranges.[29] And the Third Circuit sustained an as-applied challenge to the federal ban on possession of firearms by felons, brought by two individuals who had been convicted of non-violent crimes that could have been punished by more than one year in prison.[30]

Generally, however, applications of the two-step framework were so deferential to legislative judgments that they amounted to freestanding interest-balancing, or even rational basis review, both of which had been expressly rejected by *Heller*.

In *Drake v. Filco*,[31] for example, the Third Circuit upheld a New Jersey law that required an applicant for a carry license to demonstrate a justifiable

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[25] *Heller*, 554 U.S. at 626-27. Although the Court called these regulations "presumptively lawful," it also described them as "permissible." *Compare id.* at 627 n. 26 *with id.* at 635.

[26] For reviews of the case law, see Sarah Herman Peck, Cong. Rsch. Serv., R44618, Post-*Heller* Second Amendment Jurisprudence (2019); David B. Kopel & Joseph G.S. Greenlee, *The Federal Circuits' Second Amendment Doctrines*, 61 ST. LOUIS U. L.J. 193 (2017); David B. Kopel & Joseph G.S. Greenlee, *Federal Circuit Second Amendment Developments 2017-2018* (Univ. Denver Legal Studies Research Paper No. 18-29, 2018), *available at* https://ssrn.com/a=3227193 [https://perma.cc/C9LX-QZNQ].

[27] Wrenn v. District of Columbia, 864 F.2d 650 (D.C. Cir. 2017).

[28] Moore v. Madigan, 702 F.3d 933 (7th Cir. 2012).

[29] Ezell v. City of Chicago, 651 F.3d 684 (7th Cir. 2011); Ezell v. City of Chicago, 846 F.3d 888 (7th Cir. 2017).

[30] Binderup v. Attorney General, United States of America, 836 F.3d 336 (3d Cir. 2016) (en banc).

[31] 724 F.3d 426 (3d Cir. 2013).

need, defined as an "urgent necessity for self-protection, as evidenced by specific threats or previous attacks which demonstrate a special danger to the applicant's life that cannot be avoided by means other than by issuance of a permit to carry a handgun."[32] Not surprisingly, almost no one qualified for a license under this standard.[33]

The Third Circuit assumed, arguendo, that there might be some kind of right to carry a gun outside one's home. On that assumption, the court held that the challenged statute should be upheld on the grounds that New Jersey had begun imposing restrictions on public carry in 1924 and that other states had adopted similar regulations. The court asserted that this regulatory history made the statute "presumptively lawful" under *Heller*, and therefore put the regulated conduct "outside the scope of the Second Amendment's guarantee."[34]

For two reasons, this argument is fallacious. First, it depends on interpreting the word "presumptively" to mean "conclusively." More important, the very notion that the statute was presumptively lawful is based on a misreading of a dictum in *Heller*. The Supreme Court *characterized* certain regulations as "longstanding" and pronounced them "presumptively lawful."[35] The Court said that the list was not exhaustive, but it never said or implied that *all* longstanding regulations are presumptively lawful. Furthermore, *Heller* only approved laws prohibiting concealed carry, without saying anything about laws imposing severe restrictions on *both* open and concealed carry. Even apart from these misreadings of *Heller*, New Jersey's severe restrictions on both open and concealed carry dated back only to 1966, not 1924,[36] so they were barely more "longstanding" than the handgun ban that *Heller* had invalidated.[37]

Drake went on to hold in the alternative that the statute survived intermediate scrutiny. The only reason offered was that "[t]he predictive judgment of New Jersey's legislators is that limiting the issuance of permits to carry a

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[32] *Id*. at 428.

[33] *See* Petition for a Writ of Certiorari at 6, Drake v. Jerejian, 572 U.S. 1100 (2014) (No. 13–827) (estimating that only 0.02% of New Jersey citizens are granted public carry permits).

[34] *Drake*, 724 F.3d at 434.

[35] *Heller*, 554 U.S. at 626-27. Grammatically, the modifier "longstanding" applies only to prohibitions on the possession of firearms by felons and the mentally ill. *See id*. Although the opinion was authored by Justice Scalia, who is justly famous as an extremely careful writer, the modifier has generally been thought to apply to other regulations as well. *See*, *e.g.*, *Bruen*, 142 S. Ct. at 2133.

[36] *See Drake*, 724 F.3d at 448 (Hardiman, J., dissenting).

[37] The D.C. ban was instituted in 1976. *See, e.g.,* Parker v. District of Columbia, 478 F.3d 370, 399-400 (D.C. Cir. 2007).

handgun in public to only those who can show a 'justifiable need' will further its substantial interest in public safety."[38] In support of this conclusion, the court alluded vaguely to "history, consensus, and simple common sense."[39] *Drake* included no analysis showing so much as an effort to comply with Supreme Court doctrine, under which intermediate scrutiny requires that the means chosen must not be "substantially broader than necessary to achieve the government's interest."[40]

Other problematic regulations have been given similarly cavalier rubberstamps of approval. In *Friedman v. Highland Park*,[41] for example, the Seventh Circuit upheld a local ordinance banning the possession of semi-automatic rifles that had certain essentially cosmetic features, as well as ammunition magazines capable of holding more than ten rounds. Although the court acknowledged that these arms are in some circumstances more useful for legitimate self-defense than other options, and less dangerous than some weapons that were not banned, the court speculated (without evidence) that the net effect of the ban could conceivably be some reduction of deaths in mass shootings.

This is rational-basis review, which *Heller* expressly rejected. Once again implicitly applying rational-basis review, the court proclaimed that "[i]f a ban on semiautomatic guns and large-capacity magazines reduces the perceived risk from a mass shooting, and makes the public feel safer as a result, that's a substantial benefit.[42] This authorized a kind of Second Amendment heckler's veto, which effectively constitutes freestanding interest-balancing in which the constitutional right is assigned a value of zero.

Perhaps the most extreme example of hostility to the Second Amendment was the Ninth Circuit's decision in *Young v. Hawaii*.[43] Having previously

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[38] *Drake*, 724 F.3d at 437.

[39] *Id*. at 438 (quoting IMS Health, Inc. v. Ayotte, 550 F.3d 42, 55 (1st Cir. 2008)). Notably, the court chose not to cite a Supreme Court precedent suggesting that a conflict between two fundamental rights may be resolved by a "*long* history, a *substantial* consensus, and simple common sense." Burson v. Freeman, 504 U.S. 191, 211 (1992) (plurality opinion) (emphasis added). Even on the dubious assumption that this formula would have been applicable to the statute at issue in *Drake*, it would obviously not have been satisfied in this case.

[40] Ward v. Rock Against Racism, 491 U.S. 781, 800 (1989); see also Bd. of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480–81 (1989) ("[S]ince the State bears the burden of justifying its restrictions, it must affirmatively establish the reasonable fit we require." (citation omitted)).

[41] 784 F.3d 406 (7th Cir. 2015).

[42] *Id*. at 412.

[43] 992 F.3d 765 (9th Cir. 2021) (en banc).

held that there is no constitutional right to carry a concealed weapon,[44] the court concluded in this case that there is also no right to carry openly:

> [F]or centuries we have accepted that, in order to maintain the public peace, the government must have the power to determine whether and how arms may be carried in public places. There is no right to carry arms openly in public; nor is any such right within the scope of the Second Amendment.[45]

This holding went beyond the use of rational-basis review or Justice Breyer's freestanding interest-balancing. It simply eradicated the textually guaranteed right of the people to bear arms on the ground that an unlimited power of the government to deny that right has existed for centuries. The court never explained what the constitutional text means or could mean if it doesn't put any constraints on the government.[46] As anyone familiar with American history should anticipate, the court provided no evidence that would support its claim that such an absolute government power was "accepted" when the Second Amendment was adopted.

Instead, the court relied largely on a literal reading of the 14th-century Statute of Northampton, which appears on its face to impose an absolute proscription on public carry of weapons. By the 17th century, that interpretation had been rejected in England,[47] and the American laws that resembled the Statute of Northampton all contained an express qualification that was not in the English text.[48] *Young* also pointed to several 19th-century state surety laws, which in fact did *not* forbid anyone to carry arms in public, and in any event were apparently seldom invoked.[49] The court did not cite a single judicial opinion declaring, let alone holding, that the individual right

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[44] Peruta v. County of San Diego, 824 F.3d 919 (9th Cir. 2016) (en banc).

[45] *Young*, 992 F.3d at 821.

[46] At two points in the opinion, the court seems to assume that the Constitution's protection of the right to bear arms could mean something, but it never says what that something might be. *See id*. at 782-83, 813.

[47] *See Bruen*, 142 S. Ct. at 2139-42.

[48] The qualification contained words to the effect that one may not go armed to the terror of the people. *See* Nelson Lund, *The Future of the Second Amendment in a Time of Lawless Violence*, 116 NW. U. L. REV. 81, 104 (2021). *See also* Lund, *Second Amendment,* Heller*, and Originalist Jurisprudence*, *supra* note 16, at 1362-64 (discussing similar qualifications applicable to American prohibitions on carrying "dangerous or unusual weapons").

[49] *See Bruen*, 142 S. Ct. at 248-50; Robert Leider, *Constitutional Liquidation, Surety Laws, and the Right To Bear Arms* 15–17, *in* NEW HISTORIES OF GUN RIGHTS AND REGULATION (J. Blocher, J. Charles, & D. Miller eds.) (forthcoming).

protected by the Second Amendment could lawfully be taken away by a general ban on carrying weapons in public.[50]

In the end, the court displayed a naked willingness to substitute a figment of the judicial imagination for legal analysis:

> Notwithstanding the advances in handgun technology, and their increasing popularity, pistols and revolvers remain among the class of deadly weapons that are easily transported and concealed. That they may be used for defense does not change their threat to the "king's peace." It remains as true today as it was centuries ago, that the mere presence of [pistols and revolvers] presents a terror to the public and that widespread carrying of handguns would strongly suggest that state and local governments have lost control of our public areas. Technology has not altered those very human understandings.[51]

According to the Ninth Circuit, it is a kind of self-evident truth, for which no actual evidence is required, that the American people are and always have been terrorized by the mere presence of handguns in public. The very human understandings to which the court alludes might better be called the all too human impulse of some judges to impute their own irrational anxieties to other people. Not just the citizens of the 43 states in which law-abiding citizens can obtain a license to carry, and not just the citizens of the 25 states that allow public carry without any license, but also the citizens who constitutionalized "the right of the people to keep and bear Arms" in 1791. This en banc decision must have been seen as a vivid signal to the Supreme Court about the need to discipline the lower courts.[52]

III. *BRUEN*'S FUTURE

In any event, the *Bruen* majority certainly did see that the circuit courts were generally treating the Second Amendment with dismissive hostility, as if it were a second-class provision of the Bill of Rights.[53] In an effort to prevent these courts from continuing on the path they had followed for more than a decade after *Heller*, the Court expressly repudiates the second step in the framework they had adopted. This repudiation effectively eliminates the

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[50] *See* Lund, *Future of the Second Amendment*, *supra* note 48, at 105 n.111.
[51] *Young*, 992 F.3d at 821.
[52] *Cf. Bruen*, 142 S. Ct. at 2135, 2149 (specifically criticizing *Young*).
[53] *See* 142 S. Ct. at 2156 (quoting *McDonald*, 561 U.S. at 742 (plurality opinion)).

precedential value of all the cases that conducted freestanding interest-balancing under the rubric of intermediate scrutiny.

In place of the circuit courts' two-step framework, *Bruen* announces a test based entirely on text and history, without any room for interest-balancing or judicial policy judgments:

> When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command." *Konigsberg v. State Bar of Cal.*, 336 U.S. 36, 50 n.10 (1961)).[54]

Contrary to the impression that might be created by the citation to *Konigsberg*, this test is quite novel. The text following note 10 in *Konigsberg* endorses the very same two-part test used by the post-*Heller* circuit courts, which *Konigsberg* says is the one the Court has used "[t]hroughout its history" to determine the scope of the constitutionally protected freedom of speech. Immediately after this strange invocation of authority for the self-evident proposition that the texts of both the First and Second Amendments contain unqualified commands, *Bruen* goes on to exaggerate the extent to which the Court's First Amendment jurisprudence has relied on historical evidence rather than interest-balancing under the tiers of scrutiny. As we will see, it's doubtful that the test announced in *Bruen* will prove workable, and the Court's First Amendment jurisprudence does not suggest otherwise.

The *Bruen* opinion does insist that it will not accept the use of history to engage in the kind of fake originalism deployed by the Ninth Circuit in *Young v. Hawaii*. *Bruen* reiterates *Heller*'s insistence that "[c]onstitutional rights are enshrined with the scope they were understood to have *when the people adopted them*."[55] For that reason, a medieval law like the Statute of Northampton is only relevant if it "survived to become our Founders' law," and the government has the burden of demonstrating that fact in defending a regulation.[56] Similarly, the public understanding of *ambiguous* constitutional provisions may sometimes be inferred from post-enactment government

[54] *Id*. at 2129-30.

[55] *Id*. at 2136 (quoting *Heller*, 554 U.S. at 634-35) (emphasis added by the *Bruen* Court).

[56] *Id*.

practices that were open, widespread, and unchallenged, but such evidence cannot overcome the original meaning of the constitutional text.[57]

In applying this text-and-history test to the New York statute, *Bruen* concluded that the state failed to meet its burden of proving the existence of the requisite regulatory tradition. Notwithstanding the numerosity of the laws that were presented as evidence for the purported tradition,[58] not a single American state in the founding or antebellum periods forbade ordinary citizens to carry a weapon for self-defense unless they faced some extraordinary threat to their personal safety. Nor was there a consensus that such laws are permissible until long after the adoption of the Fourteenth Amendment, if then. That is why *Bruen* was an easy case under the mode of analysis that the Court adopted in place of the circuit courts' two-step framework.

Not all cases will be so easy, and the most important questions in the future will involve the interpretation and application of *Bruen*'s text-and-history test. There is good reason to doubt that the Court will be able and willing to apply it consistently and reliably.

The most obvious reason for skepticism is that the *Bruen* opinion itself does not consistently apply its own stated test. Just as *Heller* issued ipse dixits endorsing several forms of gun control without any evidence of their historical pedigree, *Bruen* emphasizes that nothing in the Court's opinion should be interpreted even to suggest the unconstitutionality of the "shall-issue" licensing regimes adopted by 43 states. These regimes typically impose conditions for obtaining a carry license that most law-abiding citizens can meet, such as passing a background check and taking a handgun safety class. *Bruen* notes the obvious fact that these regulations impose a much smaller burden on the right to bear arms than New York's highly restrictive statute. But the Court does not provide so much as a shred of evidence that any kind of licensing requirements had ever been imposed on the general population before the 20th century.[59] Furthermore, the first shall-issue statute was apparently not

[57] *Id.* at 2136-37. The text of the Second Amendment may be ambiguous in certain respects, such as whether "arms" includes weapons that an individual cannot "bear," and whether "the people" includes some aliens.

[58] *See id.* at 2138-56.

[59] During the founding era, there were disarmament and licensing laws aimed at discrete groups of people who were politically distrusted, such as slaves, free blacks, American Indians, and those who refused to sign loyalty oaths. *See* Adam Winker, Heller*'s Catch-22*, 56 UCLA L. REV. 1551, 1562 (2009). Such laws cannot serve as precedents for modern regulations of general applicability. First, such laws would themselves be held unconstitutional today because they involved racial classifications or compelled speech. Second, selectively disarming people on the basis of their race or

enacted until 1961, whereas may-issue statutes were enacted decades earlier.[60] Under the Court's announced methodology, how in the world could only the later, rather than the earlier, of two very late "traditions" reflect the original meaning of the Second Amendment? If there is any plausible answer to that question, it won't be found in the *Bruen* opinion.

It is striking that the Court did not simply remain silent about shall-issue regulations, which were not at issue in the case. It is also interesting that Justice Brett Kavanaugh, joined by Chief Justice John Roberts, issued a concurrence meant "to underscore two important points about the limits of the Court's decision."[61] The concurrence begins by stressing the majority's gratuitous endorsement of shall-issue regulations. It then goes on to reiterate the peremptory approval of various gun control regulations that were included in *Heller* and *McDonald*. The felt need to "underscore" these points may suggest that the majority's sua sponte dicta in this case were a concession to Kavanaugh and Roberts.[62] If that is a plausible speculation, one might also suspect that Kavanaugh and Roberts may be inclined to invalidate gun regulations only in easy cases like *Bruen* itself, especially if the regulations look like mere political grandstanding. Notably, Kavanaugh and Roberts did *not* underscore the caveat that the majority placed on its endorsement of shall-issue laws: constitutional challenges to such regulations may succeed when permitting schemes are used to pursue "abusive ends."[63]

Whether or not log-rolling took place in *Bruen*, the majority's test is inherently manipulable, just like the two-step approach embraced by the circuit courts after *Heller*. Even if the Supreme Court stops issuing ipse dixits that greenlight regulations a majority of the Justices don't care to call into question, all courts are going to face serious challenges in faithfully applying the *Bruen* test.

These problems have roots in *Heller*. The Second Amendment originally applied only to the federal government, and there appear to have been no

political views is not analogous to regulating the general population in an effort to reduce the misuse of weapons.

[60] *See* David B. Kopel, *Restoring the Right to Bear Arms:* New York State Rifle & Pistol Association v. Bruen, 2022 CATO SUPREME CT. REV. 305, 325-26, *available at* https://www.cato.org/sites/cato.org/files/2022-09/Supreme-Court-Review-2022-Chapter-11.pdf.

[61] *Bruen*, 142 U.S. at 2161-62 (Kavanaugh, J., concurring).

[62] Alito also noted the narrowness of the *Bruen* holding in his concurrence, but only in the context of responding to a lengthy section of Breyer's dissent (whose legitimate purpose Alito could not see). *See id*. at 2157 (Alito, J., concurring).

[63] *Id*. at 2138 n.9.

bans on keeping and carrying weapons in the founding period.[64] As the *Bruen* Court points out, the language of the Second Amendment is "unqualified."[65] Absent evidence to the contrary, one might think the right that was codified in the Second Amendment was the right to be completely free of federal restrictions.[66] Because the states retained what we call the police power, it might have been quite plausible for people at the time to understand the Second Amendment as an absolute prohibition, though one that applied only to the federal government.

Heller implicitly rejected this interpretation. And it's easy to imagine why. The Justices undoubtedly foresaw that the Second Amendment would almost certainly be incorporated against the states through substantive due process. Settled doctrine requires state and federal laws to be treated identically,[67] so incorporation, which promptly did take place in *McDonald*, would entail a sweeping expansion of the federal right to keep and bear arms. It would obviously be absurd to forbid all levels of government from imposing any restrictions at all on the possession and use of weapons.

Of course, it's possible that the Second Amendment was meant to place the same restraints on the federal government that already applied to the states under their own laws. Although *Heller* never specified how to identify the scope of the "pre-existing right" that it assumed was codified by the Second Amendment, it hinted at something along these lines, perhaps with the proviso that there might be post-ratification evidence showing that certain additional restrictions *would have* been considered permissible in 1791.[68]

Bruen thus encounters a problem that *Heller* avoided when it announced a right to possess a handgun without any historical analysis of that specific issue. There were very few restrictions on weapons in the founding period, but that might have been because legislatures saw no need for them. The absence of a regulation does not necessarily imply the absence of a power to

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[64] There were some militia regulations, authorized by Art. I, § 8, cl. 15, *requiring* able-bodied men to keep and bear arms. There had also been colonial regulations *requiring* citizens to carry weapons in certain circumstances. It is obvious that such regulations did not stop anyone from carrying weapons anywhere they chose to carry them, and it is equally obvious that such regulations did not imply that governments were authorized to stop people from doing so.

[65] 142 S. Ct. at 2126.

[66] *Heller* called this a "pre-existing right" but offered no evidence except an ipse dixit from a late 19th century judicial opinion. *See* 554 U.S. at 592 (citing United States v. Cruikshank, 92 U.S. 542, 553 (1876) (right to bear arms was not created by the federal Constitution or protected by the Constitution from restrictions imposed by the state governments)).

[67] *See*, *e.g.*, *Bruen*, 142 S. Ct. at 2137-38.

[68] *See* 554 U.S. at 592-619.

adopt that regulation. Among the infinity of regulations that were not adopted, how can courts decide which ones would have been considered unconstitutional if they had been proposed?

Bruen's answer to this contrafactual historical question is somewhat equivocal. In framing the applicable test, the Court seems to place a heavy burden of proof on the government. Any regulation of conduct covered by the plain language of the text is presumptively unconstitutional, and "the government *must affirmatively prove* that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms."[69] Or, in another formulation, the government must "justify its regulation *by demonstrating* that it is consistent with the Nation's historical tradition of firearm regulation."[70] On their face, these statements would seem to imply that the absence of substantial evidence that a given modern regulation was or would have been considered constitutional during the relevant historical period means that the regulation is unconstitutional.

Consider, for example, a modern regulation banning the possession or carrying of handguns in order to prevent violent crime. If there is no evidence of a tradition of addressing this problem by forbidding most citizens to possess handguns or to carry them in public, it would seem to follow inexorably from *Bruen*'s test that such bans are unconstitutional. But *Bruen* indicates that the lack of a historical tradition of such bans is merely "relevant evidence" of their unconstitutionality.[71] The Court does not say what additional evidence might be required to confirm that they are unconstitutional. Nor does the Court say what evidence would justify upholding them. *Bruen* does not address these issues because New York came nowhere near to proving that such handgun bans could be justified by "'historical precedent' from before, during, and even after the founding [that] evinces a comparable tradition of regulation."[72] But such questions are bound to arise in future cases.

The Court recognizes that changes in society, especially technological changes, will demand a "more nuanced approach" than *Heller*, *McDonald*, and *Bruen* required.[73] Apparently, this will primarily involve the use of analogical reasoning, which is presented as a superior alternative to the kind of

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[69] 142 S. Ct. at 2127 (emphasis added).

[70] *Id*. at 2129-30 (emphasis added).

[71] *Id*. at 2131.

[72] *Id.* at 2131-32.

[73] *Id.*

freestanding interest-balancing adopted by Justice Breyer and the post-*Heller* circuit courts.

Bruen suggests how this will work. *Heller* had approved regulations banning firearms in "sensitive places such as schools and public buildings" without giving any historical examples of such laws. Without calling this unsupported dictum into question, *Bruen* rejects New York's effort to cast its statute as such a regulation: "[T]here is no historical basis for New York to effectively declare the island of Manhattan a 'sensitive place' simply because it is crowded and protected generally by the New York City Police Department."[74] In an effort to indicate how narrower regulations might be justified, *Bruen* alludes to historic bans on carrying weapons to legislative assemblies, polling places, and courthouses, apparently on the assumption that schools and public buildings are analogous to these locations.[75]

Whatever one thinks of this analogy, a fundamental problem arises from the nature of the evidence for a historical tradition of gun bans at legislatures, polling places, and courthouses. *Bruen* acknowledges that this is a short list, but it does not acknowledge that even these few prohibitions were extremely rare until long after the adoption of the Second Amendment. According to the scholarly source on which *Bruen* relies, there were only *two jurisdictions* that enacted "sensitive place" laws in America prior to the adoption of the Second Amendment: the colony of Maryland prohibited arms from being carried into the legislature in the mid-17th century, and Delaware's 1776 constitution prohibited bearing arms at polling places or assembling the militia nearby.[76] After the Bill of Rights was ratified, it seems that *zero* such laws were adopted until after the Fourteenth Amendment was ratified.[77]

Notwithstanding *Heller*'s unsupported dictum about bans on guns in schools, they, too, seem to have been nonexistent. In 1824, the University of Virginia prohibited its students from keeping alcohol, chewing tobacco, weapons, servants, horses, or dogs on campus. This rule was an effort to discourage juvenile misbehavior by students, and it did not apply to faculty and staff. Neither this law nor later regulations of students at other universities

[74] *Id.* at 2134.

[75] *Id.* at 2133.

[76] *See* David B. Kopel & Joseph G.S. Greenlee, *The "Sensitive Places" Doctrine: Locational Limits on the Right to Bear Arms*, 13 CHARLESTON L. REV. 205, 229-36, 244-47 (2018).

[77] *Id.*

are precedents for treating schools as "sensitive places" that may be declared gun-free zones.[78]

Because the Court was unaware of any objections to these extraordinarily rare laws, only one of which was even in force in 1791, it assumed that it was and is settled that the Second Amendment permits gun bans at these "sensitive places," as well as at new and analogous places.[79] If that's all it takes to identify a regulatory tradition that authorizes a gun regulation, it won't be very hard for courts to limit *Bruen* to its facts.

One might object that the regulatory tradition to which *Bruen* refers should include statutes enacted during the Reconstruction and early Jim Crow periods because they imply that such statutes would have been considered constitutional earlier. In 1870, Louisiana prohibited the bearing of arms when the polls were open. In 1873, Texas banned the carrying of arms near an open polling place. In 1874 and 1886, Maryland imposed similar bans in two specific counties. And in 1874, the Georgia Supreme Court upheld a ban on carrying weapons into a courthouse.[80] These few post-ratification statutes add next to nothing to the body of founding-era precedent, itself so tiny as to be essentially nonexistent, even under the vague standard *Bruen* announces: a government practice that "has been open, *widespread*, and unchallenged since the early days of the Republic."[81] And they can hardly be used as evidence of a practice that liquidated an ambiguity in the Fourteenth Amendment. It was settled during that time period that the Fourteenth Amendment did not incorporate the Second Amendment against the states.[82]

Bruen's endorsements in dicta of shall-issue permitting schemes and gun-free zones in "sensitive places" suggest that this Court may find a way to uphold (or allow the lower courts to uphold) all but the most outlandish and onerous regulations. And when personnel changes give us a new Court, the Second Amendment could almost be turned back into a dead letter.

That may not happen. But the alternative is probably not going to be the rigorous historical analysis that *Bruen* seems at points to promise. The Court cites Justice Scalia's acknowledgment that "[h]istorical analysis can be

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[78] *See id.* at 249-52.

[79] *Bruen*, 142 S. Ct. at 2133.

[80] Kopel & Greenlee, *supra* note 76, at 245-47.

[81] *See Bruen*, 142 S. Ct. at 2137 (emphasis added) (quoting NLRB v. Noel Canning, 573 U.S. 513, 572 (2014) (Scalia, J., concurring in the judgment)); *see also id.* at 2131-32 (referring to "'historical precedent' from before, during, and even after the founding [that] evinces a comparable tradition of regulation").

[82] *See Cruikshank*, 92 U.S. at 553.

difficult; it sometimes requires resolving threshold questions, and making nuanced judgments about which evidence to consult and how to interpret it."[83] *Bruen* insists that reliance on history is "more legitimate and more administrable" than asking judges to make difficult empirical judgments about the costs and benefits of firearms restrictions, as Breyer would have them do.[84] More legitimate for sure, at least when it comes to issues where history provides meaningful guidance. But it is not true that reliance on history is always more *administrable* than making difficult empirical judgments. Modern regulations that have little or no historical pedigree will often be quite amenable to empirical analysis even if that analysis sometimes requires difficult judgments.

More important, the Court has posed a false choice by conflating Breyeresque interest-balancing with means-end scrutiny.[85] What *Heller* called "freestanding 'interest-balancing'" is certainly a *form* of means-end scrutiny, but not all such scrutiny is or need be "freestanding." *Heller* and *Bruen* both insist that the balance struck by the American people when they adopted the Second Amendment is the only balance to which courts should defer.[86] That's right, but it will sometimes, perhaps often, be impossible as a practical matter to determine where that balance was struck without performing means-end scrutiny.

Bruen itself shows why. The Court endorses shall-issue licensing regimes on the ground that these regulations apparently "are designed to ensure only that those bearing arms in the jurisdiction are, in fact, 'law-abiding, responsible citizens.'"[87] This is nothing other than means-end analysis: the government's end (restricting public carry to responsible citizens) is assumed to be consistent with the balance struck by the people when they adopted the Second Amendment, and the means chosen by the government is assumed to be confined to that constitutionally permissible end. Persuasive or not, the argument is disconnected from any identified historical tradition.

At the end of its analysis of shall-issue regulations, the Court adds: "[B]ecause any permitting scheme can be put toward abusive ends, we do not rule out constitutional challenges to shall-issue regimes where, for example, lengthy wait times in processing license applications or exorbitant fees deny

[83] *Bruen*, 142 S. Ct. at 2130 (quoting *McDonald*, 561 U.S. at 803-04 (Scalia, J., concurring)).
[84] *See id.* (quoting *McDonald*, 561 U.S. at 790-91 (plurality opinion)).
[85] *See id.* at 2129.
[86] *See Heller*, 554 U.S. at 635; *Bruen*, 142 U.S. at 2131 (quoting *Heller*).
[87] *Bruen*, 142 U.S. at 2138 n.9 (quoting *Heller*, 554 U.S. at 635).

ordinary citizens their right to public carry."[88] This is means-end analysis again. If the government chooses a means that seems to have an end that is inconsistent with what a court thinks is the balance struck by the people when they adopted the Second Amendment, the regulation may be invalidated. The Court does not even suggest that historical evidence could be found to distinguish "lengthy" wait times from constitutionally permissible wait times, or "exorbitant" fees from appropriate fees.

Recognizing that many modern regulations do not have close historical analogues, the Court notes that *Heller* and *McDonald* identified self-defense as the central component of the Second Amendment right.[89] "Therefore, whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are '*central*' considerations when engaging in an analogical inquiry."[90] Once again, comparing the burden on a constitutional right with the justification for that burden is nothing other than means-end scrutiny.

Bruen's rejection of "independent" means-end scrutiny is equivalent to *Heller*'s rejection of Breyer's "freestanding" interest-balancing. The crucial difference between the practice the Court has now repeatedly condemned and the practice it now aspires to require is whether courts maintain fidelity to the central purpose of the Second Amendment, namely protecting the right of armed self-defense. Contrary to the Court's suggestion, such fidelity does not necessarily require finding a historical regulation with which to compare a modern regulation.

Recognizing that courts can engage in result-oriented means-end scrutiny under the guise of an analogical inquiry, the Court warns that this is impermissible: the judicial role requires faithful adherence to the balance struck by the founding generation in the Constitution.[91] The warning is perfectly appropriate. But *faithfully* applying means-end scrutiny to the "sensitive place" issue, for example, would actually be easier than applying *Bruen*'s historical-tradition inquiry. At oral argument, Justice Alito suggested one way to do it:

> [C]ould we start with the purpose of the personal right to keep and bear arms? And the core purpose of that right, putting aside the military aspect, is self-defense.

[88] *Id*.
[89] *Id*. at 2133.
[90] *Id*. (quoting *Heller* and *McDonald*) (cleaned up).
[91] *Id*. at n.7.

> So starting with that, could we analyze the sensitive place question by asking whether this is a place where the state has taken alternative means to safeguard those who frequent that place?
>
> If it's a place like a courthouse, for example, a government building, where everybody has to go through a magnetometer and there are security officials there, that would qualify as a sensitive place.
>
> Now that doesn't provide a mechanical answer to every question, but would that be a way of beginning to analyze this?[92]

This is exactly the kind of analysis that "elevates above all other interests the right of law-abiding, responsible citizens to use arms" for self-defense.[93] It's an attempt to faithfully carry out the purpose of the constitutional provision under modern circumstances, without undermining the balance that the people struck when they adopted the Bill of Rights. This straightforward approach would have been more creditable, and more workable in future cases, than *Bruen*'s effort to manufacture a historical tradition of gun-free zones out of virtually no historical precedents.

Of course, faithless judges could misapply the kind of means-end analysis suggested by Alito by deciding that the New York Police Department provides an adequate substitute for the right to keep and bear arms throughout the island of Manhattan. But faithless judges could get exactly the same result under the guise of a historical inquiry. They could simply analogize urban areas to courthouses, polling places, and legislative buildings: all are places where some people might be afraid to exercise their constitutional rights because they are intimidated by the presence of armed civilians.[94]

Consider another issue, which is likely to generate considerable litigation in the coming years: the numerous regulations that modern legislatures have applied to particular kinds of weapons. These include bans or severe restrictions on highly destructive armaments, such as nuclear bombs, shoulder-fired anti-aircraft missiles, and artillery. They also include regulations that look more like political grandstanding than serious efforts to protect the

[92] Transcript of Oral Argument at 32-33 (cleaned up).

[93] *Bruen*, 142 S. Ct. at 2131 (quoting *Heller*, 554 U.S. at 635).

[94] For an extended argument along these lines, see Joseph Blocher & Reva Siegel, *When Guns Threaten the Public Sphere: A New Account of Public Safety Regulation under* Heller, 116 NW. U. L. REV. 139 (2021).

public, such as bans on so-called assault weapons,[95] on high-capacity magazines, and on nonlethal stun guns. As with "sensitive places," judges could faithfully apply means-end scrutiny by requiring the government to justify every regulation in light of the purpose of the Second Amendment, which is principally to secure the natural or inherent right to self-defense.[96] There would undoubtedly be some easy cases at both ends of the spectrum, such as nuclear weapons and nonlethal stun guns.[97] There would also be harder cases in between, as there are in the First Amendment context.

In the harder cases, *Bruen* apparently expects courts to start with founding-era laws, or perhaps with pre-1868 regulations, and then uphold analogous regulations. Genuinely analogous precedents, however, may be very hard to find. Evidence has already been found that cannons, which were among the most destructive devices that existed at the time, were freely available to civilians at least until the mid-19th century.[98] One wonders what historical analogy will be used to justify bans on cannons today, let alone less destructive devices like machine guns, which appear to have been unregulated until the 20th century. Perhaps new historical research will obviate these problems, though the likelihood of significant new findings seems small.

More importantly, we can hope that the courts will display a heightened respect for the purpose and value of the Second Amendment. Where judges have such respect, they can begin to develop a jurisprudence that is more consistent with the Constitution than the case law that *Bruen* repudiated. Progress can no doubt be made within *Bruen*'s newly announced framework, and many judges will take that obligation seriously. In the long run, however, the courts are unlikely to protect an appropriately robust right to keep and bear arms unless judges from across the political spectrum arrive at a shared consensus that the right remains valuable today, just as they have with respect to the freedom of speech.

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[95] Such bans invariably apply only to guns with certain cosmetic features, leaving functionally similar weapons unaffected. *See, e.g.*, Stephen P. Halbrook, *Banning America's Rifle: An Assault on the Second Amendment?* 22 FEDERALIST SOC'Y REV. 152 (2022).

[96] *See Heller*, 554 U.S. at 628 ("the inherent right of self-defense has been central to the Second Amendment right").

[97] For a legal argument in favor of upholding bans on nuclear weapons, see Lund, *Second Amendment,* Heller*, and Originalist Jurisprudence*, *supra* note 16, at 1373-74. For a legal argument in favor of invalidating bans on nonlethal stun guns, see *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1028-33 (2016) (Alito, J., concurring).

[98] For evidence, see Nelson Lund, *The Proper Use of History and Tradition in Second Amendment Jurisprudence*, 30 FLA. J.L. & PUB. POL'Y 171, 177-78 (2020).

IV. EDUCATING CITIZENS, INCLUDING JUDGES

The Second Amendment was completely uncontroversial when it was adopted, partly because of a broad consensus about the validity of the political principles articulated in the Declaration of Independence. Those principles had famously been given a reasoned elaboration by the Declaration's true father, John Locke. Thanks largely to William Blackstone, who was the foremost expositor of English law for the founding generation, Locke's teaching was more than merely a theory. It was understood to be the basis of the legal tradition we inherited from England, a tradition that Americans thought was founded on truths that were self-evident and unchangeable. A more widespread understanding of the relation between those principles and the Second Amendment would help promote a better understanding of the continuing value of the right to keep and bear arms.

Locke argued that reason dictates natural laws that include a duty to refrain from harming others in their life, health, liberty, or possessions. That duty, in turn, implies that everyone has a natural right to enforce the natural law by punishing those who offend against it. And that right was not completely relinquished when men left the state of nature by entering into political society.[99] In support of what the Declaration calls the unalienable rights to life, liberty, and the pursuit of happiness, Locke reasoned that a forcible attack on one's freedom or property, whether in the state of nature or in society, implies a design to take away everything else, including one's life. And that creates a state of war, even within society.[100]

For that reason, Locke recognized a natural right to kill a robber even if he is only trying to take your horse or your coat. The same reasoning that establishes the right to kill a robber also establishes the right to overthrow a predatory ruler.[101] Locke is especially famous for his defense of the right to revolt against a tyrant, but that is merely a special case of the right to self-defense. Whereas political revolts may seldom be justified, and are very rarely prudent, common criminals frequently present an immediate threat to the lives of a large portion of the public, probably even more so today than when the Second Amendment was adopted.

Similarly, William Blackstone stressed that when one's person or property is forcibly attacked, nature itself prompts an immediate violent response

[99] John Locke, *Second Treatise of Government*, ch. 2.
[100] *Id.*
[101] *Id.*, ch. 3.

because the future process of law may not offer an adequate remedy.[102] He linked this natural law with the legal right to keep and bear arms, which he put among the indispensable auxiliary rights "which serve principally as barriers to protect and maintain inviolate the three great and primary rights, of personal security, personal liberty, and private property."[103]

The right to arms, Blackstone said, is rooted in "the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression."[104] Violent oppression is not by any means limited to direct oppression by the government. In fact, government's failure to control violent criminals is the reason that the sanctions of society and laws are most commonly found insufficient to protect us from oppression. As with Locke's right to revolution, a Blackstonian right to resist tyrannical violence by the government would be a special case, and one that is rarely exercised.

Locke's understanding of correlative rights and duties in nature has an analog in the structure of the Second Amendment, which is the constitutional provision that most directly addresses the most fundamental element of our political tradition. The Second Amendment links the right of self-defense against threats to personal safety with the right of self-defense against the threat of tyranny. Just as there are natural duties along with natural rights, the Second Amendment refers to the well-regulated militia as an institution necessary to the security of a free state.

This textual reference is perfectly consistent with an individual right to arms. A well-regulated militia is, among other things, one that is not *inappropriately* regulated, as it would be if militia regulations were used to infringe the right of the people to keep and bear arms.[105] But the militia tradition also entailed a legal *duty* of able-bodied men to arm themselves, to undergo militia training, and to fight when called on to do so. The Constitution expressly recognizes a wide range of activities in which the militia may be called on to serve: enforcing the law, suppressing insurrections, and repelling invasions.[106]

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[102] 3 William Blackstone, *Commentaries* *3-4 (1st ed.).

[103] 1 *Id.* at *136.

[104] 1 *Id.* at *139.

[105] *See* Nelson Lund, *The Ends of Second Amendment Jurisprudence: Firearms Disabilities and Domestic Violence Restraining Orders*, 4 TEX. REV. L. & POL. 157, 175–76 (1999); Nelson Lund, *D.C.'s Handgun Ban and the Constitutional Right to Arms: One Hard Question?*, 18 GEO. MASON U. C.R.L.J. 229, 241–44 (2008).

[106] *See* U.S. CONST. art. I, § 8, cl. 15.

Of course, our statutes no longer require citizens to undergo militia training or to arm themselves in case they are called out for militia duties. In one obvious sense, these changes have made us more free. But the freedom to rely entirely on the government for protection against criminal violence also has the potential to undermine our freedom.

Fundamental principles of our political tradition, articulated by Locke and Blackstone and confirmed in the Second Amendment, have at least two related implications that bear on the interpretation of the Second Amendment. First, I do not lose my right to the means of protecting myself merely because others are vulnerable to violent attacks, whether through their own choices or through bad luck. Second, a robust right to keep and bear arms provides a barrier against the kind of tyranny that arises when governments acquiesce in violence, including political violence, by private groups.

The Jim Crow period offers the most vivid examples of that kind of tyranny. During this era, state governments frequently allowed or even encouraged private groups like the Ku Klux Klan to terrorize the black population.[107] The politically motivated riots of our own time, such as those that many government officials tolerated or even encouraged after George Floyd was killed, provide another example.[108]

We are obviously a long way from anything like an ascendant Ku Klux Klan, but we are not necessarily immune from serious government efforts to disarm citizens who are threatened by political violence. After Hurricane Katrina, for example, the government tried to disarm a civilian population that was threatened by common criminals during a collapse of civil order.[109] How much more tempting might it be to disarm a population threatened by political extremists pursuing aims with which many government officials sympathize?

Finally, and perhaps most important, political self-government depends for its ultimate success on citizens who possess the moral temper befitting a

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[107] *See*, *e.g.*, Ngiraingas v. Sanchez, 495 U.S. 182, 187-88 (1990).

[108] *See, e.g.,* David E. Bernstein, *The Right to Armed Self-Defense in Light of Law Enforcement Abdication*, 19 GEO. J.L. & PUB. POL'Y 177, 185-202 (2021).

[109] *See*, *e.g.*, Alex Berenson & John M. Broder, *Police Begin Seizing Guns of Civilians*, N.Y. TIMES, Sept. 9, 2005 (reporting that "after a week of near anarchy in the city, no civilians in New Orleans will be allowed to carry pistols, shotguns, or other firearms of any kind"); Stephen P. Halbrook, *"Only Law Enforcement Will Be Allowed to Have Guns": Hurricane Katrina and the New Orleans Firearms Confiscations*, 18 GEO. MASON U. C.R.L.J. 339, 339 (2008) ("Police proceeded to seize firearms at gunpoint . . . . Citizens were left without protection in a city besieged by looters and criminals.").

free people. Citizens who arm themselves are recognizing and insisting that their lives and safety are not a gift from the government, and that they claim responsibility for their own freedom and security.

The importance of this attitude was recognized almost two centuries ago by Alexis de Tocqueville in *Democracy in America*. While Tocqueville was cautiously hopeful about our future, one of his greatest fears was that democratic countries would succumb to a kind of soft despotism imposed through what we now call the administrative state. He imagined a future power, "immense and tutelary," which he described in the following way:

> [It is] absolute, detailed, regular, far-seeing, and mild. It would resemble paternal power if, like that power, it had for its object preparing men for manhood; but it only seeks, on the contrary, to keep them fixed irrevocably in childhood; it likes citizens to enjoy themselves, provided that they think only of enjoying themselves. It willingly works for their happiness; but it wants to be the unique agent and sole arbiter of that happiness; it provides for their security, foresees and provides for their needs, facilitates their pleasures, conducts their principal affairs, directs their industry, regulates their estates, divides their inheritances; can it not take away from them entirely the trouble of thinking and the pain of living?[110]

The spirit of the Second Amendment can help to retard our nation's slide into the kind of moral and political stupor that Tocqueville warned us against. That spirit survived among many millions of Americans despite the neglect and hostility with which courts treated the Second Amendment for so long. One effect has been the remarkable relaxation of onerous gun control laws in the vast majority of states since the late 1980s.[111] If it hadn't been for that political development, a majority of the Justices may never have dared to revive the Second Amendment in *Heller*.

More could be done today to fortify and preserve this revival, including steps that Congress could take under its almost plenary constitutional authority over the militia.[112]

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[110] Alexis de Tocqueville, *Democracy in America*, vol. 2, pt. 4, chap. 6, at 663 (trans. Harvey C. Mansfield & Delba Winthrop). I have slightly altered the translation.

[111] *See*, *e.g.*, Nelson Lund, *Public Opinion and the Second Amendment*, 5 J.L.: PERIODICAL LABORATORY OF LEG. SCHOLARSHIP 85, 86 (2015).

[112] U.S. CONST. art. I, § 8, cl. 16 ("[The Congress shall have Power] . . . To provide for organizing, arming, and disciplining, the Militia, and for governing, such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.").

First, Congress could define the militia to include all able-bodied adults between the ages of 17 and 44. This would require little more than removing the outdated exemption for women from the current statute.[113] (The National Guard, or "organized militia,"[114] is a small subset of the militia, which has always included most able-bodied men.)

Second, Congress could make training in the use of small arms a condition of receiving a high school diploma or admission to a college or university. This training would obviously be useful if the militia were ever summoned to deal with a sudden emergency. And it would be useful to many individuals, especially women, who would be less likely to fall victim to violent crime. But most important, training in the use of small arms would help instill a spirit of self-confidence and self-reliance in America's future decisionmakers, who will need those qualities if they are going to be genuinely responsible citizens rather than docile sheep or whining victims of governmental pettiness and indifference.

V. CONCLUSION

Heller and *Bruen* were right to insist that the Second Amendment "is the very *product* of an interest balancing by the people [and it] surely elevates above all other interests the right of law-abiding, responsible citizens to use arms" for self-defense.[115] Courts that make a good-faith effort to discover that balance will surely start with the text and history of the provision, as the Supreme Court often does when confronted with issues of first impression in other areas of the law.

Bruen was an easy case because the text and the relevant history overwhelmingly support the conclusion that New York's severe restriction on carrying guns in public was unconstitutional. Many future cases will not be so easy, and the *Bruen* opinion contains some conspicuous indications that some of those cases will not be decided solely on the basis of text and history.

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[113] *See* 10 U.S.C. 246(a) ("The militia of the United States consists of all able-bodied males at least 17 years of age and, except as provided in section 313 of title 32, under 45 years of age who are, or who have made a declaration of intention to become, citizens of the United States and of female citizens of the United States who are members of the National Guard.").

Even assuming that the current exemption for women would survive a constitutional challenge, the prominent role of women in the military today demonstrates that a blanket exemption from militia duties is unnecessary, if not insulting.

[114] *Id.* § 246(b).

[115] *Bruen*, 142 U.S. at 2131 (quoting *Heller*).

This need not lead to decisions inconsistent with the policy choices made by the people when they adopted the Second Amendment. But significant deviations from the policies of the Constitution are almost certain to infect judicial decisions unless a majority of Supreme Court Justices appreciate the continuing value of a robust right to keep and bear arms. *Bruen*'s instruction to focus on regulatory traditions will not provide the education that judges need because that test is inherently manipulable. Only if a sufficient number of judges internalize the spirit of the Second Amendment will the Court's jurisprudence come to reflect its original meaning. That spirit of self-confidence and self-reliance is also worth cultivating in all Americans because genuine political self-government is ultimately impossible without it.

Other Views:

- Kachalsky v. County of Westchester, 701 F.3d 81 (2d Cir. 2012), *available at* https://cite.case.law/f3d/701/81.
- Kolbe v. Hogan, 849 F.3d 114 (4th Cir. 2017), *available at* https://cite.case.law/f3d/849/114/.
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THE MEANING OF "REGULATE COMMERCE" TO THE CONSTITUTION'S RATIFIERS*

ROBERT G. NATELSON**

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* Note from the Editor: The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. To join the debate, please email us at info@fedsoc.org.

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[1] *Bibliographical Footnote*: This note collects all sources cited in this article more than once.

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Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847 (2003) [hereinafter *Barnett II*];

I. Previous Scholarship

A. Views of "Commerce": Traditional and "Mega"

The Constitution grants Congress power to "regulate Commerce with foreign Nations, among the several States, and with the Indian Tribes."[2] For the Constitution's first 150 years, it generally was accepted that "Commerce" referred to mercantile trade and its many incidents.[3]

Since that time, however, several writers favoring a more interventionist federal government have claimed that the Founders understood "Commerce" to be a much more comprehensive term. Thus, in 1937, Walton Hale Hamilton and Douglas Adair argued that the Founders understood "Commerce" to comprehend all economic relationships, including production as well as trade.[4] In 1953, William Winslow Crosskey elaborated this position,[5] and in 1999 Grant S. Nelson and Robert J. Pushaw published an article agreeing with Crosskey.[6]

The effect of adopting this view is to authorize, even without resort to the Necessary and Proper Clause,[7] congressional regulation of all economic

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The Documentary History of the Ratification of the Constitution (John P. Kaminski et al. eds., 1976-2021) (40 volumes in the online edition) [hereinafter DH];

Robert G. Natelson, *The Legal Meaning of "Commerce" In the Commerce Clause*, 80 St. John's L. Rev. 789 (2006) [hereinafter *Natelson, Commerce*];

— *The Original Understanding of the Indian Commerce Clause: An Update*, 23 Federalist Soc'y Rev. 209 (2022) [hereinafter *Natelson, Update*].

2 U.S. Const. art. I, § 8, cl. 3.

3 *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238, 303 (1936) (noting that "the word 'commerce' is the equivalent of the phrase 'intercourse for the purposes of trade' "); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 549–50 (1935) (noting the distinction "between commerce 'among the several States' and the internal concerns of a State"); United States v. E.C. Knight Co., 156 U.S. 1, 12 (1895) (describing commerce as "the commercial intercourse between nations and parts of nations").

4 The Hamilton-Adair book is discussed in *Natelson, Commerce*, *supra* note 1, at 791-93.

5 *Id.* at 793 (discussing Crosskey's work).

6 Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 Iowa L. Rev. 1 (1999).

7 U.S. Const. art. I, § 8, cl. 18 ("The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

transactions triggering interstate externalities—which for practical purposes means the entire American economy.[8]

Two currently-active scholars, Jack Balkin and Akhil Amar, go further. They contend that, as understood by the Founders, "Commerce" actually denoted human interactions of all forms, economic and non-economic.[9] They argue that during the 18th century, the word "commerce" was interchangeable with the word "intercourse," and that either could denote all social relationships.[10] Under this view, the Constitution empowers Congress to regulate *all* social interchange generating externalities across jurisdictional lines—subject only to the Constitution's itemized limits, such as the Bill of Rights.

In this article, I refer collectively to both non-traditional views as the "mega-Commerce Clause hypothesis." The phrase "mega-Commerce Clause" communicates its effect: It converts a moderately broad, specific congressional power into a grant more sweeping than any other in the Constitution. The label "hypothesis" reflects its status as a suggestion based on, at least so far, fairly scanty evidence.

The mega-Commerce Clause hypothesis might seem implausible if not for the standing of its sponsors and its congeniality with dominant academic political leanings.[11] One problem with the hypothesis is that it does not fit well textually within the Constitution as a whole. Normally we presume that when the same expression appears in more than one place in the same document, its meaning remains constant. But construing the appearance of

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[8] Modern Supreme Court jurisprudence permits Congress to regulate all economic activities that "substantially affect" commerce, which seems effectively to comprehend the entire economy. However, outside the realm of insurance, *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944) (holding that insurance is within the core meaning of the word "Commerce"), the basis of this expansive reading seems to be the Necessary and Proper Clause rather than the Commerce Clause per se. Robert G. Natelson, *Tempering the Commerce Power*, 68 MONT. L. REV. 95, 115-17 (2007). *See also id.* at 117-23 (pointing out that the incidental powers doctrine, embodied in the Necessary and Proper Clause, is inconsistent with the Court's broad approach). A narrower view of the Necessary and Proper Clause, such as that signaled by Chief Justice John Roberts in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 558-61 (2012), without expanding the construction of "Commerce," would reduce Congress's economic power.

[9] *See generally Balkin, Commerce*, *supra* note 1; AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 107-08 (2005) (arguing that "Commerce" includes "all forms of intercourse in the affairs of life").

[10] *E.g. Balkin, Commerce*, *supra* note 1, at 1, 5-6, 15-18.

[11] Law professors are overwhelmingly left of center, and therefore presumably support a large and active federal establishment. Adam Bonica et al., *The Legal Academy's Ideological Uniformity*, 47 J. LEGAL STUD. 1 (2018).

"Commerce" in the Commerce Clause to mean "the entire economy" or "all human relationships" seems inconsistent with its appearance in the Port Preference Clause, where the word is employed in a narrow mercantile sense.[12] Moreover, the mega-Commerce Clause hypothesis converts several other enumerated powers into surplus: For example, if Congress may regulate all *economic* relationships, then there is no need for the Postal or Intellectual Property Clauses.[13] If Congress may regulate all *human* relationships, there is no need for provisions authorizing Congress to "declare the Punishment of Treason"[14] or to prescribe how records are proven for full faith and credit purposes[15]—nor even for a power to "constitute tribunals inferior to the supreme Court."[16]

The mega-Commerce Clause hypothesis also is ahistorical: It squarely contradicts numerous representations made to the public by the Constitution's sponsors during the ratification debates of 1787-90. For example, the Constitution's advocates repeatedly represented that if the document were ratified, federal authority would not extend to the governance of real estate titles and transactions, local businesses, domestic relations, and host of other economic and non-economic activities.[17]

Additionally, three surveys of how the founding generation used the word "commerce" reveal little support for the hypothesis: As explained in Part I(B), those surveys have found that usages of "commerce" to mean anything broader than mercantile trade were relatively rare—particularly in the legal context.

This article reports the results of a fourth, more precise survey. This survey was designed to capture the meaning of (1) the word "Commerce" as it appears in the Constitution, (2) to the very people who debated and ratified that document, and (3) during the very period it was debated and ratified. Like its predecessors, the new survey finds virtually no historical support for the mega-Commerce Clause hypothesis. This article further explains that

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[12] U.S. CONST. art. I, § 9, cl. 6 ("No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.").

[13] U.S. CONST. art. I, § 8, cls. 7 & 8.

[14] *Id.*, art. III, § 3, cl. 2.

[15] *Id.*, art. IV, § 1.

[16] *Id.*, art. I, § 8, cl. 9.

[17] I have collected these representations in the following articles: *More News on the Powers Reserved Exclusively to the States*, 20 FEDERALIST SOC'Y REV. 92 (2019); *The Founders Interpret the Constitution: The Division of Federal and State Powers*, 19 FEDERALIST SOC'Y REV. 60 (2018); *The Enumerated Powers of States*, 3 NEV. L. J. 469 (2003).

the hypothesis rests on an unexamined, and inaccurate, assumption about the 18th-century meaning of the word "intercourse."

B. Prior Surveys of Founding-Era Usage

Scholars have published three broad surveys on usages of the word "commerce" before, during, and after the founding era. The goal of these surveys was to ascertain the relative frequencies of the use of "commerce" to mean mercantile trade, all economic activities, or all human interactions.

The results of the first survey were published in 2001. Randy Barnett examined then-available materials from the constitutional debates of the 1780s, judicial decisions before 1835, and other sources.[18] He found that mercantile trade was the overwhelmingly dominant sense of "commerce." In fact, the wider meanings hardly appeared at all. In a second survey, summarized in a 2003 article, Professor Barnett examined all appearances of the word in Benjamin Franklin's popular newspaper, the *Pennsylvania Gazette*, between 1728 and 1800. The results were similar.[19]

I published the third survey in 2006.[20] To account for the legal nature of the Constitution and the high level of legal literacy among the general public during the founding era, I collected all appearances of "commerce" in (1) reported English court cases issued between 1500 and 1800, (2) reported American cases decided before 1790, and (3) 18th-century legal treatises available in the Oxford University and Middle Temple libraries and in the *Eighteenth Century Collections Online* database.

Just as Professor Barnett had found that in his sources "commerce" almost always meant mercantile trade and seldom anything else, I found that the same was true throughout Anglo-American legal discourse. I also identified a tight connection between the concept of commercial regulation and the body of Anglo-American jurisprudence known as the *lex mercatoria* or law merchant. I elaborated on that connection in a 2022 article published in the *Federalist Society Review*.[21]

C. Weaknesses in Prior Surveys

These surveys yielded remarkably consistent results from a wide variety of sources. But they remain open to criticism on at least three grounds.

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[18] *Barnett I*, *supra* note 1.

[19] *Barnett II*, *supra* note 1.

[20] *Natelson, Commerce*, *supra* note 1.

[21] *Natelson, Update*, *supra* note 1.

First: Their very comprehensiveness could yield misleading results. The ratifiers' understanding of constitutional meaning was formed between September 17, 1787—the day the Constitution was released to the public—and May 29, 1790, the day the thirteenth state, Rhode Island, ratified the document. (If one includes Vermont, then the *terminus post quem* was January 21, 1791.) However, the meanings of words vary over time, and when a word has several definitions, the relative frequency of each definition may change.[22] Thus, usages from early in the 18th century[23] and from previous centuries[24] are only weak evidence of what a term meant during the ratification era. Court decisions from the 19th century[25] are even less reliable.

Second: All three surveys examined usages of the word "commerce," and Professor Barnett's first survey also studied, using more restricted sources, appearances of the verb "regulate."[26] This approach is open to the objection that the Constitution does not use either word in isolation. The Commerce Clause phrase is "regulate Commerce"; the Port Preference Clause phrase is "Regulation of Commerce."

Third: In 2001, access to ratification-era materials was much more limited and difficult than it is today. Thus, Professor Barnett consulted what was available: the essays in *The Federalist* and certain documents from the state ratifying conventions.[27] However, *The Federalist* comprises only a tiny fraction of the material now available from the public ratification debate, and we now have more complete records of the ratifying conventions as well.

II. The Nature of this Study

Recently, the editors of the *Documentary History of the Ratification of the Constitution*[28] completed publication of all the volumes in that series except those devoted to the Bill of Rights. The editors have transferred much of the voluminous supplemental material previously available only in difficult-

[22] *E.g.*, Robert G. Natelson, *Paper Money and the Original Understanding of the Coinage Clause*, 31 HARV. J.L. & PUB. POL'Y 1, 45-51 (2008) (finding that while the verb "to coin" has a primary and secondary meaning, the frequency of the secondary meaning was higher during the founding era than it is today).

[23] As in *Barnett II*, *supra* note 1.

[24] As in *Natelson, Commerce*, *supra* note 1.

[25] As in *Barnett I*, *supra* note 1.

[26] *Barnett I*, *supra* note 1, at 139-45.

[27] *See Barnett I*, *supra* note 1.

[28] DH, *supra* note 1.

to-search microform into easy-to-search print volumes. They have indexed everything, both individual series within the wider set (such as the four volumes dedicated to the ratification in Massachusetts) and the 41-volume set as a whole.[29]

Additionally, the editors have placed all volumes and as-yet-unbound supplemental material on a website that enables the user to search for particular words and phrases.[30] They have rendered the volumes downloadable in Portable Document Format (PDF) so that each can be used and searched separately, and so volumes can be combined for easier search.

I took full advantage of the editors' remarkable achievement to create a survey that is both targeted and comprehensive. It is *targeted* in that it focuses not merely on use of the word "commerce" over a long period, but on the meaning of the specific constitutional phrase "regulate Commerce" (and its variants) to the participants in the ratification debates at the very time they were participating in those debates. This survey is *comprehensive* because the newly-complete *Documentary History* enables us to examine almost every recoverable public usage.

Using paper indices, the website, and PDF copies, I searched all volumes for documents containing (1) the Commerce Clause phrase "regulate Commerce," (2) the Port Preference Clause phrase "Regulation of Commerce," and (3) the following closely related terms: (a) regulations of commerce, (b) regulate our commerce, (c) regulation of our commerce, (d) regulations of our commerce, (e) commercial regulation(s), and (f) regulations respecting commerce. In this article, I call these expressions the "target terms."

My search generated hundreds of hits. My next task was to preserve only appearances of the target terms in the founding-era material, discarding appearances in the editors' scholarly apparatus. So I eliminated tables of contents, indices, commentary, and footnotes. Then, because the *Documentary History* reproduces some items in more than one volume, I eliminated all duplications.

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[29] There are 41 volumes in the digital edition. The number of the bound, physical volumes differs. The Pennsylvania supplemental documents form one volume in the digital edition and three (volumes 32, 33, and 34) in the bound edition, and the pagination is different. Most of the supplemental volumes for particular states (such as that of Massachusetts) in the digital edition thus far have been issued only in microform, not in bound volumes. Moreover, the comprehensive index volumes appear only in the bound edition.

[30] University of Wisconsin-Madison Libraries, The documentary history of the ratification of the Constitution, https://search.library.wisc.edu/digital/ATR2WPX6L3UFLH8I.

Next, I examined each surviving document to identify those containing clues as to the meaning of the target phrases in that document. If the author merely quoted the Commerce Clause or used one of the targeted phrases without explanation, the document was dropped from the set.

This winnowing process left an initial set of 59 documents. One was a collection of notes of the Massachusetts ratifying convention by Theophilus Parsons, a leading Federalist delegate to that convention. The notes recorded a speech by Parsons' colleague, Thomas Dawes. To ensure the accuracy of Parsons' notes, I examined the more complete report of Dawes' speech in the *Documentary History*. Because the notes connected the speech to the target terms, and the speech further explained those terms, I added the full report of the speech to the set. This raised the document set to 60.

Some of these 60 contained just a single usage of a single target term, but many featured multiple uses. Only one document featured the expression "regulations respecting commerce," but it did so in company with the far more common phrase "regulate commerce." No document included the expression "regulations of our commerce."

All of the documents in the set were issued between September 17, 1787, and May 29, 1790, except for six pertaining to the 1786 Annapolis Convention. Virginia called that gathering specifically to consider "the trade of the United States" and to consider a "uniform system in their commercial regulations."[31] The Annapolis Convention served as a backdrop to the ratification discussion—especially about commerce—and participants in that discussion sometimes referred back to it.

The document set spans a wide spectrum of material: It encompasses legislative resolutions and debates, circular letters, personal correspondence, and records of the state ratifying conventions—not just the partial convention transcripts previously available, but also notes taken by individual participants. Included as well are newspaper columns and speeches by seven framers of the Constitution: William Davie, Alexander Hamilton, Nathaniel Gorham, James Madison, Charles Cotesworth Pinckney, Hugh Williamson, and Luther Martin. All of these were Federalists except for Martin.

The document set's newspaper columns, pamphlets, and broadsides provide even more variety. In addition to other published materials, there are two essays from the "Federal Farmer" (the most important Virginia Anti-Federalist essayist), two from "Agrippa" (the most important Massachusetts

[31] Resolution of the Virginia Legislature, 21 January, 1786, in 1 DH, *supra* note 1, at 180.

Anti-Federalist essayist), two from "Candidus" (another Massachusetts Anti-Federalist), and one each from "Centinel" (the most important Pennsylvania Anti-Federalist essayist), Hanno (a Massachusetts Anti-Federalist), the "Flat-bush Farmer" (another New York Federalist), and "A Native of Virginia" (a Virginia Federalist). There was no difference between how Federalists and Anti-Federalists defined the target terms.

The entire document set is itemized in the Addendum to this article.[32]

These documents shed light on the target terms from several different directions: As explained in Part III of this article, they confirm the virtual interchangeability among the phrases (1) "regulate trade," (2) "regulate commerce," and (3) "regulate trade and commerce." They identify, as Part IV shows, many of the activities considered to be subject to "regulating commerce." They further delineate two ways in which the ratifiers *excluded* laws or activities from the target terms.

Part V addresses two pillars of the mega-Commerce Clause hypothesis. The first is that members of the founding generation sometimes equated "commerce" with "intercourse." The other is that they sometimes discussed non-mercantile activities (such as agriculture and manufacturing) in conjunction with commerce. Part V demonstrates that the dominant founding-era meaning of "intercourse" was not as broad as advocates of the mega-Commerce Clause hypothesis assume. It also explains that when the Founders discussed non-mercantile activities in conjunction with regulating commerce, they were not including non-mercantile activities within the category of "commerce." Rather, they were referring to the *consequences* of regulating commerce for other aspects of life.

Part VI is a short conclusion

III. Regulate Commerce = Regulate Trade

All three prior surveys have observed a close affinity—usually identity—between the meanings of (1) "commerce," (2) "trade," and (3) "trade and commerce." When the various forms of "regulate" are added into the mix, the identity survives.

The Virginia legislature called the Annapolis Convention on January 21, 1786, "to take into consideration the *trade* of the United States; to examine the relative situations and *trade* of the said States; to consider how far a uniform system in their *commercial regulations* may be necessary to their com-

[32] Addendum, *available at* https://i2i.org/wp-content/uploads/Commerce-Ratif-addendum.pdf.

mon interest and their permanent harmony."[33] Other documents pertaining to the convention similarly referred interchangeably to "regulating commerce" and "regulating trade." Thus, a February 19, 1786, circular letter from Virginia attorney general Edmund Randolph (later a leading framer of the Constitution) invited other states to send commissioners (delegates), and, referring to Virginia's formal convention call, opined, "It is impossible for me to decide how far the uniform system in *commercial regulations*, which is the subject of that resolution, may or may not be attainable."[34] Four days later Virginia Governor Patrick Henry sent a similar letter, but characterized the convention's mission as "framing such regulations of *trade* as may be judged necessary to promote the general interest."[35]

When empowering its convention commissioners, the New Jersey legislature authorized them to

> take into Consideration the *Trade* of the United States: to examine the relative Situation and *Trade* of the said States; to consider how far an uniform System in their *commercial Regulations* and other important Matters may be necessary to their common Interest and permanent Harmony.[36]

The convention's own report employed variants of the phrases "regulate commerce" and "regulate trade" interchangeably throughout.[37]

The Annapolis Convention was a topic of discussion during the ratification era. In 1788, a Brooklyn, New York essayist calling himself "A Flat-Bush Farmer" summarized that assembly's work: "The Convention who met at Annapolis two years ago were sent to regulate commerce . . . [but they] reported to the different States the impropriety of merely regulating trade."[38] The same year, the French diplomat Gaspard Joseph Amand Ducher wrote to the Comte de la Luzerne and, discussing the "annapolis

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[33] *Resolution of the Virginia Legislature, Jan. 21, 1786*, 1 DH, *supra* note 1, at 180 (italics added).

[34] *Edmund Randolph to the Executives of the States*, Feb. 19, 1786, 1 DH, *supra* note 1, at 180 (italics added).

[35] *Governor Patrick Henry to the Executives of the States*, Feb. 23, 1786, 1 DH, *supra* note 1, at 181 (italics added).

[36] *The New Jersey Legislature and the Appointment of Delegates to the Annapolis Convention*, Mar. 14, 1786, 3 DH MICROFORM SUPPLEMENT–N.J., *supra* note 1, at 37.

[37] *Proceedings and Report of the Commissioners at Annapolis, Maryland*, Sept. 11-14, 1786, 1 DH, *supra* note 1, at 182-83.

[38] "A Flat-Bush Farmer" (broadside), Apr. 21, 1788, 21 DH, *supra* note 1, at 1472, 1473.

Congress," mentioned the current state of "commercial regulations," in conjunction with a "large coastal trade."[39]

The same pattern appears throughout the entire ratification record. In *Federalist* No. 42, for example, James Madison repeatedly used variations of "regulate commerce" and "regulate trade" interchangeably.[40] An Anti-Federalist writing under the name "Hanno" wrote, "That commercial regulations . . . will be beneficial, is agreed on all hands: but great attention is necessary to perfect a system of trade and revenue."[41] The Massachusetts Anti-Federalist "Agrippa" similarly employed regulation of commerce and regulation of trade as synonyms.[42] The document set contains a substantial number of other writings that draw the same equivalency, including writings composed both by Federalists[43] and Anti-Federalists.[44]

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[39] Gaspard Joseph Amand Ducher to Comte de la Luzerne, Feb. 2, 1788, 16 DH, *supra* note 1, at 11, 13.

[40] THE FEDERALIST NO. 42 (James Madison), 15 DH, *supra* note 1, at 427. *See id.* at 428 ("regulation of foreign commerce"), 429 ("regulate the commerce"), 430 ("regulating foreign commerce," "regulate the trade," "regulation of commerce"), & 431 ("trade").

[41] "Hanno," MASS. GAZETTE, Nov. 13, 1787, 4 DH, *supra* note 1, at 225, 226.

[42] "Agrippa," *Letter III*, MASS. GAZETTE, 4 DH, *supra* note 1, at 432, 433:

> The other class of citizens to which I alluded was the ship-carpenters. [N]obody objects against a system of commercial regulations for the whole continent [but i]t is a very serious question whether giving to Congress the unlimited right to regulate trade would not injure them still further. It is evidently for the interest of the state to encourage our own trade as much as possible. But in a very large empire, as the whole states consolidated must be, there will always be a desire of the government to increase the trade of the capital, and to weaken the extremes.

[43] *To be or not to be? Is the Question*, N.H. GAZETTE, April 16, 1788, 28 DH, *supra* note 1, at 291, 292 (stating that "a proper regulation of commerce by Congress" will lead to "An increased revenue, from a proper and universal regulation of trade"); Hugh Williamson, *Speech at Edenton, N.C.*, Nov. 8, 1787, 30 DH, *supra* note 1, at 10, 14 ("It has been objected in some of the Southern States, that the Congress, by a majority of votes, is to have the power to regulate trade. It is universally admitted that Congress ought to have this power, else our commerce, which is nearly ruined, can never be restored"); "Marcus," *Letter IV*, NORFOLK & PORTSMOUTH J., Mar. 12, 1788, 30 DH, *supra* note 1, at 93, 94 ("We must have treaties of commerce, because without them we cannot trade to other countries.").

[44] "The Federal Farmer," *Letter XI*, 17 DH, *supra* note 1, at 265, 309 (describing the Commerce Clause as granting "the sole power to regulate commerce with foreign nations, or to make all the rules and regulations respecting trade and commerce between our citizens and foreigners"); James Monroe, *Remarks at the Virginia Ratifying Convention*, 9 DH, *supra* note 1, at 1108 ("Treaties, Sir, will not extend your commerce. Our object is the regulation of commerce and not treaties. . . . It is not to the advantage of the United States, to make any compact with any nation with respect to trade."); Richard Henry Lee to Edmund Pendleton, May 26, 1788, 18 DH, *supra* note 1, at 74, 77 ("The danger of Monopolized Trade may be avoided by calling for the consent of 3 fourths of the U. States on regulations of Commerce.").

IV. The Content of "Regulating Commerce"

A. More Historical and Legal Context

This Part IV reviews what the document set tells us about the content of "regulate commerce" and its variations. Before proceeding further, however, I should introduce the reader to some historical and legal context.

1. The Lex Mercatoria or Law Merchant

In an earlier article, I explained that 18th-century Americans equated regulating "commerce" or "trade" across jurisdictional lines with the body of jurisprudence called the *lex mercatoria* or *law merchant*.[45] Contemporaneous treatises on the law merchant inform us of the scope of that jurisprudence. The scope was somewhat broader than one might think merely from reading the phrases "regulate trade" and "regulate commerce." The law merchant or lex mercatoria embraced the following:

- the law of bankruptcy;[46]
- regulation and licensing of merchants, brokers (factors), and others involved in trade, including requirements of oaths, bonds, and recordkeeping;
- regulation of commercial paper—notes, drafts, and the like;
- price controls;
- all aspects of ships and navigation;
- prohibitions on certain forms of trade and of activities associated with trade, including territorial restrictions, both outside and within the legislature's jurisdiction;
- regulations of inventory, such as packing and shipping, marking and labeling—and flat prohibitions on inter-jurisdictional trading of certain goods (contraband);
- related financial charges, including but not limited to customs and duties;
- administration of commercial treaties;

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[45] *Natelson, Update*, *supra* note 1.

[46] The Constitution included a separate bankruptcy power in addition to the Commerce Clause, U.S. Const. Art. I, § 8, cl. 4, probably to ensure that Congress could regulate intrastate as well as interstate bankruptcies.

- marine insurance;
- incorporation of trading entities;
- certain criminal measures, such as penalties for piracy and unauthorized mercantile activities; and
- the appointment of commissioners (agents) to administer the system.[47]

Notice that the lex mercatoria applied only to commerce across jurisdictional lines. In the British Empire, that meant commerce with foreign nations and among units of the British Empire—as well as trade with Native Americans during the limited time the government in London managed the Indian trade. The lex mercatoria did not apply to the regulation of commerce within England. Under the proposed Constitution, the prospective domain of Congress's lex mercatoria power was commerce with foreign nations, among the states, and with the Indian tribes. As one North Carolina Federalist recognized, the new inter-jurisdictional Commerce Power was the same as had been exercised by the British government.[48] It would not apply to purely in-state transactions.

2. The Dispute About Navigation Acts

Almost no participants in the ratification debates questioned the wisdom of the Constitution's grant to Congress of power over the law merchant. This unanimity prevailed even among those Anti-Federalists most intent on retaining maximum discretion at the state level—a fact that is, by the way, a good indication of how restricted the scope of the congressional Commerce Power was understood to be. The principal controversy over regulating commerce was a dispute between the Federalists and Southern Anti-Federalists over the *congressional procedure* for adopting federal "navigation acts."

In Anglo-American practice, a navigation act was a species of statute regulating commerce with foreign nations and among units of the British Empire (and prospectively, among the states). Navigation acts covered more than navigation—just as, as I have noted elsewhere, the Anglo-American

[47] *Id*. at 221-23.

[48] *A North Carolina Citizen on the Federal Constitution*, Apr. 1788, 30 DH, *supra* note 1, at 124, 138 (reflecting on Anti-Federalist fears by stating, "We submitted the regulation of our commerce to the Brittish Parliament, a sett of men in whose election we had no choice and are now affraid to commit the same matter to men of our own chusing.").

"land tax" (direct tax) covered more than land.[49] Navigation acts prescribed which ships could carry which cargos to which ports and which items could not be traded at all. They imposed financial exactions on trade ("customs," "tonnage," "imposts," and other kinds of "duties").[50] They set forth disclosure and bonding requirements. And they prescribed civil and criminal penalties for violation of their regulations.[51]

In other words, navigation acts covered a large subset of the law merchant. They did not cover all of it. For example, they seem not to have addressed bankruptcy or commercial paper. But neither did they extend to subjects outside the law merchant.

Although Federalists pointed to prospective benefits from a congressional power to regulate commerce,[52] Southern Anti-Federalists feared that a navigation act adopted by a bare majority in Congress representing only Northern interests might impose restrictions on shipping and imports that would raise the price of goods purchased by Southerners. This would enrich Northerners at Southern expense.

However, the solution offered by Southern Anti-Federalists was *not* to abolish the congressional Commerce Power. Their solution was to amend the Constitution to require that navigation acts be approved by either two-thirds[53] or three-fourths[54] of each chamber of Congress. This, they believed, would ensure the benefits of central regulation without sectional discrimination.

B. Subjects Mentioned As Within Regulating Commerce

Partly due to the concerns of Southern Anti-Federalists, the discussion on the Commerce Clause included many references to navigation—including carriers and the carrying trade, freight charges, ship construction,

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[49] Robert G. Natelson, *What the Constitution Means by "Duties, Imposts, and Excises"—and Taxes (Direct or Otherwise)*, 66 CASE WESTERN RES. L. REV. 297, 312 (2015).

[50] In American usage particularly, the term "duties" comprehended all indirect taxes, including imposts, customs, tonnage, and excises, as well as impositions levied not to raise revenue but to influence trade. *Id.* at 318-29.

[51] *E.g.*, 4 Geo. iii, c. 15 (1764) (imposing requirements of all these kinds). This act led to much colonial dissatisfaction.

[52] *Infra* Part V(B).

[53] *Address of the Antifederalist Minority of the Maryland Convention*, May 1, 1788, 12 DH, *supra* note 1, at 659, 666 (proposing a two thirds requirement).

[54] Richard Henry Lee to Edmund Pendleton, May 26, 1788, 18 DH, *supra* note 1, at 74, 77 (proposing a three-fourths requirement).

and the like.[55] This discussion also included frequent mention of the following:

- persons involved in trade: merchants and tradesmen,[56] shipbuilders,[57] and sailors;[58]

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[55] There are many such references within the document set:

References to Ships: "A Native of Virginia," Apr. 2, 1788, 9 DH, *supra* note 1, at 655, 670 (pamphlet) ("foreign bottoms"); *Antifederal Discoveries*, BALTIMORE J., Mar. 18, 1788, 11 DH, *supra* note 1, at 404, 405 ("vessels"); "Marcus," *Letter IV*, Norfolk & Portsmouth J., Mar. 12, 1788, 30 DH, *supra* note 1, at 93, 95 (vessels, carriers); William Grayson, *Remarks at the Virginia Ratifying Convention*, Jun. 16, 1788, 10 DH, *supra* note 1, at 1299 (referring to a navy); Charles Cotesworth Pinckney, *Remarks in the S.C. House of Representatives*, Jan. 17, 1788, 27 DH, *supra* note 1, at 116, 123 (ship building, fisheries); Hugh Williamson, *Speech at Edenton, N.C.*, Nov. 8, 1787, 30 DH, *supra* note 1, at 10, 14 (carrying trade), & 15 (ship building); Jabez Bowen to John Adams, Aug. 31, 1789, 25 DH, *supra* note 1, at 591 (coasting and other "Vessells").

General references to navigation: "Centinel," *Letter III*, PHILA. INDEP. GAZETTEER, Nov. 8, 1788, 14 DH, *supra* note 1, at 55, 57 ("marritime affairs"); Alexander Hamilton, *Remarks at the New York Ratifying Convention*, 22 DH, *supra* note 1, at 1704, 1727 (identifying the northern states as the navigating states); Rawlins Lowndes, *Remarks in the South Carolina Legislature*, Jan. 17, 1788, 27 DH, *supra* note 1, at 125 (referring to ships, freight, and the carrying trade); *North Carolina Delegates to Governor Richard Caswell*, Sept. 18, 1787, 13 DH, *supra* note 1, at 215, 216 (navigation and ship building).

Foreign diplomats also made the connection: Antoine de la Forest to Comte de la Luzerne, New York, May 16, 1788, 12 DH, *supra* note 1, at 736 (navigation); Gaspard Joseph Amand Ducher to Comte de la Luzerne, Feb. 2, 1788, 16 DH, *supra* note 1, at 11, 13 (navigation, navigators).

Navigation acts: Luther Martin, "Genuine Information" *Address III,* Mar. 28, 1788, 11 DH, *supra* note 1, at 456, 468; *Address of the Antifederalist Minority of the Maryland Convention*, May 1, 1788, 12 DH, *supra* note 1, at 659, 666; "Candidus," *Letter I*, INDEP. CHRON. Dec. 6, 1787, 4 DH, *supra* note 1, at 393, 396 (also referencing "carriers"); "Candidus," *Letter II*, INDEP. CHRON. Dec. 20, 1787, 5 DH, *supra* note 1, at 493 & 497 (also referencing shipbuilding and the carrying trade); "Hanno," MASS. GAZETTE, Nov. 13, 1787, 4 DH, *supra* note 1, at 225, 226; Edward Carrington to Thomas Jefferson, Oct. 23, 1787, 8 DH, *supra* note 1 at 93, 94 (also referencing carriers and freights).

Navigation of the Mississippi River: Samuel McDowell et al., *Circular Letter to the Court of Fayette County, Ky.*, February 28,1788, 16 DH, *supra* note 1, at 261, 262; Harry Innes to John Brown, Feb. 20, 1788, 16 DH, *supra* note 1, at 152, 153.

[56] Publications: *Antifederal Discoveries*, BALTIMORE J., Mar. 18, 1788, 11 DH, *supra* note 1, at 404, 405 (merchants); "Candidus," *Letter II*, INDEP. CHRON., Dec. 20, 1787, 5 DH, *supra* note 1, at 493, 497 (merchants and tradesmen); "Curtius," *Letter III*, N.Y. DAILY ADV'R, Nov. 3, 1787, 19 DH, *supra* note 1, at 174, 175 ("that enlightened order in society, the mercantile"); "Sydney," N.Y.J., Jun. 13 & 14, 1788, 20 DH, *supra* note 1, at 1153, 1157 (complaining of impositions on traders).

Correspondence: Samuel Blachley Webb to Joseph Barrell, Jan. 13, 1788, 15 DH, *supra* note 1, at 362, 363 ("the Mercantile Interest").

[57] "Agrippa," *Letter III*, MASS. GAZETTE, Nov. 30, 1787, 4 DH, *supra* note 1, at 342, 343 (ship carpenters).

[58] "A Native of Virginia" (pamphlet), Apr. 2, 1788, 9 DH, *supra* note 1 at 655, 671.

- imports and exports;[59]
- imposts and other financial duties[60] and the resulting revenue;[61]
- merchandise[62]—that is, the articles of trade, including foodstuffs,[63] luxury items,[64] and slaves;[65]

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[59] Publications: "Centinel," *Letter III,* PHILA. INDEP. GAZETTEER, Nov. 8, 1788, 14 DH, *supra* note 1, at 55, 57 ("excessive importations"); THE FEDERALIST NO. 7, 14 DH, *supra* note 1, at 130, 133 (Alexander Hamilton) ("duties on her importations"); *id*. No. 42 (James Madison), 15 DH, *supra* note 1, at 427, 430 ("A very material object of this [commerce] power was the relief of the States which import and export through other States, from the improper contributions levied on them by the latter"); "A Plebeian," *An Address to the People of the State of New York*, Apr. 17, 1788, 20 DH, *supra* note 1, at 942, 956 (complaining that the country imports more than it exports).

Convention debates: James Madison, *Remarks at the Virginia Ratifying Convention*, Jun. 11, 1788, in 9 DH, *supra* note 1, at 1153 (smuggling).

Correspondence: Jabez Bowen to John Adams, Aug. 31, 1789, 25 DH, *supra* note 1, at 591 (duty free imports).

[60] Publications: A Native of Virginia" (pamphlet), Apr. 2, 1788, 9 DH, *supra* note 1, at 655, 670 ("duties"); "Candidus," *Letter II*, INDEP. CHRON. Dec. 20, 1787, 5 DH, *supra* note 1, at 493, 494 (imposts), & 497 ("duties of impost and excise"); THE FEDERALIST NO. 7, 14 DH, *supra* note 1, at 130, 133 (Alexander Hamilton) ("duties on her importations"); PROVIDENCE GAZETTE, May 23, 1789, 25 DH, *supra* note 1, at 512 ("the Impost and other Regulations of Commerce").

Convention debates: Theophilus Parsons, *Notes of [Massachusetts] Convention Debates*, Jan. 21, 1788, 6 DH, *supra* note 1, at 1294, 1296 (reporting speech of Thomas Dawes, Jr., discussing "imposts and excises"); James Madison, *Remarks at the Virginia Ratifying Convention*, Jun. 11, 1788, in 6 DH, *supra* note 1, at 1153 (imposts).

Correspondence: Jabez Bowen to John Adams, Aug. 31, 1789, 25 DH, *supra* note 1, at 591, 592 (paying duties on merchandise); Gaspard Joseph Amand Ducher to Comte de la Luzerne, Feb. 2, 1788, in 16 DH, *supra* note 1, at 11, 13 (customs, duties, rebates, bounties, tonnage).

[61] "A Flat-Bush Farmer" (broadside), Apr. 21, 1788, 21 DH, *supra* note 1 at 1472, 1474 (referring to the revenue from commerce); "A Jerseyman," *To the Citizens of New Jersey*, TRENTON MERCURY, Nov. 6, 1786, 3 DH, *supra* note 1 at 145, p. 147 ("the proper regulation of our commerce would be insured; the imposts on all foreign merchandise imported into America would still effectually aid our Continental treasury"); Hugh Williamson, *Speech at Edenton, N.C.*, Nov. 8, 1787, 30 DH, *supra* note 1 at 10, 14 ("a vast revenue for the general benefit of the nation").

[62] THE FEDERALIST NO. 42 (James Madison), 15 DH, *supra* note 1, at 427, 430 (merchandise); *To be or not to be? Is the Question*, N.H. GAZETTE, April 16, 1788, 28 DH, *supra* note 1, at 291, 292 (carrying merchandise after paying duties).

[63] Nathaniel Gorham, *Remarks at the Massachusetts Ratifying Convention,* Jan. 25, 1788, in 6 DH, *supra* note 1, at 1352, 1354 (beef, butter, and pork); Harry Innes to John Brown, Feb. 20, 1788, 16 DH, *supra* note 1, at 152, 153 (fish oil and rice).

[64] "Centinel," *Letter III*, PHILA. INDEP. GAZETTEER, Nov. 8, 1788, 14 DH, *supra* note 1, at 55, 57 ("foreign merchandise and luxuries"); "Mechanic," INDEP. GAZETTEER, Apr. 23, 1788, 34 DH, *supra* note 1, at 1217, 1218 ("foreign merchandise, manufactures, and even laces, trinkets, toys, and gewgaws").

- restrictions on trade, including monopolies[66] and government regulations prohibiting certain kinds of trade,[67] and employing restrictions to win trade concessions from foreign governments.[68]

Thus, the ratification-era discourse does not mention every item encompassed by the lex mercatoria, but all the items mentioned are within the lex mercatoria.

C. Subjects Mentioned As Excluded from "Regulating Commerce"

The founding generation's understanding of what regulating commerce was, and was not, was so clear that there was little need to enumerate items excluded from that category. There were, as mentioned earlier, numerous Federalist representations about limits on federal power under the Constitution. However, they were targeted more at calming apprehensions about the scope of the General Welfare[69] and Necessary and Proper Clauses[70] than about the much better understood scope of the Commerce Clause.

Only two items in the document set mention exclusions from the Commerce Clause. An author writing under the pseudonym "Deliberator" responded to Tench Coxe's representations[71] about the limits on federal

[65] THE FEDERALIST NO. 42 (James Madison), 15 DH, *supra* note 1 at 427, 429 (decrying the slave trade); Luther Martin, "Genuine Information," *Address VIII*, Jan. 22, 1788, 11 DH, *supra* note 1, at 196 (same); "Deliberator," FREEMAN'S J., Feb. 20, 1788, 33 DH, *supra* note 1, at 902, 904 (regretting that "Congress may, under the sanction of that clause in the constitution which empowers them to regulate commerce, authorize the importation of slaves").

[66] Publications: "Agrippa," *Letter XII*, MASS. GAZETTE, Jan. 15, 1788, 5 DH, *supra* note 1, at 720, 723; "Marcus," *Letter IV*, NORFOLK & PORTSMOUTH J., Mar. 12, 1788, 30 DH, *supra* note 1, at 93, 94; "Sydney," N.Y.J., Jun. 13 & 14, 1788, 20 DH, *supra* note 1 at 1153, 1157.

Correspondence: Richard Henry Lee to Edmund Pendleton, May 26, 1788, 18 DH, *supra* note 1, at 74, 77.

[67] Publications: THE FEDERALIST NO. 22, 14 DH, *supra* note 1, at 436, 437 (Alexander Hamilton) ("prohibitions, restrictions, and exclusions"); NEWPORT HERALD, Sept. 13, 1787, 26 DH SUPPLEMENTAL DOCUMENTS-R.I., *supra* note 1, at 40, 41 (saving money by banning foreign manufactures); PROVIDENCE GAZETTE, May 23, 1789, 25 DH, *supra* note 1, at 512 (same).

Convention debate: Alexander Hamilton, *Remarks at the New York Ratifying Convention*, 22 DH, *supra* note 1, at 1704, 1727 (restrictions on foreign trade).

Correspondence: Harry Innes to John Brown, Feb. 20, 1788, 16 DH, *supra* note 1, at 152, 153 (prohibitions on imports).

[68] "Marcus," *Letter IV*, NORFOLK & PORTSMOUTH J., Mar. 12, 1788, 30 DH, *supra* note 1, at 93, 95; William Davie, *Remarks at the N.C. Ratifying Convention* (Hillsborough), Jul. 24, 1788, 30 DH, *supra* note 1, at 233, 243.

[69] U.S. CONST. art. I, § 8, cl. 1.

[70] *Id.*, art. I, § 8, cl. 18.

[71] "A Freeman" (Tench Coxe), *Letter I*, PA. GAZETTE, Jan. 23, 1788, 15 DH, *supra* note 1, at 453, 458.

power. "Deliberator" seemed to agree with Coxe that inspections of produce were outside the scope of the Commerce Clause standing alone. However, "Deliberator" asserted that inspection laws were within Congress's authority when the Necessary and Proper Clause is added to the Commerce Clause.[72] In other words, "Deliberator" contended that inspection laws were not regulations of commerce per se, but would be within Congress's authority to enact because they are incidental to regulating commerce. As discussed below, Chief Justice John Marshall disagreed with the conclusion that Congress could mandate inspections of produce.[73]

The other item discussing an exclusion from the Commerce Clause is both more authoritative and more sweeping. In a widely-publicized speech defending the Constitution, James Wilson stated:

> For instance, the liberty of the press, which has been a copious source of declamation and opposition, what control can proceed from the federal government to shackle or destroy that sacred palladium of national freedom? If indeed, a power similar to that which has been granted for the regulation of commerce, had been granted to regulate literary publications, it would have been as necessary to stipulate that the liberty of the press should be preserved inviolate, as that the impost should be general in its operation.[74]

The implication of this statement goes well beyond freedom of the press. The necessary predicate for Wilson's statement that the "regulation of commerce" does not extend to "literary publications" is that as a general proposition the regulation of commerce does not extend to production. There is no principled way to exclude newspapers, books, and broadsides from the scope of the Commerce Clause unless one also excludes agriculture, manufactures, mining, and arts and crafts. The Federalist representations on the limits of federal power confirm this conclusion.[75]

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[72] "Deliberator," FREEMAN'S J., Feb. 20, 1788, 33 DH, *supra* note 1, at 902, 903:

> "Congress cannot enact laws for the inspection of the produce of the country." [quoting Coxe]. Neither is this strictly true. Their power "to regulate commerce with foreign nations and among the several States, and to make all laws which shall be necessary and proper for carrying this power (among others vested in them by the constitution) into execution," most certainly extends to the enacting of inspection laws.

[73] *Infra* note 85 and accompanying text.

[74] James Wilson, *Speech in the State House Yard, Philadelphia*, Oct. 6, 1787, 2 DH, *supra* note 1, at 167, 168.

[75] *See* the sources cited *supra* note 17.

V. Clarifications

A. Alexander Hamilton and the Word "Intercourse"

One item in the document set might be used as evidence in support of the mega-Commerce Clause hypothesis. It is a report of a speech by Alexander Hamilton delivered on June 27, 1788, to the New York ratifying convention. This is the relevant excerpt (I have italicized the critical words):

> The great leading objects of the federal government, in which revenue is concerned, are to maintain domestic peace, and provide for the common defence. In these are comprehended *the regulation of commerce; that is, the whole system of foreign intercourse*; the support of armies and navies, and of the civil administration.[76]

We should approach this passage with caution. Hamilton did not write these words, and there is nothing precisely like them in his essays in *The Federalist*. This passage was transcribed from Hamilton's speech by a shorthand reporter. A minor discrepancy between what was said and what was transcribed usually does not make much difference in the speaker's overall point, but in this case it could. If, for example, Hamilton actually said "and" instead of "that is," then the fragment could not support a mega-Commerce Clause reading.

I will assume, nevertheless, that the reported version of the speech is accurate. This assumption offers an opportunity to address a common—although fallacious—argument raised by mega-Commerce Clause advocates. This argument is that "commerce" means more than "trade" because speakers in the founding era and in the early Republic sometimes equated commerce with intercourse, and dictionary definitions of "commerce" often included the word "intercourse." Chief Justice John Marshall's opinion in *Gibbons v. Ogden* is cited in support of the argument. Representative is the following, penned by Professor Jack Balkin:

> In the eighteenth century, however, "commerce" did not have such narrowly economic connotations. Instead, "commerce" meant "intercourse" and it had a strongly social connotation. . . .What is the original meaning of "commerce"? Samuel Johnson's dictionary, roughly contemporaneous with the Founding, defines "commerce" as "Intercourse; exchange of one thing for another, interchange of anything;

[76] Alexander Hamilton, *Remarks in the New York Ratifying Convention*, Jun. 27, 1788, 22 DH, *supra* note 1, at 1921, 1955 (italics added).

> trade; traffick." Johnson's secondary definition of commerce is "common or familiar intercourse." . . . By 1824, in Gibbons v. Ogden, counsel for Ogden tried to argue that "commerce" meant only trade or exchange. Chief Justice Marshall bluntly rejected the argument:
>
> > This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic [i.e., trade],[77] but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse.
>
> Marshall clearly did not suggest that treating navigation as commerce was a non-literal usage or that the Necessary and Proper Clause was required: "All America understands, and has uniformly understood, the word 'commerce,' to comprehend navigation . . . . [T]he attempt to restrict it comes too late."[78]

Of course, Marshall did not need to enlist the Necessary and Proper Clause to encompass navigation because navigation was within the core meaning of "regulating commerce"—the lex mercatoria. But what of the equation of "commerce" with "intercourse"?

Although Professor Balkin examined the definition of "commerce" in a contemporaneous dictionary, he did not examine the definition of "intercourse." He seems to have assumed that "intercourse" necessarily carried a very broad meaning. But here is the entry in Samuel Johnson's *Dictionary*, the source Balkin cited for the definition of "commerce":

> INTERCOURSE. . . .
>
> 1. Commerce; exchange.
> 2. Communication.[79]

Relying on any one 18th-century dictionary is risky—particularly Johnson's, which can be idiosyncratic. So let us check Johnson's entry against two others. Thomas Sheridan's 1787 dictionary defined "intercourse" as

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[77] Professor Balkin's interjection of "trade" to define "traffic" is an oversimplification. Johnson's actual definition of "traffick" is "1. Commerce; merchandising; large trade. 2. Commodities; subject of traffick." SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (8th ed. 1786) (unpaginated) (defining "traffick"). It is impossible to recreate what was in Marshall's mind when he distinguished traffic, commerce, and intercourse.

[78] *Balkin, Commerce, supra* note 1, at 1, 15, & 19.

[79] JOHNSON, *supra* note 77 (unpaginated) (defining "intercourse").

"Commerce, exchange; communication."[80] William Perry's 1788 first American edition defined it as "commerce; communication."[81]

Johnson stands vindicated, for these entries are all very similar. Note the common pattern, however: "Exchange" and "communication" were secondary and tertiary definitions. And even they do not encompass all human relationships. The primary (i.e., most common) definition of "intercourse" was: *commerce!*

Thus, when an 18th-century speaker referred to commerce as intercourse, he likely was being tautological: "commerce is commerce." Tautology sometimes makes good rhetoric.

Now let us return to *Gibbons v. Ogden*. Was Marshall being tautological? Probably so: Here are his words: "Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the *commercial intercourse* between nations . . . "[82] Marshall limited the noun "intercourse" by the adjective "commercial." This phrase—"commercial intercourse"—is exactly the same one the Annapolis convention employed in its report when describing its mission.[83] And as we already have seen, that mission had been described interchangeably as addressing "the regulation of commerce" and "the regulation of trade."[84]

Another part of Marshall's opinion in *Gibbons* confirms that that he did not use the word "intercourse" expansively. That part of the opinion addressed laws for the inspection of goods:

> That inspection laws may have a remote and considerable influence on commerce, will not be denied; but that a power to regulate commerce is the source from which the right to pass them is derived, cannot be admitted. The object of inspection laws, is to improve the quality of articles produced by the labour of a country; to fit them for exportation; or, it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the States, and prepare it for that purpose. They form a portion of that immense mass of legislation, which embraces every thing within the territory of a State, not

[80] THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (1789) (unpaginated) (defining "intercourse").

[81] WILLIAM PERRY, ROYAL STANDARD ENGLISH DICTIONARY (1st American ed. 1788) (unpaginated) (defining "intercourse").

[82] *Gibbons*, 22 U.S. at 189-90 (italics added).

[83] *Proceedings and Report of the Commissioners at Annapolis, Maryland*, Sept. 11-14, 1786, 1 DH, *supra* note 1, at 182.

[84] *Supra* Part III.

> surrendered to the general government: all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c., are component parts of this mass.
>
> No direct general power over these objects is granted to Congress; and, consequently, they remain subject to State legislation.[85]

Apologists for federal power always seem to overlook this passage.[86] But the passage is important because Marshall specifically declined to extend the Commerce Power to include work on a product "before it becomes an article of . . . commerce."

Marshall, like James Wilson, was a nationalist. Yet both rejected the mega-Commerce Clause hypothesis: They agreed that the Commerce Power generally does not extend to production.[87] Marshall, as is clear from his words in *Gibbons*, did not think of either "Commerce" or "intercourse" as comprising all social relationships or even all aspects of the economy.

In summary: Those who argue that the Constitution's use of the word "Commerce" has a very broad definition because speakers sometimes equated "commerce" with "intercourse" assume that "intercourse" always had a broad definition. In fact, however, the most common meaning of "intercourse" was merely "commerce," a term usually interchangeable with mercantile trade. Thus, when Hamilton referred to "the whole system of foreign intercourse," he very likely meant nothing more than "the whole system of foreign trade."

B. Commercial Regulation and Its Consequences

The founding generation recognized that human activities are interdependent. Thus, when arguing in favor of a congressional power to "regulate Commerce," the Constitution's supporters predicted that the prudent exercise of that power would lead to favorable consequences for *non-mercantile* human activities. In other words, regulation of commerce—particularly restrictions on foreign imports and foreign shipping—could not only pro-

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[85] *Gibbons*, 22 U.S. at 203.

[86] *E.g.*, Wickard v. Filburn, 317 U.S. 111, 122 (1942) (enlisting Marshall in extending the Commerce Power to agricultural production without addressing this language).

[87] *Supra* notes 74 & 75 and accompanying text. I say "generally" because under the Necessary and Proper Clause, Congress should be able to regulate aspects of production that are mere incidents of commerce—labeling, for example.

mote American trade, but also could stimulate American agriculture and manufacturing, raise land prices, create jobs, and promote immigration.

Our document set contains a substantial number of quotations from advocates of the Constitution predicting non-mercantile benefits from the central regulation of commerce.[88] It also includes corresponding statements of regret that previous congressional impotence had permitted injury to occur.[89]

Advocates of the mega-Commerce Clause hypothesis sometimes misread such statements as implying that the Founders thought the non-commercial activities benefitting from commercial regulation were part of "Commerce" itself.[90] The documents examined here do not support that position. Nor do they support the modern Supreme Court doctrine that when non-mercantile activities "substantially affect" commerce, Congress may regulate them. The documents state only that the benefits of regulating *commerce itself* could spill over into other realms.

Thus, Hugh Williamson, one of the Constitution's framers, argued in a North Carolina speech that regulation of commerce would bring widespread benefits. But the only specific regulation he suggested was barring foreign vessels from American ports,[91] a standard term in navigation acts. A

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[88] *E.g.*, "Agrippa," *Letter III*, MASS. GAZETTE, Nov. 30, 1787, 4 DH, *supra* note 1, at 342, 343 (claiming benefits for ship carpenters, although questioning other benefits); "An American," *To Richard Henry Lee*, Dec. 28, 1787-Jan. 3, 1788, 15 DH, *supra* note 1, at 165, 168 (citing benefits to agriculture and manufacturing); "Candidus", *Letter I*, INDEP. CHRON., Dec. 6, 1787, 4 DH, *supra* note 1, at 393 (agriculture and manufactures); "Candidus," *Letter II*, INDEP. CHRON., Dec. 20, 1787, 5 DH, *supra* note 1, at 493, 497 (citing the benefit to, in addition to merchants and tradesmen, shipbuilding, agriculture, and manufactures); "A Flat-Bush Farmer" (broadside), Apr. 21, 1788, 21 DH, *supra* note 1, at 1472, 1474 (citing benefits to government revenue); *To be or not to be? Is the Question*, N.H. GAZETTE, April 16, 1788, 28 DH, *supra* note 1, at 291, 292 (claiming benefits for agriculture, woollen manufactures, land values, immigration, and tax revenue); NEWPORT HERALD, Sept. 13, 1787, 26 DH SUPPLEMENTAL DOCUMENTS-R.I., *supra* note 1, at 40, 41 (claiming that regulations of commerce "will make an annual saving of one third of the imports of foreign manufactures immediately, which will give full employ to our laboring poor").

[89] *E.g., Newport Mechanick's Meeting*, c. 20-22 March 1788, 24 DH, *supra* note 1, at 119 (lamenting, because of a lack of central commercial regulation, "the decay of our trade, the ruin of our mechanicks, and the want of employ for the industrious labourers"); William Davie, *Remarks to the Hillsborough (N.C.) Convention*, Jul. 24, 1788, 30 DH, *supra* note 1, at 233, 243 (attributing to the lack of commercial regulation "a general decay of trade, the rise of imported merchandise, the fall of produce, and an uncommon decrease of the value of lands. Foreigners have been reaping the benefits and emolument which our citizens ought to enjoy").

[90] *Natelson, Commerce*, *supra* note 1, at 842 n.258 (summarizing this view).

[91] Hugh Williamson, *Speech at Edenton, N.C.*, Nov. 8, 1787, 30 DH, *supra* note 1, at 10, 14-15.

New Jersey Federalist writing as a "A Jerseyman" emphasized benefits to agriculture, manufacturing, government revenue, and immigration. These were to be accomplished by the levying of imposts and "heavy duties" on foreign imports.[92]

The most comprehensive statement on this subject in the document set is the address to the Massachusetts ratifying convention by Thomas Dawes, a prominent Federalist who later served as a justice of the state supreme judicial court. Here are some excerpts from Dawes' speech, as reported by the *Documentary History*:

> Mr. Dawes said, he thought the powers in the paragraph under debate should be fully vested in Congress. We have suffered, said he, for want of such authority in the federal head. . . . Our agriculture has not been encouraged by the imposition of national duties on rival produce . . . A vessel from Roseway or Halifax [both in Nova Scotia] finds as hearty a welcome with its fish and whale bone at the southern ports, as though it was built, navigated and freighted from Salem or Boston. And this must be the case, until we have laws comprehending and embracing alike all the states in the union. . . .
>
> Congress has not had power to make even a trade law, which shall confine the importation of foreign goods to the ships of the producing or consuming country: If we had such a law, we should not go to England for the goods of other nations; nor would British vessels be the carriers of American produce from our sister states . . . .
>
> Our manufactures are another great subject, which has received no encouragement by national duties on foreign manufactures, and they never can by any authority in the old confederation . . . . Has Congress been able, by national laws to prevent the importation of such foreign commodities as are made from such raw materials as we ourselves raise[?]. It is alledged, that the citizens of the United States have contracted debts within the last three years, with the subjects of Great-Britain, for the amount of near six millions of dollars, and that consequently our lands are mortgaged for that sum . . . . If we wish to encourage our own manufactures— to preserve our own commerce—to raise the value of our own lands, we must give Congress the powers in question. . . .[93]

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[92] "A Jerseyman," *To the Citizens of New Jersey*, TRENTON MERCURY, Nov. 6, 1786, 3 DH, *supra* note 1, at 145, 147. *See also* BALTIMORE GAZETTE, May 22, 1788, 13 DH, *supra* note 1, at 112 (predicting "a system of commercial regulations, which upon the whole may tend to the revival and establishment of our credit, and the encouragement of our trade and manufactures . . .").

[93] *Remarks of Thomas Dawes at the Massachusetts Ratifying Convention*, Jan. 21, 1788, 6 DH, *supra* note 1, at 1287-89. Theophilus Parsons summarized the speech in his notes this way:

Observe that while Dawes wished to encourage manufacturing and raise the value of American lands, the methods he suggested all were traditional exercises of the lex mercatoria: imposition of financial duties, restrictions on imports, and limits on foreign ships.

VI. CONCLUSION

The survey reported in this article demonstrates that when Americans considered ratifying the Constitution, they understood the power "to regulate Commerce" as meaning only that Congress could administer the traditional law merchant. This was a body of law Americans usually referred to interchangeably as "regulating commerce" or "regulating trade." Although the term "intercourse" sometimes was applied to the same concept, the definition of "intercourse" when so applied was a limited one meaning simply "commerce."

The province of the law merchant was wider than governing trade per se—it also included subjects such as bankruptcy and commercial paper—but it still was circumscribed by clearly understood boundaries. As a general proposition it did not encompass non-economic activities, nor even most economic activities: Land use, real estate transactions, inheritance, and production of most kinds all were excluded.

The survey illustrates once again that the federal system crafted by the framers and adopted by the ratifiers was designed to serve only limited purposes. Of course, a system designed for limited purposes is now being tasked with addressing far more. This mismatch may well be a leading cause of prevailing public dissatisfaction with the performance of the federal government. That, however, is a subject for another time.

> Congress should have the power of imposts and excises—that they encourage agriculture by checking the importation and consumption of foreign produce—necessity of Congress having the regulation of commerce—talks about agriculture and manufactures—population from migration—convenient places for mills for manufacturing. But we cannot encourage manufactures until Congress have these powers— when they have these powers, Congress will have but little occasion for direct taxation.

Theophilus Parsons, *Notes of Convention Debates*, Jan. 21, 1788, 6 DH, *supra* note 1, at 1294, 1296.

Other Views:

- Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1 (2010), *available at* https://repository.law.umich.edu/mlr/vol109/iss1/1/.
- Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 IOWA L. REV. 1 (1999), *available at* https://heinonline.org/HOL/LandingPage?handle=hein.journals/ilr85&div=9&id=&page=.
- The Commerce Clause, Interpretation & Debate, National Constitution Center, https://constitutioncenter.org/the-constitution/articles/article-i/clauses/752.

Measuring and Evaluating Public Responses to Religious Rights Rulings*

Creighton Meland and Stephen Cranney**

The story of Jack Phillips and his cake shop—Masterpiece Cakeshop—is by now familiar. Jack Phillips declined to create a custom wedding cake celebrating a same-sex wedding because of his religious belief about marriage.[1] For declining, the Colorado Civil Rights Commission charged Mr. Phillips with discrimination based on sexual orientation under the Colorado Anti-Discrimination Act. After the Commission ruled against him, Mr. Phillips appealed to the United States Supreme Court and asserted a First Amendment right to refuse to promote a message about marriage that violated his faith. That Court vacated the judgment against Mr. Phillips after it found that Colorado showed hostility and animus toward Mr. Phillips's religious beliefs while it prosecuted him.

But the Court's majority did not address how the First Amendment's Free Speech Clause interacts with public-accommodations laws. As the Supreme Court predicted decades ago, this conflict has sharpened as state and local governments have simultaneously expanded the definition of "public accommodation" and broadened the classes of persons protected by public-accommodations laws.[2]

This issue is now squarely before the Court in *303 Creative LLC v. Elenis*, where the Court must decide "[w]hether applying a public-accommodation law to compel an artist to speak or stay silent violates the Free Speech Clause

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* Note from the Editor: The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. To join the debate, please email us at info@fedsoc.org.

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[1] Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n, 138 S. Ct. 1719 (2018).

[2] Boy Scouts of America v. Dale, 530 U.S. 640, 656-57 (2000).

of the First Amendment."[3] The case involves a custom website designer who is challenging Colorado's law—the same one that applied to Mr. Phillips—because it requires her to create wedding websites celebrating same-sex weddings if she does so for opposite-sex weddings.

When public-accommodations laws—or any laws for that matter—regulate speech, courts apply heightened scrutiny. This generally requires courts to "make[] a normative judgment about the ends" and then decide if "the government can and should serve the end through a better-drafted law."[4] But in the public-accommodations context, how should courts balance the government's generally legitimate interest in ending discrimination with the constitutional protections for free expression and religious liberty?

Professor Netta Barak-Corren is a legal scholar, professor, and cognitive scientist who developed a study to attempt to answer that question.[5] Her study—the Masterpiece Study—tried to examine whether the Supreme Court's decision in *Masterpiece* increased discrimination by the wedding services industry against same-sex couples.[6] She did this by sending fictitious requests from same-sex and opposite-sex couples to creative professionals—photographers, bakers, and florists—before and after the *Masterpiece* decision. She then measured whether these professionals' responsiveness to same-sex wedding requests changed after the decision. She claims there was a statistically significant increase in discrimination against same-sex couples seeking wedding photographs, cakes, or floral arrangements. She calls this the Masterpiece Effect.

Professor Barak-Corren then reasons that this evidence may justify state and local governments refusing to grant religious exemptions to their public-accommodations laws.[7] She argues that the Masterpiece Effect is relevant for

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[3] 303 Creative LLC v. Elenis, No. 21-476, 2022 WL 515867, at *1 (U.S. Feb. 22, 2022).

[4] Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2419 (1996).

[5] The study includes two articles, an appendix, and the related data. Netta Barak-Corren, *A License to Discriminate? The Market Response to Masterpiece Cakeshop*, 56 HARV. CIV. RIGHTS & CIV. LIBERTIES L. REV. 315 (2021) [hereinafter *HCRCLLR*]; Netta Barak-Corren, *Religious Exemptions Increase Discrimination Towards Same-Sex Couples: Evidence from Masterpiece Cakeshop*, 50 J. LEGAL STUDIES 75 (2021) [hereinafter *JLS*]; Netta Barak-Corren, *Online Appendix*, *available at* https://perma.cc/GF73-AHXU (May 6, 2021) [hereinafter *Appendix*]; Netta Barak-Corren, *Religious Exemptions and Discrimination: Evidence from* Masterpiece Cakeshop, OSF Home (June 4, 2021, 6:26 AM), *available at* https://osf.io/ve5yn/.

[6] *HCRCLLR*, *supra* note 5, at 315.

[7] *Id.* at 362.

First Amendment claims and defenses and establishes the government's interest in denying religious exemptions to public-accommodations laws.[8]

We evaluate this study now because the Supreme Court will evaluate the interaction between public-accommodations laws and the First Amendment in *303 Creative LLC v. Elenis*. In that case, several amicus briefs—including one signed by twenty-one states and the District of Columbia—cite the Masterpiece Study to argue that Colorado's interest in regulating the website designer is sufficient to overcome any First Amendment interests.[9] So the study and its conclusions are directly implicated in the case.

The study has gained attention elsewhere too. Media reports cite the Masterpiece Study.[10] And a local government relied on Professor Barak-Corren as an expert to defend its law.[11] Although her report was ultimately excluded, the case is on appeal.[12] And the study still raises important questions. What is the role of experts in balancing governmental interests and constitutional freedoms? How can studies properly be used to support the government's or the claimant's interests?

With those questions in mind, we evaluate the Masterpiece Study. We ultimately conclude that the Masterpiece Study does not prove a Masterpiece Effect. Thus, the study does not justify denying exemptions to laws that infringe on the First Amendment.

Our evaluation proceeds as follows. Part I describes the study and its conclusions. Part II critiques the empirical claims made by the study. We demonstrate that the study's own data does not show a Masterpiece Effect. We also highlight several methodical assumptions that undermine the reliability of the Masterpiece Study. Part III analyzes the study's legal conclusions and policy recommendations. We show that from a legal perspective, the study does not justify laws that infringe on free exercise because it doesn't provide sufficient evidence to support a government's interest in a law that burdens religious

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[8] *Id.* at 361.

[9] Br. of Mass. et al. as Amici Curiae Supp'g Resp. at 26 n.15, 303 Creative LLC v. Elenis, 142 S. Ct. 1106 (2022) (No. 21-476), 2022 WL 3691314; Br. for Scholars of Behavioral Science and Economics as Amici Curiae Supp'g Resp. at 12–13, *303 Creative*, 142 S. Ct. 1106 (No. 21-476); Br. of 30 Religious, Civil Rights, and Grassroots Orgs. as Amici Curiae Supp'g Resp. at 17, *303 Creative*, 142 S. Ct. 1106 (No. 21-476).

[10] Devin Dwyer et al., *Same-sex Marriage Foe Appeals to SCOTUS over Anti-Discrimination Law*, ABC NEWS, Sept. 15, 2022, 2:05 AM, https://abcnews.go.com/Politics/sex-marriage-foe-appeals-scotus-anti-discrimination-law/story?id=89812117.

[11] Chelsey Nelson Photography, LLC v. Louisville/Jefferson Cnty. Metro Gov't, 2022 WL 3972873, at *22–25 (W.D. Ky. Aug. 30, 2022).

[12] *Appeal docketed*, No. 22–5884 (6th Cir. Oct. 4, 2022).

freedom. We also challenge Professor Barak-Corren's reliance on a purely "consequentialist" view of the law in conjunction with the study. And we discuss how the freedom of expression (as distinct from the freedom of religion) affects the Masterpiece Study's legal conclusions and relevance. Part IV concludes.

I. The Masterpiece Study

This overview summarizes the Masterpiece Study's methodology and conclusions. For reasons of space, simplicity, and clarity, we focus on the most relevant methods and conclusions, not all of them.

A. Background, Structure, and Methodology

The Masterpiece Study sought to examine "the consequences of religious exemptions to antidiscrimination laws" and their "normative implications" based on the assumption that the *Masterpiece* decision would result in a religious exemption for Mr. Phillips.[13] Professor Barak-Corren did so by employing an "auditing" methodology, where researchers posing as customers contact a research subject with a question, elicit a response from him or her, and then record the response.[14]

Professor Barak-Corren surveyed four states: Indiana, Iowa, North Carolina, and Texas. She selected these states because they had similar levels of religiosity and political leanings but varied as to religious freedom restoration acts (RFRA) and statewide or local antidiscrimination laws (AD) that prohibited discrimination on the basis of sexual orientation.[15] All told, there were four different legal regimes: (1) no statewide RFRA or AD (North Carolina), (2) a statewide RFRA and local AD (some jurisdictions in Indiana and Texas), (3) a statewide RFRA and no local AD (the remaining jurisdictions in Indiana and Texas), and (4) no RFRA but a statewide AD (Iowa).[16]

Professor Barak-Corren believed that the *Masterpiece* decision would "draw extensive coverage and discussion in the public media" and could therefore potentially have "an impact on public attitudes and conduct."[17] This assumption led her to conclude that *Masterpiece* "created a favorable

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[13] *HCRCLLR*, *supra* note 5, at 315.

[14] *See*, *e.g.*, Marianne Bertrand & Esther Duflo, *Field Experiments on Discrimination* 314, *in* Handbook of Field Experiments (Abhijit Vinayak Banerjee & Esther Duflo eds. 2017).

[15] *HCRCLLR*, *supra* note 5, at 338.

[16] *Id.*

[17] *Id.* at 334.

setting for the empirical test of the effects (or lack thereof) of religious exemptions and sexual orientation discrimination."[18] To measure these potential effects, the study surveyors sent fictitious email inquiries to the creative professionals typically involved in recent court proceedings—florists, bakers, and photographers.[19]

The study sent four waves of emails. Waves 1 and 2 occurred in May 2018, before the *Masterpiece* ruling. The study surveyors sent email messages from fictitious same-sex couples (Wave 1) followed by messages from fictitious opposite-sex couples (Wave 2).[20] Names suggested the couple's sexual orientation.[21] Same-sex couples received a much higher positive response rate (70.8% positive response rate) in Wave 1 than opposite-sex couples did in Wave 2 (58.7% positive response rate).[22] The Masterpiece Study attributed the decline in positive response rates between Wave 1 and Wave 2 to respondent "attrition."[23]

Professor Barak-Corren sent Waves 3 and 4 several weeks after the June 2018 *Masterpiece* ruling.[24] In order to avoid spurious correlation between sexual orientation and unmeasured characteristics in each respective wave, Professor Barak-Corren randomly blended the sexual orientation for Waves 3 and 4.[25] Professor Barak-Corren also did this because she recognized the attrition problem in Waves 1 and 2 and wanted to mitigate that problem in Waves 3 and 4. So approximately half of the creative professionals received a same-sex inquiry in Wave 3 while the other half received an opposite-sex inquiry. The inquiries also blended same-sex and opposite-sex couples in Wave 4.[26]

A non-response was considered a rejection. Professor Barak-Corren further assumed that rejections were based on discriminatory intent. Therefore, in Waves 3 and 4, Professor Barak-Corren considered higher instances of

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[18] *Id.* at 336.

[19] *Id.* at 340 n.114; *Appendix*, *supra* note 5, at 1–11.

[20] *HCRCLLR*, *supra* note 5, at 340–41.

[21] *Appendix*, *supra* note 5, at 1–9.

[22] *Id.* at 19.

[23] *HCRCLLR*, *supra* note 5, at 344.

[24] *Id.* at 337–38.

[25] Spurious correlation incorrectly attributes a direct relationship between two variables even though the correlation is really due to a third, unmeasured variable affecting both variables. Herbert A. Simon, *Spurious Correlation: A Causal Interpretation*, 49 J. AM. STAT. ASS'N. 467, 467–79 (1954).

[26] *Appendix*, *supra* note 5, at 12.

non-responses for one group as evidence of discrimination.[27] Stated simply: a non-response to a request for a good or service for a same-sex wedding was considered sexual orientation discrimination.[28]

Overall response rates by Wave were as follows:[29]

Wave	Response Rate	Composition
W1	70.8	Same-Sex
W2	58.7	Opposite-Sex
W3	63.4	Combined
W4	61.9	Combined

B. Findings and Conclusions

The study concludes that "post-*Masterpiece* inquiries from a same-sex couple had a 66.3% chance of receiving a positive response [and] [e]quivalent inquiries from an opposite-sex couple have a 75.5% chance of being answered positively."[30] The study then attributed this 9.2% difference solely to the identity of the couple.[31] Professor Barak-Corren concluded from this data that there is a Masterpiece Effect—i.e., that *Masterpiece* caused creative professionals to decline to provide services for same-sex weddings more frequently after the decision.

Professor Barak-Corren explained that broad coverage from "mainstream," "progressive," and "conservative" news outlets "had an expressive effect on" creative professionals which caused a change in their "perceptions of the social norm regarding service refusal" for same-sex weddings and emboldened them to more often decline such inquiries.[32] In her view, this coverage created a new perceived social norm which caused professionals to be more willing to decline to provide certain goods and services based on their religious beliefs.[33]

To attempt to confirm the results, the study compared four different categories of results for (a) all businesses; (b) businesses in what is called the

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[27] *See HCRCLLR*, *supra* note 5, at 345 ("The most common form of declining service is simply no response.").

[28] *Appendix*, *supra* note 5, at 11.

[29] *HCRCLLR*, *supra* note 5, at 343.

[30] *Id.* at 345.

[31] *Id.*

[32] *Id.* at 334–36 (internal footnotes omitted).

[33] *Id.* at 336, 353–54.

control group (businesses that were first contacted after *Masterpiece*); (c) "Pre-Masterpiece Gay Friendly Businesses" (businesses that positively responded to same-sex inquiries before *Masterpiece*); and (d) "Pre-Masterpiece Generally Keen Businesses" (businesses that positively responded to both same-sex and opposite-sex inquiries before *Masterpiece*).[34] The study tracked each category separately. These different categories measured the Masterpiece Effect across creative professionals' profiles, comparing those willing to serve same-sex couples before *Masterpiece* ("gay friendly") to businesses that took all customers ("generally keen") without regard to sexual orientation.[35]

Professor Barak-Corren concludes that the results of her study "provide the missing piece to the puzzle of applying a strict scrutiny analysis."[36] She argues her study is especially relevant to the "least restrictive means" component of strict scrutiny because it supports universal enforcement of antidiscrimination laws.[37] In her view, the Masterpiece Study illustrates that any exemptions from antidiscrimination laws "substantially detract[] [from the government's goal of ending discrimination] in most regimes, by substantially expanding discrimination against same-sex couples."[38]

II. THE MASTERPIECE STUDY'S FAULTY METHODOLOGY AND CONCLUSIONS

This Part explores the six main problems with the study's methodology. (1) The study's data shows discrimination against opposite-sex couples before *Masterpiece*, (2) the study fails to adequately consider the regression to the mean to account for reduced responsiveness in Waves 3 and 4, (3) the study uses non-responses to determine discrimination, (4) the study has a "gay friendly" fallacy, (5) the study deploys a pseudo-control group, and (6) the study fails to measure the audience of the *Masterpiece* decision among the audited population, i.e. creative professionals.[39]

[34] *Id.* at 353.
[35] *Id.* at 345–47.
[36] *Id.* at 362.
[37] *Id.*
[38] *Id.*
[39] The district court that excluded Professor Barak-Corren's report noted some of these problems too. We note that where relevant.

A. The Study's Data Shows Discrimination Against Heterosexual Couples Before Masterpiece

The study's pre-*Masterpiece* data shows same-sex couples were more likely to receive an explicitly positive response (71% positive response rate) to their inquiry than opposite-sex couples (59% positive response rate).[40] Conversely, and as a necessary corollary, opposite-sex couples were more likely than same-sex couples to receive an explicit decline or a non-response to their inquiries for wedding services. Because the Masterpiece Study counts non-responses as discrimination, the prevalence of explicit denials and non-responses to opposite-sex couples compared to same-sex couples before *Masterpiece* would suggest there was pre-*Masterpiece* discrimination against opposite-sex couples.

This counterintuitive finding makes it easier to detect a supposed change after *Masterpiece* that creates an illusory Masterpiece Effect. The study uses the pre-*Masterpiece* comparisons between responsiveness to opposite-sex and same-sex inquiries to support its conclusion of post-*Masterpiece* same–sex discrimination. It was easier to show that responsiveness to opposite-sex couples increased after *Masterpiece* compared to responsiveness to same-sex couples *because of* the low pre-*Masterpiece* responsiveness to opposite-sex couples.

Even if perfect equality in responsiveness for same-sex and opposite-sex inquiries were found post-*Masterpiece*, under the study's logic, one could conclude that *Masterpiece* caused an increase in discrimination against same-sex couples. Post-*Masterpiece*, creative professionals responded positively or cooperatively to opposite-sex inquiries about 58% of the time.[41] But pre-*Masterpiece*, creative professionals responded positively or cooperatively to same-sex inquiries about 64% of the time.[42] So even if same-sex and opposite-sex positive responsiveness were the same after *Masterpiece*, Professor Barak-Corren's logic would still have found discrimination against same-sex couples.

This raises other problems too. The study attributes the differences in non-responses between Waves 1 and 2 to "attrition," but it attributes the differences in non-responses in Waves 3 and 4 to discrimination.[43] The study admits its finding of pre-*Masterpiece* discrimination against opposite-sex couples is "tenuous,"[44] but it later concludes that requests for services for same-

[40] *HCRCLLR*, *supra* note 5, at 343.

[41] *Appendix*, *supra* note 5, at 19.

[42] *Id.*

[43] *HCRCLLR supra* note 5, at 344.

[44] *Id.* at 344 n.132.

sex weddings were more likely to be declined post-*Masterpiece*.[45] For the sake of consistency, the Masterpiece Study needed to characterize non-responses the same across waves—either they should be classified as discriminatory non-responses (which would be inaccurate in our view, as explained below) or as non-responses due to attrition. But not both. Professor Barak-Corren does not offer a defensible explanation for this inconsistency.[46]

Compounding the problem, the study uses the term "attrition" incorrectly. Professor Barak-Corren claims that attrition is "common to studies."[47] "Attrition" in social science refers to the phenomenon in survey studies when people know they are being studied at multiple points across time and drop out of the study before it concludes.[48] The creative professionals in the Masterpiece Study did not know they were in a study and therefore were not in a position to "drop out" in the conventional social science sense.

Professor Barak-Corren also does not account for how other variables associated with Waves 1 and 2 might account for the differences in responsiveness between Waves 1 and 2 and Waves 3 and 4. Like most auditing studies, the Masterpiece Study was intended to detect the "signal in the noise." This refers to the idea that social scientists must separate the variable of interest—the "signal," which, in this case, is *Masterpiece*'s effect on discrimination—from the randomness of numbers arising in the course of the measurement—the "noise."[49] But the inquiries were sent at different times, and the scripts contained different wording.[50] The higher non-response rate of Wave 2 (i.e., inquiries from opposite-sex couples) likely arose from the "noise" associated with the timing of contact and/or the wording of the inquiries and not discrimination against opposite sex couples.[51] We reach this conclusion because

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[45] *Id.* at 345.

[46] *Id.* at 345–48.

[47] *Id.* 344.

[48] Survey studies—unlike auditing studies— collect "information from a sample of individuals through their responses" when the individuals are "recruit[ed] participants." Julie Ponto, *Understanding and Evaluating Survey Research*, 6 J. ADV. PRAC. ONCOLOGY 168, 168 (2015), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4601897/pdf/jadp-06-168.pdf.

[49] Nate Silver, THE SIGNAL AND THE NOISE: WHY SO MANY PREDICTIONS FAIL—BUT SOME DON'T 416 (2012).

[50] *Chelsey Nelson Photography*, 2022 WL 3972873, at *23 n.13 (noting differences in requests, including dates and in-person meetings).

[51] Keeping question wordings consistent across time is one of the canonical principles in survey design. *See* Pew Research Center, *Writing Survey Questions*, https://www.pewresearch.org/our-methods/u-s-surveys/writing-survey-questions/ (last visited June 2, 2022) ("When measuring change over time, it is important to use the same question wording and to be sensitive to where the question is

the "signal" in Waves 1 and 2 amounts to an unusual result: widespread pre-*Masterpiece* discrimination against opposite-sex couples. This result is unusual, and Professor Barak-Corren does not accept it.[52] But the study never adjusts for or addresses these possibilities.[53]

These statistical differences in non-responses between Waves 1 and 2 cast serious doubt on any ability to draw inferences from changes across waves pre- and post-*Masterpiece* using this data.[54] That is especially true given how the study attributes different causes to non-responses in Waves 1 and 2 compared to Waves 3 and 4.

B. The Study Fails to Account for Regression to the Mean

As we have explained, the Masterpiece Study experienced significant "attrition" between Waves 1 and 2. This irregular pattern of responses prevented the study from detecting potential discrimination pre-*Masterpiece*.[55] Professor Barak-Corren attempts to get over the attrition hurdle by measuring the change in responsiveness to inquiries for same-sex wedding services by pre-*Masterpiece* "gay friendly" businesses.[56] "Gay friendly" businesses, as Professor Barak-Corren uses the term, are businesses that positively responded to requests for same-sex wedding services in Wave 1.[57]

Professor Barak-Corren claims that previously gay friendly businesses "randomly contacted by opposite-sex or same-sex couples after the decision was rendered respond[ed] less favorably to same-sex couples" after *Masterpiece*.[58] But the oddly high level of positive responses to inquiries for same-sex wedding services pre-*Masterpiece* makes it much easier to find a significant decrease in responses to same-sex wedding inquiries after the ruling. Claiming

asked in the questionnaire to maintain a similar context as when the question was asked previously.").

[52] *HCRCLLR*, *supra* note 5, at 344 n.132 ("It is possible to infer that, prior to *Masterpiece Cakeshop*, opposite-sex couples were disfavored relative to same-sex couples (reverse discrimination), but this inference seems tenuous.").

[53] There is no way to isolate the effects of these factors based on the data we reviewed and their potential effect on creative professionals willingness to respond or not. Properly conducted studies either randomize or hold steady the wording that is not directly related to the dependent variable of interest. *See, e.g.*, Marianne Bertrand and Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 The Am. Econ. Rev. 991, 991–93 (2004) (randomizing resume names in employment study).

[54] *Chelsey Nelson Photography*, 2022 WL 3972873, at *23 (making this point).

[55] *Id*. at *22; *JLS*, *supra* note 5, at 92–93.

[56] *HCRCLLR*, *supra* note 5, at 345.

[57] *Id*.

[58] *JLS*, *supra* note 5, at 4.

to detect an effect in such a situation is a textbook example of the "regression fallacy." Regression in this sense "describes a tendency of extreme measurements to move closer to the mean when they are repeated."[59] This is a well-established, well-investigated phenomenon across a wide range of activities.[60]

Consider an example. In a classic article, Amos Tversky and Daniel Kahnman described how regression to the mean might work with students.[61] If one selects the ten top scoring children on an aptitude test, he will usually observe a performance decrease in a second test. Conversely, if one selects the ten worst scoring students, he will typically find their performance to improve on a subsequent test. In each case, the students' performances moderate to their average performance level.[62] Tversky and Kahnman explain that failure to recognize regression to the mean can lead to "spurious" causal explanations and counter-productive policies.[63]

When regression to the mean is possible, the analyst must ascertain whether high performance in the first testing arose from a statistical aberration.[64] If the first measurement derives from a performance above the norm, a later measurement, which may well be average, will appear to be a slump.[65] The Masterpiece Study does not delineate these possibilities. The supposed effects of *Masterpiece* are measured against an unusually favorable pre-*Masterpiece* responsiveness to same-sex inquiries in the group that is selected precisely because they positively responded to same-sex inquiries—i.e., gay friendly businesses. Under these circumstances, a subsequent decline in the professionals' responsiveness is unsurprising. In fact, such a slump is likely an artifact of regression to the mean—rather than a result of attitudinal changes post-*Masterpiece*—based on a pre-*Masterpiece* sampling consisting of a high-

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[59] Christy Chuang-Stein, *The Regression Fallacy*, 27 DRUG INFO. J. 1213, 1213 (1993).

[60] *See, e.g.*, Tanya Halliday et. al., *Failing to Account for Regression to the Mean Results in Unjustified Conclusions*, 30 J. WOMEN & AGING 2, 2–5 (2018); Gary Smith, *A Fallacy that Will not Die*, 25 THE JOURNAL OF INVESTING 7, 7–15 (2016); James P. Hughes et. al., *Regression to the Mean and Changes in Risk Behavior Following Study Enrollment in a Cohort of U.S. Women at Risk for HIV*, 25 ANNALS OF EPIDEMIOLOGY 439, 439–44 (2015); Debra Wetcher-Hendricks, *Does the Sophomore Slump Really Exist?*, 7 THEORY IN ACTION 59, 63–64 (2014); Jan Stuhler, *Mobility Across Multiple Generations: The Iterated Regression Fallacy* 1–2 (Inst. for the Study of Lab., Discussion Paper, No. 7072, 2012).

[61] Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124, 1126 (1974).

[62] *Id.*

[63] *Id.* at 1127.

[64] Adrian Barnett et al., *Regression to the Mean: What it is and How to Deal with it*, 34 INT'L J. OF EPIDEMIOLOGY 215, 217 (2005).

[65] *Id.*

scoring gay-friendly group.[66] The Masterpiece Study could have tried to adjust its methods and conclusions to account for regression to the mean with tools like an analysis of covariance.[67] But the study did not employ this tool or any others and therefore failed to account for the possibility of regression to the mean.

C. The Study Measures Discrimination via Nonresponses

Another concern is that the study counts failure to respond to an email as discrimination. Professor Barak-Corren noted that, for a variety of reasons, "no response" was the "most common form of declining service."[68] Carefully controlled and disseminated auditing studies that show differential non-responses can comprise evidence of general discrimination.[69] But increased discriminatory sentiment is typically manifested in both a higher non-response rate for same-sex couples and a higher explicit rejection rate, because the discriminatory sentiment operates in both ways.[70] So if there was a post-*Masterpiece* increase in discrimination, and we assume for the sake of argument that non-response correlates to and approximates discrimination, we would also expect to measure an increase in the directly measurable form of discrimination: explicit declines.

Explicit rejections are a more definite signal that a creative professional has intentionally declined the request. Measuring these rules out circumstances where creative professionals did not read the request, were too busy to respond, or did not respond to the inquiry for a variety of other reasons.[71] To be fair, Professor Barak-Corren acknowledges that non-responses in

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[66] *See id.*

[67] *Id.*

[68] *HCRCLLR*, *supra* note 5, at 345.

[69] *See, e.g.*, Ali M. Ahmed et al., *Are Lesbians Discriminated Against in the Rental Housing Market? Evidence From a Correspondence Testing Experiment*, 71 J. HOUSING ECON. 234, 234–38 (2008) (Sweden); Nathaniel Lauster & Adam Easterbrook, *No Room for New Families? A Field Experiment Measuring Rental Discrimination Against Same-Sex Couples and Single Parents*, 58 SOC. PROBS. 389, 389–409 (2011) (Canada); Joshua Hellyer, *Homophobia and the Home Search: Rental Market Discrimination Against Same-Sex Couples in Rural and Urban Housing Markets*, 51 J. HOUSING ECON. 1, 2–6 (2021).

[70] Auditing studies often measure both explicit rejections and non-responses. *See* Hellyer, *supra* note 69, at 3.

[71] For example, the study noted that some creative professionals explained in follow-up phone calls that they did not respond to the inquiries for various reasons, including that they failed to receive the email, thought the inquiry was a scam, or intended to but forgot to respond. *Appendix*, *supra* note 5 at 13–14.

Waves 3 and 4 could have had other causes.[72] She defends the study's reliance on nonresponses by claiming that non-responses did not "randomly and therefore equally" distribute across couple types and therefore showed discrimination.[73] But the study's failure to account for the regression to the mean in responsiveness in Waves 3 and 4 eliminates the study's ability to draw any distribution inferences from Waves 3 and 4.

We analyzed the Masterpiece Study's original, anonymized data, but we only considered explicit rejections to investigate potential discrimination.[74] For opposite-sex couples, the explicit rejection rate before *Masterpiece* was 5.6% while after *Masterpiece* that rate was 8.7%. This difference is statistically significant at p=.011.[75] The same-sex explicit rejection rate increased from 7.3% to 9.7%, but with an insignificant p-value of .06.[76] For that reason, we are unable to attribute the increase from 7.3% to 9.7% to an actual increase in discrimination, as opposed to random happenstance from the noise. So while explicit rejections increased after *Masterpiece* for opposite-sex couples, we cannot conclude that explicit rejections increased for same-sex couples after *Masterpiece*.

D. The Study Suffers from a "Gay Friendly" Fallacy

According to the study, creative professionals who agreed to serve same-sex couples before *Masterpiece*—"gay friendly" businesses—showed lower responsiveness to same-sex couples in the post-*Masterpiece* waves. As discussed above, this shift was statistically expected regardless of whether there was in fact an underlying change in attitudes because of the unusually high Wave 1 responsiveness and regression to the mean. Even so, this apparent change invites a question not addressed in Professor Barak-Corren's study: How did

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[72] *HCRCLLR*, *supra* note 5, at 345.

[73] *Id.*

[74] The original data is at https://osf.io/ve5yn/ and the code for our original re-analysis is posted at https://github.com/StephenCranney/MasterpieceEffect.

[75] A Welch two-sample t-test was used with t=-2.552, df=1,741 and a 95% confidence interval of -0.055 to -0.007. This p-value means there is a one out of one hundred chance that this shift happened by accident. Conversely, there is a 99% chance that the explicit rejection rates of opposite-sex couples did really increase between waves.

[76] A Welch two sample t-test was used, with the t=-1.854, df=1780, and a 95% confidence interval of -.05 to .001. In social science, a p-value below .05 is required for something to be termed "statistically significant." Any p-value above .05 is not considered a real, statistical change, and any differences that appear to happen are assumed to be the result of random noise. Beatrice Grabowski, *"P<.05" Might Not Mean What You Think: American Statistical Association Clarifies P Values*, 108 J. NAT'L CANCER INST. 4, 4–5 (2016).

businesses that declined requests for services for same-sex weddings before *Masterpiece* react after *Masterpiece*?

To answer this question, we identified businesses that explicitly declined a same-sex inquiry before *Masterpiece*. Then we looked at how many in this group also explicitly declined to serve opposite-sex couples before *Masterpiece*. Finally, we analyzed how many in the same group explicitly declined same-sex and opposite-sex inquiries after *Masterpiece*. This essentially inverts the Masterpiece Study's "gay friendly" analysis whereby it looked at businesses that positively responded to same-sex inquiries before *Masterpiece* and then compared that group's responsiveness to same-sex inquiries after *Masterpiece*.

To begin, we sampled businesses that explicitly rejected requests to provide services for a same-sex wedding in Wave 1. We call this group "gay antagonists" because of the express rejection of same-sex inquiries (although we don't know their reasons for declining service). Of that group, we found that 59% also explicitly refused to serve opposite-sex couples. In other words, of all of the creative professionals that explicitly declined same-sex inquiries pre-*Masterpiece*, 59% also explicitly declined opposite-sex inquiries. The pre-*Masterpiece* response disparities were highly statistically significant based on our analysis ([$p<.001$]).[77] Again, this means there is a less than one in a thousand chance that this difference arose from chance, so we can be fairly certain that there was a real pre-*Masterpiece* gap between rejecting same-sex and opposite-sex couples for the "gay antagonist" group, especially because the social sciences only demand a less than 1 in 20 chance that the relationship is due to random noise.[78]

However, after the *Masterpiece* decision, the same gay antagonist group was no more likely to expressly deny a same-sex inquiry (59% rejection rate) than an opposite-sex inquiry (52%) (the difference between these two rejection rates is a statistical tie at $p=.39$; again a statistical tie because p exceeds .05).[79] For this group, there was a statistically significant decline in same-sex explicit rejections post-*Masterpiece*. Because of the gay antagonist group's composition—i.e., only creative professionals who explicitly declined a same-sex inquiry before *Masterpiece*—the group explicitly declined same-sex

[77] A Welch two-sample t-test was used, with $t=-6.70$, $df=65$ and a 95% confidence interval of -0.5 to -0.3.

[78] *See* Kelly Servick, *It Will Be Much Harder to Call New Findings "Significant" if This Team Gets its Way*, SCIENCE (Jul. 25, 2017), https://www.science.org/content/article/it-will-be-much-harder-call-new-findings-significant-if-team-gets-its-way.

[79] A Welch two-sample t-test was used, with $t=-.871$, $df=130$ and a 95% confidence interval of -0.25 to 0.1.

inquiries 100% of the time before *Masterpiece*. After *Masterpiece*, though, this same group explicitly declined 59% of the time. On the other hand, opposite-sex rejections by this group did not significantly decline—those rejections went from 59% before *Masterpiece* to 52% after.

Given this data, and using the study's logic that an explicit decline is an act of discrimination no matter the stated reason for the decline, *Masterpiece* appeared to cause a change of heart among formerly "gay antagonistic" creative professionals. These professionals became *more accepting* of same-sex couples as demonstrated by the decline in the explicit rejection rate post-*Masterpiece*. In short, they discriminated less after *Masterpiece.* Of course, we are not arguing that *Masterpiece* caused more people to support same-sex marriage. Rather, we are simply demonstrating that if one selects only those respondents that score high on a certain variable (here, explicit declines to same-sex inquiries), they will naturally shift toward the mean in later measurements, making it (falsely) appear they changed their minds.

If *Masterpiece* caused a real and statistically detectable increase in decisions to refuse inquiries for same-sex weddings, the conclusions would not differ so significantly based on how we cut the data (e.g. express rejections versus non-responses) and defined our variables. Indeed, changing focus from the "gay friendly" group to the "gay antagonist" group shows creative professionals expressly declined same-sex inquiries *less* after *Masterpiece*, the exact opposite of a purported Masterpiece Effect. In reality, the stories told by the data change depending on the operationalization of the variables. Reliable conclusions robust to a variety of alternative specifications should not be easily called into question merely because the test is set up differently.[80]

E. The Study Has No Reliable Control Group

Typically, scientific studies require at least two groups: the group receiving the treatment and the control group.[81] The treatment group is exposed to the treatment expected to lead to a particular outcome, while the control group is not.[82] Studies which purport to measure the effect of a treatment or to evaluate the cause of a change in behavior should test a treatment group *and*

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[80] George Qian & Adam Mahdi, *Sensitivity Analysis Methods in the Biomedical Sciences*, 323 MATHEMATICAL BIOSCIENCES 1, 12 (2020).

[81] A treatment is the intervention hypothesized to cause the effect studied. *See Experiments: Quantitative Data Analysis*, URBAN INST., https://www.urban.org/research/data-methods/data-analysis/quantitative-data-analysis/impact-analysis/experiments (last visited June 2, 2022).

[82] Neil J. Salkind, *Control Group*, SAGE ENCYCLOPEDIA OF RESEARCH DESIGN 251 (2010).

a control group.[83] This ensures that the effect of the treatment is attributable to the treatment rather than to the particular composition of the experimental group, overall trends that might affect the experimental and control group, or an otherwise unique feature of the experimental group.

Professor Barak-Corren claims her control group is the businesses she contacted for the first time after *Masterpiece* "to evaluate the possibility that the repeated measurement of the experimental procedure had an independent effect on business behavior."[84] Professor Barak-Corren claims that it was important to use a control group because it supposedly allowed the study to measure post-*Masterpiece* discrimination against same-sex couples even though the study couldn't make this determination pre-*Masterpiece* because of the attrition issue.[85]

In the Masterpiece Study, the "treatment" was being exposed to or becoming aware of the *Masterpiece* decision. That is because the *Masterpiece* decision is the variable hypothesized to cause the change in the dependent variable, i.e., whether creative professionals respond differently to inquiries for same-sex wedding services. In these circumstances, a true control group would be exposed to more or less the same conditions, but would lack exposure to the *Masterpiece* ruling.[86]

But the Masterpiece Study has no methodologically valid control group. As we explain in more detail in the next section, there is no valid control group because the Masterpiece Study never measures whether the creative professionals were or were not exposed to the particular treatment—the *Masterpiece* decision. Without knowing that information, it is impossible for the "control group" to independently verify any causal link between *Masterpiece* and creative professionals' responses or non-responses to inquiries post-*Masterpiece*.[87]

To truly evaluate the effects, if any, of a judicial decision like *Masterpiece,* a correct study would need to evaluate the decision in a localized market and then compare the results from that jurisdiction to persons in other

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[83] Susan Athey & Guido W. Imbens, *The State of Applied Econometrics: Causality and Policy Evolution*, 31 J. ECON. PERSPS. 3, 3–32 (2017).

[84] *HCRCLLR*, *supra* note 5, at 342; *Appendix*, *supra* note 5, at 22.

[85] *JLS*, *supra* note 5, at 90.

[86] "[O]nly in the presence of a control group can a researcher determine whether a treatment under investigation truly has a significant effect on an experimental group." Mary Earick Godby, *Control Group*, BRITANNICA (MAY 14, 2020), https://www.britannica.com/science/control-group.

[87] Ioana E. Marinescu et al., *Quasi-Experimental Causality in Neuroscience and Behavioural Research*, 2 NATURE HUMAN BEHAVIOUR 891, 891–98 (2018).

jurisdictions who were not aware of the decision.[88] By doing so, the control group would allow observation of a population unaffected by the decision. Only then could the study potentially isolate the Masterpiece Effect by taking into account trends and other factors that were affecting results at the same time. Conversely, if the control group exhibited behavior similar to the treated group, any pre-and-post *Masterpiece* change would be attributed to factors other than *Masterpiece*. While circumstances may have precluded formation of a true control group in the Masterpiece Study, this omission undermines the study's conclusions because there was no opportunity to test the hypothesis against a population not exposed to *Masterpiece*. So any Masterpiece Effect cannot be separated from the myriad of explanatory factors we have presented.

F. The Study Did Not Measure Audience Awareness of Masterpiece

As noted, the Masterpiece Study is an audit-style study which sought to measure how the *Masterpiece* decision affected the behaviors of creative professionals in the wedding services industry by sending fictitious inquiries to those professionals.[89] Typically, to test how a Supreme Court decision changes individuals' attitudes or behaviors, there must be information about whether the public or the individual knew about the decision and the individual's attitude toward the decision.[90] That makes common sense. If we

[88] Formal policy studies looking at rates across geographic areas compare a control group of similar geographic areas not exposed to the variable of interest. *See* Benjamin D. Sommers et al., *Changes in Mortality After Massachusetts Health Care Reform: A Quasi-experimental Study*, 160 ANNALS OF INTERNAL MEDICINE 585, 585–593 (2014).

[89] *HCRCLLR*, *supra* note 5, at 341.

[90] Many studies have done so based on measured audience awareness or by providing information about the opinion. *See* Matthew P. Hitt et al., *Justice Speaks But Who is Listening? Mass Public Awareness of US Supreme Court Cases*, 7 J. L. & COURTS 29, 37–38 (2019); Emily Kazyak & Mathew Stange, *Backlash or a Positive Response?: Public Opinion of LGB Issues after* Obergefell v. Hodges, 65 J. HOMOSEXUALITY 2028, 2039–40 (2018); Alex Badas, *The Public's Motivated Response to Supreme Court Decision-Making*, 37 JUST. Sys. J. 318, 329–30 (2016) (relying on questions that described recent Supreme Court holding to assess public response to decision); D.P. Christenson & D.M. Glick, *Issue-Specific Opinion Change: The Supreme Court and Health Care Reform*, 79 PUBLIC OPINION 881, 881–905 (2015); Brandon L. Bartels & Christopher D. Johnston, *On the Ideological Foundations of Supreme Court Legitimacy in the American Public*, 57 AM. J. POL. SCI. 184, 193 (2012) ("In line with prior research, awareness exhibits a quite potent impact" on legitimacy measurements.); Christopher D. Johnston & Brandon L. Bartels, *Sensationalism and Sobriety: Differential Media Exposure and Attitudes Toward American Courts*, 74 AM. OPINION Q. 260, 266–67 (2010); VALERIE J. HOEKSTRA, PUBLIC REACTION TO SUPREME COURT DECISIONS (2003); Roy B. Flemming, John Bohte, & B. Dan Wood, *One Voice Among Many: The Supreme Court's Influence on Attentiveness to Issues in the United States, 1947-92*, 41 AM. J. POL. SCI. 1224, 1228–30 (1997).

want to measure whether a particular book about low carbohydrate diets caused someone to change diets, we first need to know whether he or she read the book.

Professor Barak-Corren argues that that *Masterpiece* emboldened creative professionals to exercise their rights to religious exemptions from public-accommodations laws, which caused them to more frequently decline same-sex inquiries after *Masterpiece*.[91] To feel so emboldened, the creative professionals must have known about the decision. A creative professional could potentially learn of the case by reading the opinion, hearing about the opinion from media reports, or by hearing about the opinion second-hand by speaking with others who were aware of the case. The creative professional could even be exposed to the decision without explicitly knowing about it if others conveyed its concepts to the professional.[92]

But the study did not measure whether the creative professionals were aware of the decision or, if they were aware of the decision, how they became aware of it.[93] These omissions are important. Of course, if creative professionals did not know about the decision at all and did not notice their peers changing their behavior, it is impossible to conclude that the *Masterpiece* decision caused any behavioral changes.[94] Unaware creative professionals could not have changed their responsiveness to same-sex wedding inquiries as a result of *Masterpiece*. And even if the *Masterpiece* Study measured *whether* the studied professionals knew about the decision—either directly or as told by

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[91] *HCRCLLR*, *supra* note 5, at 353–55.

[92] *Id.* at 354 ("The expressive theory of law argues that law can foster change not only or merely by the imposition of costs or benefits, but also by conveying that a certain norm has received a consensual status.").

[93] *Chelsey Nelson Photography*, 2022 WL 3972873, at *22–25 (criticizing this omission). In contrast, one study ensured case awareness by furnishing respondents with short summaries of key points to afford information comparable to a media report absorbed by the study subject. Katerina Linos & Kimberly Twist, *The Supreme Court, the Media and Public Opinion: Comparing Experimental and Observational Methods*, 45 J. LEGAL STUDIES 223, 232 (2016).

[94] Bert I. Huang, *Judicial Credibility*, 61 WM. & MARY L. REV. 1053, 1080 (2020) ("The typical worry is that surveys [in natural settings] relatively overstate such effects because in real life people do not always hear or internalize the news."). This lack of information creates problems with causation and correlation. Professor Barak-Corren makes a causation argument—that *Masterpiece* caused an increase in discrimination. But "[c]ausation explicitly applies where action A causes outcome B. On the other hand, correlation is simply a relationship. Action A relates to Action B—but one event doesn't necessarily cause the other event to happen." Archana Madhavan, *Correlation vs. Causation: Understanding the Difference for your Product*, AMPLITUDE BLOG (Sept. 20, 2019), https://amplitude.com/blog/causation-correlation.

others—we would still need to know *what* they understood from the decision.[95] That is necessary for two reasons.

First, the ruling did not establish a religious exemption for creative professionals to decline to create custom works for same-sex weddings that conflict with their religious beliefs. Instead, the Court held that Colorado's "hostility" towards Masterpiece Cakeshop and Mr. Phillips violated his religious freedom under the First Amendment.[96] At the same time, as Professor Barak-Corren acknowledges, "the decision also affirmed the need for AD laws to protect against sexual orientation discrimination in the marketplace."[97] For example, the Court explained that it is the "general rule" that "religious and philosophical objections . . . do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public-accommodations law."[98]

So Professor Barak-Corren's behavioral claims require several inferences. One must first infer that the creative professionals misunderstood the case as granting a religious exemption instead of protecting against religious hostility. Next, one must infer that the public broadly misunderstood the decision in this way because there could only have been a change in creative professionals' "perceptions of the social norm regarding service refusal" if the public widely misunderstood the decision.[99] The Masterpiece Study does not opine on how a proper understanding of *Masterpiece* as a religious-hostility case would have influenced professionals' behaviors or attitudes or the study's conclusions.

Second, different media outlets reported on the decision differently. Professor Barak-Corren sampled media outlets she deemed "mainstream," "progressive," and "conservative."[100] In Professor Barak-Corren's estimation, mainstream outlets characterized the decision as a "narrow" one that "did not resolve the big constitutional questions at issue."[101] The progressive outlets criticized the decision and specifically "voiced concerns that *Masterpiece*

[95] Linos & Twist, *supra* note 93 at 227 ("individuals must hear about and understand this news coverage").
[96] *Masterpiece Cakeshop*, 138 S. Ct. at 1721.
[97] *HCRCLLR*, *supra* note 5, at 325.
[98] *Masterpiece Cakeshop*, 138 S. Ct. at 1728.
[99] *HCRCLLR*, *supra* note 5, at 354.
[100] *Id.* at 334–36.
[101] *Id.* at 334.

Cakeshop will grant objectors a license to discriminate."[102] And the conservative outlets explained the decision was a "victory" and "express[ed] significantly less reservations about its scope."[103]

These characterizations expose a hidden assumption in the study's media analysis: creative professionals rely primarily on "conservative" outlets for their news. This assumption is necessary to support the study's conclusion that *Masterpiece* caused a change in social norms which encouraged creative professionals to more frequently not respond to inquiries for services for same-sex weddings.[104] That is so because mainstream and progressive media outlets would presumably not have changed social norms on the topic—mainstream outlets claimed the opinion was narrow and progressive outlets criticized the decision.[105] By contrast, in Professor Barak-Corren's view, conservative outlets described the decision in broad terms and did not "mention its recognition of the important role of AD laws in protecting against sexual orientation discrimination."[106]

But the Masterpiece Study does not specify which type of media the creative professionals observed. And at least some commentators from media not surveyed by the Masterpiece Study, claimed, at the time of the decision, that "'[n]arrow' has emerged as *one of the most common descriptions* of the Supreme Court's decision" in *Masterpiece.*[107] If the public commonly believed the decision was narrow, there would be no change in social perceptions and no basis for professionals to feel emboldened to decline inquiries for services related to same-sex weddings.

Creative professionals also could have different perceptions of the *Masterpiece* decision if they saw mainstream or progressive coverage combined with conservative coverage. For example, Professor Barak-Corren cites one study that examined public embrace of Supreme Court rulings based on the degree and type of media coverage.[108] That study found that the media can influence the public's opinion of Supreme Court rulings, but the degree of influence

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[102] *Id.* at 335–36.

[103] *Id.* at 334–35.

[104] *Id.* at 353–55.

[105] *Id.* at 336.

[106] *Id.* at 334–35.

[107] *See* Christine Emba, *The Supreme Court Wasn't Ready to Decide on the Wedding Cake. Neither are We.*, WASH. POST, June 5, 2018, https://www.washingtonpost.com/opinions/the-supreme-court-wasnt-ready-to-decide-on-the-wedding-cake-neither-are-we/2018/06/05/55c890f8-6905-11e8-bea7-c8eb28bc52b1_story.html (emphasis added).

[108] *HCRCLLR*, *supra* note 5, at 334 n.87 (citing Linos & Twist, *supra* note 93).

depends on whether coverage is either one-sided supportive coverage or two sided (both supportive and critical).[109] The study concluded that the type of media coverage dictates whether widely-reported cases do or do not change public opinion.[110] Likewise, Professors Johnston and Bartels found that individuals' attitudes towards the Supreme Court depend on the type of media they consume.[111] Consumers of "sensationalist media"—political talk radio and cable television—are more likely to have negative attitudes about the Court compared to consumers of "sober media"—newspapers and network news.[112] To that end, Professors Johnston and Bartels concluded "that not all information concerning the courts is identical and, thus, *where* one gets their knowledge is determinative of their subsequent attitudes."[113] In contrast, the Masterpiece Study does not examine subjects' media exposure in any robust or methodologically systematic way. Nor does Professor Barak-Corren systemically evaluate how she classifies mainstream, progressive, or conservative media.[114] She instead makes an anecdotal sampling without measuring the key data point, namely, the impact of the media reporting of the ruling on the attitudes and behaviors of creative professionals.

Even creative professionals who viewed only "conservative" outlets may have had different impressions of *Masterpiece* depending on the articles they read. Professor Barak-Corren cites seven conservative articles.[115] Four articles explained that the case protected religious freedom while also describing the decision as narrow.[116] It is impossible to say what impression of the case a

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[109] Linos & Twist, *supra* note 93, at 223.

[110] *Id.* at 247.

[111] Johnston & Bartels, *supra* note 90, at 266–67.

[112] *Id.* at 261, 272–73.

[113] *Id.* at 276.

[114] Researching the ideological leanings of media outlets involves approaches that are much more systematic and sophisticated than relying on the researcher's judgment calls. For example, one attitudinal study used 749 online human judges to score 10,502 political articles. *See* Ceren Budak et al., *Fair and Balanced? Quantifying Media Bias through Crowdsourced Content Analysis*, 80 PUBLIC OPINION Q. 250 (2016), https://academic.oup.com/poq/article/80/S1/250/2223443.

[115] *HCRCLLR*, *supra* note 5, at 335 nn.91–93 (citing articles described *infra* nn.116-20).

[116] *See Religious Freedom Groups Praise Supreme Court's Masterpiece Ruling*, CATH. NEWS AGENCY (June 4, 2018), *archived at* https://perma.cc/NV9W38UR (noting "[r]eligious freedom groups cheered" while acknowledging the Court "tailored the decision to this particular case"); Todd Starnes, *A Win for Masterpiece Cakeshop But it Ain't Over Yet*, FOX NEWS (June 4, 2018), *archived at* https://perma.cc/8STY-5Q5Z (explaining decision "should give some comfort to Christian business owners" but saying the decision was based on Colorado "having expressed 'hostility to religion'"); Bill Mears & Judson Berger, Supreme Court sides with Colorado baker who refused to

reader might take away from this nuanced coverage. Meanwhile, three articles could fairly be described as promoting the decision as granting a religious exemption to public-accommodations laws. But it would be foolhardy to claim these three articles caused a seismic shift in public perceptions. One was a news release by the Family Research Council,[117] an organization whose "mission is to advance faith, family, and freedom in public policy and the culture from a biblical worldview."[118] The study provides no information about how widely this release circulates, and, in any event, subscribers to this release likely would have already had religion-based objections to providing services to celebrate same-sex weddings. Another article quoted Jack Phillips as describing the case as "'a big win'" without elaboration.[119] Only one article from an actual media source (The Daily Signal) said *Masterpiece* offered broader protections for religious liberty despite its seemingly narrow opinion.[120]

III. The Masterpiece Study Gets the Law Wrong

Having shown that the data does not support the Masterpiece Effect, we will now turn to the study's legal underpinnings and conclusions. We conclude that general auditing studies like the Masterpiece Study are ill-equipped to shed light on how to reconcile public-accommodation laws with the First Amendment. We evaluate both religious freedom and free speech claims and defenses here because businesses often defend themselves against public-

make wedding cake for same-sex couple, FOX NEWS LIVE (June 4, 2018), *archived at* https://perma.cc/6YHF-XMS9 (The "justices set aside a Colorado court ruling against the baker—while stopping short of deciding the broader issue of whether a business can refuse to serve gay and lesbian people."); *Victory for Colorado Cake Case*, LIBERTY COUNS. (June 4, 2018), *archived at* https://perma.cc/9M8L-QZ23 ("Though the Court focused on the explicit hostility exhibited by the Colorado Civil Rights Commission in this specific instance, this significant decision will have a wide impact regarding the clash between free speech and the LGBT agenda.").

[117] Tony Perkins, *Supreme Court Ruling a Victory for Freedom of Colorado Baker to Live by his Faith, says Family Research Council*, FAM. RSCH. COUNCIL (June 4, 2018), *archived at* https://perma.cc/4Q7L-Q5FX.

[118] *Vision and Mission Statements*, FAM. RSCH. COUNCIL, https://www.frc.org/mission-statement.

[119] *Colorado Baker Reacts to 'Big Win' in Same-Sex Wedding Cake Case*, FOX NEWS INSIDER (June 5, 2018), *archived at* https://perma.cc/3Z2C-PDRP.

[120] Emilie Kao, *Why the Supreme Court's Ruling for a Christian Baker Was Not 'Narrow'*, DAILY SIGNAL (June 12, 2018), *archived at* https://perma.cc/ECS6-7D72.

accommodations laws by invoking the expressive character of the activity being regulated and their free exercise rights.[121]

Courts apply strict scrutiny to laws that infringe on religious liberty and free speech.[122] The federal RFRA and state RFRAs (generally) codify strict scrutiny.[123] Strict scrutiny is "the most demanding test known to constitutional law."[124] It requires the government to demonstrate that the law furthers a compelling government interest in the most narrowly tailored way to achieve that interest.[125] In evaluating compelling interests, courts look beyond "broadly formulated interests justifying the general applicability of government mandates."[126] This means the government must have a compelling interest in declining an exception for a particular claimant.[127] As for narrow tailoring, if the government can achieve its purposes in a manner that does not burden speech or religion, it must do so.[128]

Generally, governments claim that applying public-accommodations laws further compelling interests by ensuring the public has equal access to goods and services and by preventing dignitary harms associated with being denied a good or service. Indeed, those are the interests advanced by Colorado in *303 Creative LLC v. Elenis* in applying its law to a website designer.[129]

The Masterpiece Study generally analyzed the first interest—how religious exemptions could affect the government's interest in ensuring access to wedding-related services.[130] So we evaluate that interest first. We also analyze whether the Masterpiece Study can support an interest in preventing dignitary harms. After showing that the Masterpiece Study cannot generally be used to support either interest, we evaluate the consequentialist approach Professor Barak-Corren uses to evaluate public-accommodations laws and

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[121] *See infra* Part III.D.

[122] *See*, *e.g.*, Fulton v. City of Philadelphia, Pennsylvania, 141 S. Ct. 1868, 1881 (2021); Reed v. Town of Gilbert, Ariz., 576 U.S. 155, 164–65 (2015); *Boy Scouts of Am.*, 530 U.S. at 659; Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, 515 U.S. 557, 579–81 (1995).

[123] Gonzalez v. O Centro Espirita Beneficiente Uniao do Vegetal, 546 U.S. 418, 430 (2006) (noting the federal RFRA "adopted" a strict scrutiny test).

[124] City of Boerne v. Flores, 521 U.S. 507, 534 (1997).

[125] *See*, *e.g.*, *Fulton*, 141 S. Ct. at 1881.

[126] *O Centro Espirita*, 546 U.S. at 431. *See also* Wisconsin v. Yoder, 406 U.S. 205, 230–34 (1972) (government lacked evidence demonstrating particularized harm in accommodating religious objections of the Amish).

[127] *Fulton*, 141 S. Ct. at 1881.

[128] *Id.* at 1886.

[129] Br. for Resp. Elenis at 36–40, *303 Creative*, 142 S. Ct. 1106 (No. 21-476).

[130] *HCRCLLR*, *supra* note 5, at 317–18 (explaining that experiment measured supposed willingness of creative professionals to provide services for same-sex weddings).

religious liberty. Finally, we discuss a material omission in the Masterpiece Study in the context of *303 Creative LLC v. Elenis*: an inquiry into the likely effect of a free speech-based exemption from public-accommodations laws for objections to providing goods or services that express ideas and values that conflict with the creative professionals' views or beliefs.

A. Broadly Formulated Access Interests Don't Satisfy Strict Scrutiny

We start with the often-asserted claim that public-accommodations laws serve a compelling governmental interest by ensuring equal access to goods and services. As a matter of fact and as a matter of law, the Masterpiece Study does not demonstrate that granting a religious exemption limits access to wedding-related goods or services for same-sex couples.

We have shown that the Masterpiece Study did not demonstrate a Masterpiece Effect which limited the availability of wedding-related services to same-sex couples.[131] But even assuming the Masterpiece Effect, Professor Barak-Corren concedes that her study does not show a lack-of-access problem.[132] So factually, the Masterpiece Study does not support the argument that the government has a compelling interest in ensuring equal access to goods and services for same-sex weddings by eliminating religious exemptions.[133] When access is not denied, there are serious questions about whether the state's interest lies in preventing discrimination throughout the economy or whether the government is regulating religious events or observances.

As a matter of law, the study inappropriately seeks to use generalized data to resolve case-specific disputes. But courts must scrutinize the asserted harms caused by granting specific exemptions in specific cases. For example, when a law allegedly violates the religious freedom of a business owner, the question

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[131] *See supra* Part II.

[132] *HCRCLLR*, *supra* note 5, at 361 ("The data show courts that market alternatives do exist—there are vendors who will provide services to same-sex couples . . . .").

[133] Some courts have held that the government may have a compelling interest in ensuring access to a particular creative professional's expressive goods or services. *See* 303 Creative LLC v. Elenis, 6 F.4th 1160, 1178–82 (10th Cir. 2021), *cert. granted,* No. 21-476, 2022 WL 515867, at *1 (U.S. Feb. 22, 2022) (website designer); Emilee Carpenter, LLC, v. James, No. 21-CV-6303-FPG, 2021 WL 5879090, at *16 (W.D.N.Y. Dec. 13, 2021) (photographer). The Supreme Court has never adopted that approach in the strict scrutiny analysis. *See*, *e.g.*, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 728 (2014) (rejecting strict scrutiny argument as applied to single employer); *Hurley*, 515 U.S. at 577 (government interest did not compel access to particular parade). And Professor Barak-Corren does not endorse this view either—her argument, in our view, looks more holistically at how the creative professional market might react as a whole to affect access generally and not to any particular business.

is not whether the government has a compelling interest in enforcing antidiscrimination laws generally, but whether it has a compelling interest in denying a religious exemption to that particular business.[134]

The Masterpiece Study is not equipped to address these nuances. The study did not examine whether exempting any particular public accommodation would eliminate the market alternatives Professor Barak-Corren identified. And the study acknowledges that "independent vendors in one area could be different than independent vendors in another area."[135] Even so, the study makes a blanket statement about the Masterpiece Effect: that any religious exemption for any public accommodation would increase the willingness of creative professionals to object to providing certain services that violate their religious beliefs.[136] But as Justice Samuel Alito observed in his concurring opinion in *Fulton*, the availability of alternative services to same-sex couples undercuts the government's interest when the service providers do not enjoy market domination.[137] The Supreme Court made a similar point in *Hurley v. Irish–American Gay, Lesbian & Bisexual Group of Boston* where the government had no compelling interest in forcing parade organizers to include a banner when alternative parades were "presumably" available.[138]

For that reason, the Masterpiece Study's lack of evidence about specific objectors in specific jurisdictions or market alternatives in those jurisdictions casts doubt on whether the study can apply in any particular case. Professor Barak-Corren's study cannot be used for particular cases because she generally makes no specific findings within specific jurisdictions.[139] For example, a photographer in Austin, Texas (which is subject to a state RFRA and a local

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[134] *Fulton*, 141 S. Ct. at 1881. Another way of saying this is that the government must show a compelling interest in applying the law "to the person." Tanner Bean, *"To the Person": RFRA's Blueprint for A Sustainable Exemption Regime*, 2019 B.Y.U. L. Rev. 1, 11 (2019).

[135] *HCRCLLR*, *supra* note 5, at 348 n.140.

[136] This echoes an unfortunately common refrain: "[b]ehind every free exercise claim is a spectral march; grant this one, a voice whispers to each judge, and you will be confronted with an endless chain of exemption demands from religious deviants of every stripe." Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 947 (1989).

[137] *Fulton*, 141 S. Ct. at 1886 (Alito, J., concurring). *See also* Nathan B. Oman, *Doux Commerce, Religion and the Limits of Antidiscrimination Laws*, 92 IND. L. J. 693, 719 (2017) ("Aggressively enforcing antidiscrimination norms in the absence of threats to meaningful access can undermine the pluralism-managing force of markets.").

[138] 515 U.S. at 577.

[139] There are a few exceptions. For example, Professor Barak-Corren does a quick demographic comparison between Dallas, Texas and Houston, Texas. *HCRCLLR*, *supra* note 5, at 356. But more than anything, this comparison highlights the need for specificity, because these cities had differences in the percentage of Evangelicals, attitudes towards same-sex marriage, and regime type. *Id.*

AD), might respond differently than one in rural Texas with different cultural leanings and subject only to the state RFRA. While the study examines general religiosity as a factor, it does not measure these important intrastate differences or the nuances arising from a diversity of attitudes about same-sex marriage. Because it fails to measure these distinctions, the study is not useful as specific evidence in any one jurisdiction because it imparts no finding relevant to the jurisdiction under review.

As a matter of real-life experience, the access issue has little force because of the business risk to creative professionals of declining to create expressive goods for same-sex weddings. Businesses have faced significant public backlash for declining to provide goods for same-sex weddings or to support same-sex marriage more broadly. This backlash has often resulted in lost profits,[140] closed businesses,[141] and limited access to markets.[142] Some public-accommodations laws impose criminal penalties, which further disincentivizes same-sex wedding inquiry declinations.[143] And the same-sex wedding industry is growing and profitable.[144] All of these potential penalties and losses associated with only providing goods and services for opposite-sex weddings naturally deter most creative professionals from declining same-sex wedding inquiries. Religious objectors may already experience a penalty in the marketplace in the form of potential penalties or profits foregone on serving same-sex weddings. A law and economics approach would suggest creative professionals suffer by refusing same-sex business and that a decision to decline this business is not economically rational.[145]

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[140] Blair Miller, *Masterpiece Cakeshop Owner Says He's Lost 40% of Business, Welcomes SCOTUS Hearing*, DENVER 7 (last updated June 26, 2017) https://www.thedenverchannel.com/news/politics/masterpiece-cakeshop-owner-says-hes-lost-40-of-business-welcomes-scotus-hearing.

[141] *Sweet Cakes by Melissa Announces Closure*, KGW8, https://www.kgw.com/article/news/local/gresham/sweet-cakes-by-melissa-announces-closure/329740849 (last updated Oct. 6, 2016).

[142] Country Mill Farms, LLC v. City of E. Lansing, 280 F. Supp. 3d 1029, 1041–42 (W.D. Mich. 2017).

[143] *See*, *e.g.*, Brush & Nib Studio, LC v. City of Phoenix, 448 P.3d 890, 898 (Ariz. 2019) (highlighting Phoenix's criminal penalties).

[144] Scottie Andrew, *Same-sex Weddings have Boosted Economies by $3.8 Billion Since Gay Marriage was Legalized Five Years Ago This Month, a New Study Says*, CNN BUSINESS (June 2, 2020, 4:05 PM), https://www.cnn.com/2020/06/02/economy/same-sex-weddings-3-billion-trnd/index.html.

[145] Stephanie H. Barclay, *An Economic Approach to Religious Exemptions*, 72 FLA. L. REV. 1211, 1231 (2020).

B. Broadly Formulated Dignitary Harm Interests Don't Satisfy Strict Scrutiny

Next, we address the claim that public-accommodations laws serve a compelling government interest by reducing the dignitary harm associated with being declined a service. The claim is that denial of a product or service by reason of suspect class status may be an affront to personal dignity. But if this is the interest in view, it is important to pinpoint the reason for the decline in service. The Supreme Court has described this interest in the context of outright refusals to serve a particular class of persons because of their status in the provision of basic goods and services.[146] These cases have not involved legitimate religiously based objections to providing custom, expressive goods.

But the Supreme Court has consistently rejected possible dignitary harms as a justification for compelling or eliminating religiously or philosophically motivated speech.[147] Relatedly, the Supreme Court has also made clear that religious based objections to same-sex marriage cannot serve as the basis for personal affront. In *Masterpiece*, the court said that "gay persons could recognize and accept without serious diminishment to their own dignity and worth" legitimate declines in service based on sincerely held religious beliefs.[148] Likewise, in *Obergefell*, the Supreme Court described religiously-based objections to same-sex marriage as "decent and honorable" and made sure to emphasize that those "beliefs are not disparaged here."[149]

In any event, the most frequent form of declining service in the Masterpiece Study was a non-response. Those types of declines are especially weak support for any supposed violation of a dignity interest. A potential customer who receives a non-response would have no way of knowing the reason for

[146] *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 625 (1984) ("It thereby both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life."); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 291 (1964) (Goldberg, J., concurring) ("The primary purpose of the Civil Rights Act of 1964, however, as the Court recognizes, and as I would underscore, is the vindication of human dignity and not mere economics.").

[147] The Supreme Court has rejected the idea that dignitary harms can override the First Amendment's speech protections. *See* Matal v. Tam, 137 S. Ct. 1744, 1763 (2017) (collecting cases); Snyder v. Phelps, 562 U.S. 443, 451 (2011) (upholding a speaker's right to deliver graphically homophobic messages "that fall short of refined social or political commentary. . . ."); Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

[148] *Masterpiece Cakeshop*, 138 S. Ct. at 1727.

[149] Obergefell v. Hodges, 576 U.S. 644, 672 (2015).

the non-response.[150] And service providers decline to reply to requests for services all the time for a myriad of reasons that have nothing to do with the status of the person making the request.

The creative professional's dignity is also worth considering. Prosecuting a creative professional and stripping him or her of a livelihood imposes a choice between martyrdom and a broken conscience.[151] In *Masterpiece*, Colorado's public-accommodations law forced Mr. Phillips to cease making wedding cakes, which caused layoffs and a significant loss of business.[152] In these cases, the creative professional must repeatedly violate his conscience or face financial ruin. That's generally an unconstitutional choice: "In our constitutional tradition, freedom means that all persons have the right to believe or strive to believe in a divine creator and a divine law. For those who choose this course, free exercise is essential in preserving their own dignity and in striving for a self-definition shaped by their religious precepts."[153]

C. The Study Emphasizes a Consequentialist Approach to Law

The Masterpiece Study seeks to contribute "to the consequentialist debate on religious exemptions, by studying . . . the effects of religious exemptions on sexual orientation discrimination."[154] In law, "*rule consequentialism*[] evaluates legal rules solely based on their consequences."[155] On this view, legal rules "may (or must) go into effect if and only if justified by their consequences."[156] This approach can be contrasted with nonconsequentialism which "does not ignore consequences entirely, but instead denies that the rightness or wrongness of our conduct is determined solely by the goodness or badness of the consequences."[157]

Professor Barak-Corren pursues a consequentialist theory of law because she believes the Supreme Court "has consistently cited consequentialist concerns (or lack thereof) in rejecting (or granting) requested religious

[150] *See HCRCLLR*, *supra* note 5, at 353 ("[T]he experiment, by design, eliminated the risk of getting caught . . ., as emails allow vendors to entirely avoid the detection of discrimination . . . ."); *id.* ("[E]ven before *Masterpiece Cakeshop*, vendors could have opted to ignore emails from same-sex couples or provide excuses . . . .").

[151] Christopher Lund, *Martyrdom and Religious Freedom*, 50 CONN. L. REV. 959, 965–67 (2018).

[152] Barclay, *supra* note 145, at 1231.

[153] *Hobby Lobby*, 573 U.S. at 736 (Kennedy, J., concurring).

[154] *HCRCLLR supra* note 5, at 318.

[155] Note, *Rights in Flux: Nonconsequentialism, Consequentialism, and the Judicial Role*, 130 HARV. L. REV. 1436, 1438 (2017).

[156] *Id.*

[157] *Id.* at 1439.

exemptions."[158] In her view, consequentialism was at least in the Justices' minds as they considered *Masterpiece*.[159] Professor Barak-Corren explains her position that "[i]n constitutional law, as elsewhere, arguments about outcomes should rest on actual data."[160]

Based on the Masterpiece Effect, Professor Barak-Corren concludes that religious exemptions should generally be avoided to prevent increased nonresponses to same-sex wedding inquiries.[161] She argues that the Masterpiece Study shows that *Masterpiece* "substantially detracted" from public-accommodations laws' goal of ending discrimination "in most regimes, by substantially expanding discrimination against same-sex couples." [162] She concludes by suggesting "these results vindicate states that currently insist on enforcing AD laws without providing exemptions."[163]

But the problem with the Masterpiece Study's consequentialist theory is that it asks courts to predict outcomes based on public reaction to media reports about court decisions. As we have explained, the Masterpiece Study depends on a link between the *Masterpiece* decision and the public reaction. The link is the news media.[164] According to Professor Barak-Corren's recommendations, courts must consider potential public reaction when deciding cases involving a potential religious exemption. Then, courts should fashion their opinions in a way to avoid potential misreporting by the media. Professor Barak-Corren states that "even an intentionally narrow and case-specific exemption can have a substantial impact on an industry and its customers."[165]

How the public would react to any given decision is a matter of speculation. The Masterpiece Study did not measure how audiences absorbed media reports or whether the public understood *Masterpiece* as preventing

[158] *HCRCLLR*, *supra* note 5, at 318.

[159] For example, Professor Barak-Corren highlights Justice Anthony Kennedy asking the U.S. Solicitor General (who supported Mr. Phillips) if "the government [would] feel vindicated in its position" if "more and more bakers" declined to create wedding cakes for same-sex weddings upon a favorable ruling for Masterpiece Cakeshop. *Id.* at 318. Professor Barak-Corren also believes that Justice Kennedy considered "what the consequences of their decision[] [was] likely to be." *Id.* at 361.

[160] *Id.* at 363.

[161] *Id.* at 362–63. Professor Barak-Corren offers one caveat: "[I]t is possible that a different combination of legal means will generate different behavioral outcomes, and such combinations should be tested—or, where relevant, pre-tested—in the appropriate circumstances in the future." *Id.* at 362.

[162] *Id.*

[163] *Id.*

[164] *Id.* at 334–35.

[165] *Id.* at 320.

government hostility towards religion or granting a religious exemption. If the media broadly mischaracterized the decision, then the media, and not the courts, would be the cause of any Masterpiece Effect. But, of course, neither the courts nor government more broadly can predict or control how the media might report on particular cases.[166]

Consequentialism itself is not a sound vessel irrespective of its conflicts with constitutional jurisprudence. Among the problems with consequentialism is that "the effects of any legal rule can be described in an infinite number of ways."[167] And even consequentialists acknowledge consequentialism is out of place in matters of free expression due to state incapacity to assess actual harm in matters of speech.[168] That's for good reason. A consequentialist approach would lead to a balancing between core First Amendment rights and a speculative prediction of how the consequences of a decision exempting those rights might affect other members of the public. But the very point of the First Amendment—as well as the Bill or Rights generally—is to place these rights "beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."[169] Put differently, a consequentialist approach turns on what courts think to be good policy, but "good policy" changes over time. Professor Barak-Corren essentially advocates for a "value judgment" by supposing that governments' general interest in preventing discrimination outweighs individual religious exemptions.[170] By contrast, the First Amendment assumes that protecting certain freedoms is good policy regardless of particular outcomes in particular cases.

In fact, looking at particular cases or potential outcomes of Professor Barak-Corren's consequentialist theory of judicial review highlights one of its main flaws: it implicitly encourages governments to treat religious business owners with hostility, coerce or stifle religious speech, and to otherwise

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[166] *See*, *e.g.*, Columbia Broad. Sys., Inc. v. Democratic Nat. Comm., 412 U.S. 94, 153 (1973) (Douglas, J., concurring) ("'[O]ur liberty depends on the freedom of the press, and that cannot be limited without being lost.'" (quoting Thomas Jefferson)); New York Times. Co. v. U.S., 403 U.S. 713, 714 (1971) (prohibiting prior restraint of classified Vietnam documents); Craig v. Harney, 331 U.S. 367, 383 (1947) (Murphy, J., concurring) ("A free press lies at the heart of our democracy . . . ."); *Chelsey Nelson Photography*, 2022 WL 3972873, at *25 (excluding Professor Barak-Corren's report and noting "public acceptance is not a proper barometer for First Amendment protections").

[167] Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2048 (1996).

[168] David A.J. Richards, *A Theory of Free Speech*, 34 UCLA L. REV. 1837, 1893–94 (1987) (describing why consequentialism should not decide cases of free expression).

[169] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

[170] Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 366 (3d Cir. 1999) (Alito, J.).

discriminate against religion. This result cannot be reconciled with the First Amendment. As one legal scholar noted in the context of speech, "bad consequences that come about because the speech persuades people to do certain things cannot justify suppression."[171] Professor Barak-Corren implicitly accepts that courts should allow the government to show hostility to religion so that the public does not misunderstand religious hostility cases as granting religious exemptions and therefore feel emboldened to deny requests for services related to same-sex weddings.

Take *Masterpiece*. Under Professor Barak-Corren's theory, the Supreme Court should have allowed Colorado to treat Mr. Phillips and his bakery with religious hostility to avoid "a negative effect on vendor receptiveness to same-sex ceremonies[.]"[172] This conclusion implies courts should allow governments not just to disregard but to disparage religious beliefs. That conflicts with bedrock free exercise protections.[173]

And it has serious practical consequences. For example, *Klein v. Oregon Bureau of Labor and Industries* set aside a $135,000 fine imposed by the Oregon State Bureau of Labor and Industries ("BOLI") on bakers who refused to prepare a custom wedding cake for a same-sex marriage based on their religious belief about marriage.[174] Guided by *Masterpiece,* the court ruled that BOLI's "handling of the damages portion of the case does not reflect the neutrality toward religion required by the Free Exercise Clause."[175] But under Professor Barak-Corren's consequentialist approach, this ruling—tinged with bias and hostility and resulting in a significant fine—would withstand review for fear it would open the door to dangerous, unknown consequences. Such an approach may also present the greatest risk to minority religions who most frequently request religious exemptions, at least under RFRA.[176]

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[171] David A. Strauss, *Persuasion*, *Autonomy and Freedom of Expression*, 91 COLUM. L. REV. 334, 334 (1991).

[172] *Chelsey Nelson Photography*, 2022 WL 3972873, at *24.

[173] The "government has no role in deciding or even suggesting whether the religious ground for Phillips' conscience-based objection is legitimate or illegitimate." *Masterpiece Cakeshop*, 138 S. Ct. at 1731.

[174] 506 P.3d 1108 (Or. Ct. App. 2022).

[175] *Id.*

[176] *See* Stephen Cranney, *Are Christians More Likely to Invoke RFRA--and Win--Than Other Religions Since* Hobby Lobby*?*, 72 MERCER L. REV. 585, 586–87 (2021); Christopher C. Lund, *RFRA, State RFRAs*, *and Religious Minorities*, 53 SAN DIEGO L. REV. 163, 165 (2016) ("RFRA and state RFRAs have been valuable for religious minorities, who often have no other recourse when the law conflicts with their most basic religious obligations.").

Professor Barak-Corren says the study calls for "a clear and bright line decision that provides specific and unambiguous behavioral instructions."[177] But she acknowledges the evanescence of any effects, noting that she could not accurately measure a Masterpiece Effect after time passage and occurrence of ongoing societal effects.[178] In stark contrast, the First Amendment stands the test of time.

D. The Study Does Not Account for Exemptions for Freedom of Expression

In contrast to diffuse experimentation brought about by consequentialism, the Constitution categorically protects sincerely held religious beliefs. Often this freedom dovetails with the First Amendment's free speech guarantee.[179] Of course, the Free Speech Clause applies beyond religiously motivated speech—it applies to speech regardless of the motivation.[180] And because many types of public accommodations create expression as their good or communicate ideas through their service, these laws and the First Amendment have often collided.[181] Free speech—as well as free exercise—often plays a role in the services public accommodations do and do not provide.

As previously noted, Professor Barak-Corren chose to audit photographers, bakers, and florists, and the choice of these professionals "was influenced by recent cases in which businesses refused service to same-sex couples."[182] She intends for her study to inform debates and litigation over conflicts between same-sex couples and wedding vendors who object to their unions. Many of these creative professionals claim they are engaged in protected expression as well as religious adherence.[183] How would Professor

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[177] *HCRCLLR*, *supra* note 5, at 364.

[178] *Id.* at 343 ("[I]t was not possible to continue isolating the effects of the decision from intervening political developments.").

[179] *See*, *e.g.*, Wooley v. Maynard, 430 U.S. 705, 713–17 (1977) (protecting Jehovah's Witness from being compelled to display state motto on license plate when motto conflicted with religious beliefs); *Barnette*, 319 U.S. at 633–36 (protecting Jehovah's Witnesses from being compelled to salute of American flag which would have violated their religious beliefs).

[180] *Hurley*, 515 U.S. at 572–80 (protecting speech of parade organized to celebrate Irish heritage); Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc., 487 U.S. 781, 801 (1988) (protecting speech of professional fundraiser).

[181] *See*, *e.g.*, *Hurley*, 515 U.S. at 566; *Roberts*, 468 U.S. at 618.

[182] *HCRCLLR*, *supra* note 5, at 340 n.114.

[183] *See*, *e.g.*, *Masterpiece Cakeshop*, 138 S. Ct. at 1742 (Thomas, J., concurring) ("The conduct that the Colorado Court of Appeals ascribed to Phillips—creating and designing custom wedding cakes—is expressive."); Dep't of Fair Emp. & Hous. v. Superior Ct., 54 Cal. App. 5th 356, 391 (2020) (baker raising First Amendment defense as to creating custom wedding cake); *Chelsey Nelson*

Barak-Corren classify an artist's objection to creating a requested cake, floral arrangement, or photograph for a same-sex couple when the objection is based on the artist's artistic judgment? Is that discrimination or artistic license? Professor Barak-Corren does not answer these questions or address how the Masterpiece Study or consequentialist jurisprudence would handle objections by creative professionals who contend that public-accommodations laws involve forced or restricted speech. But these artistic decisions should be considered valid artistic or aesthetic judgments rather than illegal discrimination.

Courts have held or opined in dicta that wedding photography,[184] wedding cake design,[185] and wedding floral arranging[186] are or can be expressive and thus merit First Amendment protection. Some have said the same about wedding-related activities not addressed by Professor Barak-Corren, such as web site design and calligraphy.[187] Beyond weddings, many other organizations and businesses have successfully asserted a First Amendment defense to anti-discrimination laws when application of those laws interfered with their desired expression. These include television casting,[188] Amazon's charitable-giving program,[189] search algorithms,[190] a softball league designed to advance

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Photography, 2022 WL 3972873, at *11 ("Wedding photographers, . . . convey distinct messages".); State v. Arlene's Flowers, Inc., 441 P.3d 1203, 1225 (Wash. 2019) (custom florist raising First Amendment defense because requiring her to create custom arrangement for same-sex wedding "force[d] her to endorse same-sex marriage").

[184] *See*, *e.g.*, Kaplan v. California, 413 U.S. 115, 119–20 (1973) ("[P]ictures, films, paintings, drawings, and engravings . . . have First Amendment protection[.]"); ETW Corp. v. Jireh Pub., Inc., 332 F.3d 915, 924 (6th Cir. 2003) ("The protection of the First Amendment . . . includes . . . photographs."); Bery v. City of New York, 97 F.3d 689, 695 (2d Cir. 1996) ("[P]hotographs . . . always communicate some idea or concept" and "are entitled to full First Amendment protection."); Chelsey Nelson Photography LLC v. Louisville/Jefferson Cnty. Metro Gov't, 479 F. Supp. 3d 543, 557 (W.D. Ky. 2020); Emilee Carpenter, LLC v. James, No. 21-CV-6303-FPG, 2021 WL 5879090, at *11 (W.D.N.Y. Dec. 13, 2021).

[185] *Masterpiece Cakeshop*, 138 S. Ct. at 1737–39 (Gorsuch, J., concurring). *See also* Klein v. Oregon Bureau of Labor and Industry, 410 P. 3d 1051, 1071 (Or. Ct. App. 2017).

[186] *Arlene's Flowers*, 441 P.3d at 1224.

[187] *303 Creative*, 6 F.4th at 1168, *cert. granted,* No. 21-476, 2022 WL 515867, at *1 (U.S. Feb. 22, 2022) (web site design); Telescope Media Group v. Lucero, 936 F.3d 740 (8th Cir. 2019) (videography); Brush & Nib Studio, LC v. City of Phoenix, 448 P.3d 890, 897 (Ariz. 2019) (calligraphy); Country Mill Farms, LLC v. City of E. Lansing, 280 F. Supp. 3d 1029, 1038 (W.D. Mich. 2017) (wedding venue).

[188] Claybrooks v. American Broadcasting Companies, Inc., 898 F Supp. 2d 986 (M.D. Tenn. 2012).

[189] Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc., 6 F.4th 1247, 1254 (11th Cir. 2021).

[190] Zhang v. Baidu.com Inc., 10 F. Supp. 3d 433, 437 (S.D.N.Y. 2014).

"the idea of athletic competition and good physical health in support of the gay lifestyle,"[191] a beauty pageant,[192] parades,[193] Boy Scouts,[194] newspapers,[195] public speakers,[196] and custom t-shirt printers.[197] Free speech doctrine recognizes that creative professionals have a right to express their own views and not be forced by the government to express views they disagree with.

These precedents explain that photographers, bakers, florists, and other businesses and organizations engaged in expression have the constitutional freedom to reject an engagement because it does not fit their personal values or artistic and stylistic approach. These artistic choices differ in kind from the invidious discrimination that public-accommodations laws are meant to prevent. But the Masterpiece Study did not delineate between the reasons for non-responses of photographers, bakers, and florists Specifically, the Masterpiece Study never evaluates whether any of the post-*Masterpiece* non-responses resulted from artistic judgments as opposed to sexual orientation discrimination. These omissions undermine the Masterpiece Study's applicability to claims involving speech-based objections to creating an expressive product for a same-sex wedding.

IV. Conclusion

The Masterpiece Study suffers both in its methodology and conclusions. The study detected an anomalous pre-*Masterpiece* discrimination against opposite-sex couples. This caused Professor Barak-Corren to inconsistently label non-responses between Waves 1 and 2 and Waves 3 and 4, created a regression-to-the-mean issue that the study never addresses, and contributed to significant inconsistencies in inquiries between pre-and-post *Masterpiece* waves. This then led to the spurious causal explanation that underpins the

[191] Apilado v. North American Gay Amateur Athletic Alliance, 792 F. Supp. 2d 1151, 1161 (2011).

[192] Green v. Miss United States of Am., LLC, 533 F. Supp. 3d 978, 992–98 (D. Or. 2021).

[193] *Hurley*, 515 U.S. at 569–81 (public-accommodations law could not apply to parade in a way that altered parade's speech); Bd. of Ancient Ord. of Hibernians v. Dinkins, 814 F. Supp. 358, 366 (S.D.N.Y. 1993) (same).

[194] *Boy Scouts of Am.*, 530 U.S. at 650–56.

[195] Groswirt v. Columbus Dispatch, 238 F.3d 421 (6th Cir. 2000). *Cf.* McDermott v. Ampersand Pub., LLC, 593 F.3d 950, 962 (9th Cir. 2010) ("To the extent the publisher's choice of writers affects the expressive content of its newspaper, the First Amendment protects that choice.").

[196] City of Cleveland v. Nation of Islam, 922 F. Supp. 56, 59 (N.D. Ohio 1995).

[197] Lexington-Fayette Urb. Cnty. Hum. Rts. Comm'n v. Hands On Originals, 592 S.W.3d 291, 294 (Ky. 2019).

Masterpiece Effect. The study also counted non-responses as discrimination without giving reasons to rule out other explanations. And when we evaluated explicit denials, we attained different conclusions. In our analysis, we examined previously "gay antagonist" creative professionals. This population explicitly declined same-sex wedding inquiries *less often* after *Masterpiece*. Statistically sound studies do not vary in their results based on how the variables contained in the data are arranged. Entirely different findings based on explicit rejections make clear that the study's conclusions are not sound. The study maintained no true control group. And the study never measured creative professionals' exposure to *Masterpiece* to establish a link between knowledge of the opinion and a change in behavior.

These shortcomings undermine one of the potential uses of the study: evaluating the government interest prong of strict scrutiny analysis. But the Masterpiece Study establishes no factual basis to conclude that granting a religious exemption limits access to goods and services or causes widespread dignitary harm. Without proper methodology or reliable conclusions, the study cannot provide an evidentiary basis to deny religious exemptions. The study's purported legal value also rests on a questionable doctrine of consequentialism. "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials."[198] A consequentialist approach discards these important protections in order to guard against diffuse and unproven discrimination. It also opens the door to forced artistic expression and suppression of speech to combat discrimination that has not been proven to exist.

Finally, Professor Barak-Corren fails to measure or even consider whether her recommendations would increase anti-religious animus.[199] Under her approach, creative professionals would face the choice between being forced out of business or a broken conscience. When judicial decisions are built on the quicksand of inconclusive social science, unintended and unanticipated effects are likely to follow. Better that courts perform their hard tasks with the sound tools of constitutional interpretation and legal analysis already at their disposal.

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[198] *Barnette*, 319 U.S. at 638.

[199] *See, e.g.*, *Masterpiece Cakeshop*, 138 S. Ct. at 1732; Dr. A v. Hochul, 142 S. Ct. 552, 556 (2021) (mem.) (Gorsuch, J., dissenting) ("This record practically exudes suspicion of those who hold unpopular religious beliefs."); Masterpiece Cakeshop Inc. v. Elenis, 445 F. Supp. 3d 1226, 1239–43 (D. Colo. 2019); *Klein*, 506 P.3d at 1125–27.

Other Views:

- Netta Barak-Corren, *A License to Discriminate? The Market Response to Masterpiece Cakeshop*, 56 HARV. CIV. RIGHTS & CIV. LIBERTIES L. REV. 315 (2021), *available at* https://harvardcrcl.org/wp-content/uploads/sites/10/2021/10/Barak-Corren.pdf.
- Brief of Massachusetts et al. as Amici Curiae Supporting Respondents, 303 Creative LLC v. Elenis, 142 S. Ct. 1106 (2022) (No. 21-476), *available at* https://www.supremecourt.gov/DocketPDF/21/21-476/234024/20220819130152948_Brief%20of%20Massachusetts%20et%20al.%20in%20No.%2021-476.pdf .
- Netta Barak-Corren, *How One Supreme Court Decision Increased Discrimination Against LGBTQ Couples*, THE ATLANTIC (Feb. 6, 2021), https://www.theatlantic.com/ideas/archive/2021/02/masterpiece-cakeshop-lgbtq-discrimination/617514/.
- Nelson Tebbe, *The Principle and Politics of Liberty of Conscience*, 135 HARV. L. REV. 267 (2021), *available at* https://law.yale.edu/sites/default/files/area/clinic/document/tebbe_liberty_of_conscience_final.pdf.