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Review articles are published thanks to the hard work of our fifteen Practice Group Executive Committees and authors who volunteer their time and expertise. The Review seeks to contribute to the marketplace of ideas in a way that is collegial, accessible, intelligent, and original. Articles are available at **fedsoc.org** and through the Westlaw database.

We hope that you enjoy reading Volume 21 and come away with new information and fresh insights. Please send us any suggestions and responses at **info@fedsoc.org**.

Sincerely,

Katie McClendon
Director of Publications

The Federalist Society Review

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The TRAP Act's Contribution to Preventing Transnational Repression Through Interpol

By Ted R. Bromund & Sandra Grossman

Criminal Law & Procedure Practice Group

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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 authors. We invite responses from our readers. To join the debate, please email us at info@fedsoc.org.

The Transnational Repression Accountability and Prevention (TRAP) Act of 2019, introduced in both the House and Senate in September, is a bipartisan response to widespread concern about the abuse of Interpol by authoritarian governments for political purposes.[1] Repressive regimes, particularly in Russia, China, Turkey, and Venezuela, use Interpol to issue illegitimate Red Notices and diffusions against political opponents. The effect of this abuse can be severe and is borne by individuals whose due process guarantees and human rights are harmed. As a result, Interpol abuse has drawn increasing attention and criticism from a wide range of international organizations, political leaders, and non-governmental organizations.

From a U.S. perspective, Interpol abuse is a problem for several reasons. It undermines the legitimacy of an international organization that otherwise serves U.S. interests in fighting terrorism and transnational crime. U.S. judicial and law enforcement organizations waste resources by processing illegitimate and abusive claims. U.S. law enforcement officials can unwittingly become involved in furthering human rights abuses against already persecuted individuals, some of whom are seeking refuge in the United States. Most seriously, Interpol abuse subverts the legal sovereignty of the United States by allowing authoritarian regimes to use U.S. legal proceedings to define their political opponents as criminals, and then to punish these political opponents or even have them imprisoned in the United States.

While the TRAP Act does not address every kind of Interpol abuse that affects the U.S., it makes a valuable contribution to shedding light on this abuse. It also requires the U.S. to adopt processes to strengthen accountability and transparency within Interpol, thus limiting abuse at its source. Its introduction is an important first step in reducing the effects of Interpol abuse in the U.S. and enhancing Interpol's ability to function with greater legitimacy and efficacy in the future.

I. What Interpol Is, and Is Not

To understand the problem of Interpol abuse, it is important to first understand what Interpol is, and what it is not. Hollywood portrays Interpol as an international police agency with the power to investigate crimes and make arrests around the globe—like a local police force, but on a worldwide stage.[2] Every part of this depiction is completely incorrect.

In reality, Interpol has no ability to conduct investigations or make arrests. Known formally as ICPO-INTERPOL, it is an organization of 194 sovereign states, including the United States, which helps its members coordinate police cooperation

1 For another example of the seriousness with which Congress is treating Interpol abuse, see the Defending American Security from Kremlin Aggression Act of 2019, S. 482, 116th Cong. § 707 (2019).

2 *See* Most Popular Interpol Movies and TV Shows, IMDB, https://www.imdb.com/search/keyword/?keywords=interpol. For one prominent example, see *Now You See Me* (2013).

against ordinary crime.[3] In the U.S., relations with Interpol are co-managed by the Departments of Justice and Homeland Security. Interpol's constitution strictly prohibits it from becoming involved in political, racial, religious, or military affairs.[4] Interpol is akin to a bulletin board on which the world's police forces can post their own, national wanted notices. It is up to every member state to decide what use, if any, it will make of a national wanted notice posted through the organization. The fact that Interpol has published a national wanted notice does not transform it into an international wanted notice or make it any more reliable than it was when it was originally published at the national level.

Interpol has two primary mechanisms for coordinating police cooperation. First, it publishes Red Notices.[5] These are commonly described as international arrest warrants, but this is again inaccurate. A Red Notice is an Interpol publication made at the request of a member nation. To obtain a Red Notice, a member nation must 1) assert that it has a national arrest warrant for an individual, 2) identify that individual, 3) provide judicial information about the crime that it alleges has been committed, and 4) pledge to seek extradition once the individual is located and provisionally detained.[6]

Precisely because it respects the sovereignty of its member nations, all Interpol can do is to ensure that the requesting nation fulfills the bureaucratic requirements for obtaining a Red Notice and check the data available to it to see if the notice request might be political. Its respect for its members' sovereignty means Interpol cannot look into the basis of domestic prosecutions to determine whether they are political, and Interpol begins with the assumption that all requests from all its members are legitimate. Thus, it is too easy for autocratic member nations to illegitimately get Red Notices published by Interpol based on political offenses.[7]

Interpol's second mechanism for coordinating police cooperation against ordinary crime is its electronic network, the I-24/7 system.[8] This is a secure global communications system that links law enforcement organizations in all of Interpol's member nations and allows them to search Interpol-maintained databases of nationally-collected information, such as the Stolen and Lost Travel Documents database. Established in 2003, the I-24/7 system works in tandem with Interpol's I-Link system, a web-based interface which allows member nations to request Red Notices and distribute other communications, known as diffusions, simply by filling out an online form.[9]

When the I-Link system came on-line in 2009, the Interpol system became much easier to use, which led to an explosion in the number of Red Notices published. In 1998, Interpol published only 737 Red Notices; in 2018, it published 13,516.[10] As a result, Interpol must verify the compliance with its rules of more than one Red Notice request every hour of every day. The rise of electronic communications systems in Interpol has not only facilitated legitimate police business; it has also facilitated abuse of the Interpol system and made it easier to hide that abuse in the rising volume of Red Notice requests.[11]

II. Interpol Abuse and Its Effects

U.S. Department of Justice (DOJ) policy does not consider a Red Notice alone to be a sufficient basis for arrest, because the notices do not meet the requirements of the Fourth Amendment to the Constitution. Instead, the U.S. treats a Red Notice only as a formalized request to be on the lookout for the individual in question and to advise the interested nation if they are located in the United States.[12]

U.S. law enforcement action against any particular individual pursuant to a Red Notice must originate through an arrest warrant issued by the U.S. Attorney's Office.[13] The DOJ's Criminal Division must first determine if there is a valid extradition treaty for the specified crime between the U.S. and the requesting country. If there is a basis for extradition, the requesting country must also submit a diplomatic request for a provisional arrest. The U.S. Attorney's Office with appropriate jurisdiction will then file a complaint and request an arrest warrant for extradition.[14]

Although the process for acting pursuant to a Red Notice is clear, law enforcement agencies, in particular Immigration and

3 *What Is INTERPOL?*, Interpol, https://www.interpol.int/Who-we-are/What-is-INTERPOL.

4 Constitution of the International Criminal Police Organization-INTERPOL, art. 3, *available at* https://www.interpol.int/en/content/download/590/file/Constitution%20of%20the%20ICPO-INTERPOL-EN.pdf.

5 *Red Notices*, Interpol, https://www.interpol.int/How-we-work/Notices/Red-Notices.

6 INTERPOL's Rules on the Processing of Data, art. 83, *available at* https://www.interpol.int/content/download/5694/file/24%20E%20RPD%20UPDATE%207%2011%2019_ok.pdf?inLanguage=eng-GB (setting forth "specific conditions for publication of red notices").

7 *See infra* at Section III.

8 *Databases*, Interpol, https://www.interpol.int/en/How-we-work/Databases.

9 Diffusions are informal messages transmitted directly from one Interpol member nation to another. They can concern a wide range of police business, including requesting the arrest of an individual. *See About Notices*, Interpol, https://www.interpol.int/en/How-we-work/Notices/About-Notices.

10 Interpol Annual Activity Report 1999, p. 6, *available at* https://www.interpol.int/en/content/download/4918/file/Annual%20Report%201999-EN.pdf and Interpol Annual Report 2018, p. 5, *available at* https://www.interpol.int/content/download/13974/file/19COM0009%20-%202018%20Annual%20Report06_EN_LR.pdf.

11 *Strengthening Respect for Human Rights, Strengthening INTERPOL*, Fair Trials International, November 2013, Section III.3, *available at* https://www.fairtrials.org/wp-content/uploads/Strengthening-respect-for-human-rights-strengthening-INTERPOL4.pdf.

12 *Frequently Asked Questions*, INTERPOL Washington, U.S. Department of Justice, https://www.justice.gov/interpol-washington/frequently-asked-questions ("Can a person be arrested based on an INTERPOL Red Notice?").

13 Section 3, "Provisional Arrests and International Extradition Requests – Red, Blue, or Green Notices," in *Justice Manual – Organization and Functions Manual*, U.S. Department of Justice, https://www.justice.gov/jm/organization-and-functions-manual-3-provisional-arrests-and-international-extradition-requests.

14 *Id.*

Customs Enforcement (ICE), use Red Notices to target foreign nationals for detention and deportation without following the prescribed procedures.[15] Since 2010, ICE has promoted a program called "Project Red," which is described as a coordinated effort between ICE and Interpol to arrest and detain individuals in the U.S. who are the subjects of Red Notices.[16] The program has led to the arrest, detention, and removal of what ICE describes as "1,800 foreign fugitives."[17] Troublingly, nowhere on the project's website is there a recognition that a Red Notice is not an international arrest warrant, and that it is not a reliable indicator of guilt. Indeed, ICE wrongly asserts that a Red Notice "serves as an international wanted notice."[18] Additionally, ICE does not acknowledge that Red Notices may be challenged and deleted due to improper and abusive requests by member states.[19] Thus, ICE agents often detain individuals based on a Red Notice alone.[20]

In a recent case, a U.S. citizen filed an immigrant visa petition for her father, a citizen of Armenia.[21] Unbeknownst to him, he was the subject of a Red Notice that arose from a private business dispute with corrupt Armenian officials. ICE detained him due to the Red Notice. The immigration judge denied his request to lower the extremely high bond amount, despite the fact that he appeared eligible for permanent residency and asylum and had extensive family ties in the U.S. The sole stated reason for refusing to lower the bond amount was the existence of a Red Notice, even though a Red Notice actually *decreases* flight risk since it makes travel more difficult.[22] Department of Homeland Security officials and immigration judges consistently miss this point, sometimes resulting in prolonged detention for innocent people.

Accepting a Red Notice in this way without scrutiny can, and often does, turn ICE agents and immigration judges into unwitting agents of abusive foreign nations. Worse, if a person enters the U.S. on a valid visa that is then cancelled or revoked[23] based solely on the publication of a Red Notice, the abusive foreign nation has essentially manufactured an immigration violation in the U.S. by simply publishing the Red Notice.[24] Subjects of Red Notices may then be detained, placed into deportation proceedings, denied bond (or reasonable bond), and prevented from successfully obtaining visas, asylum, lawful permanent residence, or citizenship.[25] Interpol abuse has far reaching effects outside of the U.S. immigration system as well. Individuals with Red Notices can be restricted from international travel, have their bank accounts closed or questioned, or face challenges seeking employment.[26]

III. Rising Concern Over Interpol Abuse

Concern over Interpol abuse has risen steadily for the past decade. The case that has attracted the most attention is that of William Browder, the London-based investor and the inspiration behind the U.S.'s Magnitsky Act, signed into law in 2012.[27] Mr. Browder has been the subject of repeated and abusive Russian requests for Interpol action. But focusing on Mr. Browder alone misses the wider pattern of abuse by many nations, not just Russia.

In a March 2019 article titled "How Strongmen Turned Interpol Into Their Personal Weapon," the *New York Times* described the problem this way: "unwaveringly confident in its fellowship of nations, Interpol was slow to recognize an era in which autocrats and strongmen wield increasing power over international institutions."[28] Particularly significant was the admission by Koo Boon Hui, President of Interpol from 2008 to 2012, that "[a]t that time, we felt we had the processes in place to have the right balance. I think now they've found that not to be adequate."[29] The *Wall Street Journal*'s Editorial Board weighed in with a stinging February 2019 call to address "Interpol's Dictator Problem," noting that "Interpol's obeisance to dictators remains a problem, and reform should be on Washington's agenda."[30]

These expressions of concern from U.S. publications, while valuable, were belated. German Chancellor Angela Merkel publicly denounced Turkey's abuse of Interpol during Germany's

15 Ted R. Bromund, *ICE Wrongly Continues To Use Interpol Red Notices for Targeting*, Forbes, December 19, 2018, https://www.forbes.com/sites/tedbromund/2018/12/19/ice-wrongly-continues-to-use-interpol-red-notices-for-targeting/#3df3add8175e.

16 *Project Red*, U.S. Immigration and Customs Enforcement, https://www.ice.gov/features/project-red.

17 *Id.*

18 *ICE, US Marshals Arrest 45 International Fugitives with Interpol Notices*, U.S. Immigration and Customs Enforcement, June 24, 2016, https://www.ice.gov/news/releases/ice-us-marshals-arrest-45-international-fugitives-interpol-notices.

19 *Project Red*, *supra* note 16.

20 Bromund, *ICE Wrongly Continues*, *supra* note 15.

21 Unfortunately, the authors are unable to provide a citation here due to client confidentiality. For the case of Alexey Kharis, which offers a similar example of Interpol abuse affecting individuals lawfully in the United States, see Natasha Bertrand, *How Russia Persecutes Its Dissidents Using U.S. Courts*, The Atlantic, https://www.theatlantic.com/politics/archive/2018/07/how-russia-persecutes-its-dissidents-using-us-courts/566309/.

22 *Id.*

23 Visa cancellations are not governed by any known process and are therefore subject only to the discretion of immigration officials.

24 Bromund, *ICE Wrongly Continues*, *supra* note 15.

25 Ted R. Bromund and Sandra A. Grossman, *Challenging a Red Notice: What Immigration Attorneys Need to Know About INTERPOL*, AILA Law Journal, April 2019, Vol. 1, No. 1, https://www.grossmanyoung.com/wp-content/uploads/sites/155/2019/04/AILA-1-1-bromund.pdf.

26 Ted R. Bromund, *Putin's Long Arm*, The Weekly Standard, March 2, 2015, https://www.washingtonexaminer.com/weekly-standard/putins-long-arm.

27 Joshua Yaffa, *How Bill Browder Became Russia's Most Wanted Man*, The New Yorker, August 13, 2018, https://www.newyorker.com/magazine/2018/08/20/how-bill-browder-became-russias-most-wanted-man.

28 Matt Apuzzo, *How Strongmen Turned Interpol Into Their Personal Weapon*, N.Y. Times, March 22, 2019, https://www.nytimes.com/2019/03/22/world/europe/interpol-most-wanted-red-notices.html.

29 *Id.*

30 *Fixing Interpol's Dictator Problem*, Wall St. J., February 10, 2019, https://www.wsj.com/articles/fixing-interpols-dictator-problem-11549836628.

2017 election.[31] That same year, the Parliamentary Assembly of the Council of Europe published a comprehensive report on "Abusive Recourse to the Interpol System."[32]

Non-governmental organizations across the ideological spectrum had already reached a similar conclusion. Fair Trials International, headquartered in London, began to shed light on Interpol abuse through a series of reports in 2013 and engaged with Interpol to foster its reform.[33] Scholars at the Heritage Foundation started to draw attention to the need for a U.S. policy response to Interpol abuse in the same year.[34] Attorneys representing immigrants in the United States with Red Notices, or representing U.S. citizens with family members targeted by Interpol, also began to advocate on their behalf.[35]

Awareness of Interpol abuse has started to affect how cases involving Red Notices are adjudicated in the United States. While ICE wrongly continues to rely on Red Notices to identify criminals and act based on manufactured immigration violations, at least some federal judges are starting to show an increasing willingness to challenge this reliance. In 2018, for example, one Third Circuit judge dissented from the denial of a petition for release from detention of a Russian citizen who had languished in U.S. immigration detention for over two and a half years solely because of a Red Notice issued by Russia.[36] In her dissent, Judge Jane Richards Roth declared that "the judicial branch of our federal government should be sheltered from the political maneuverings of foreign nations. . . . Nevertheless, there are occasions when it becomes evident that the machinations of a foreign government have inadvertently . . . become entangled in the judicial process."[37] Judge Roth's dissent and the decisions of other federal judges point out the serious due process concerns that arise when officials place undue weight on the existence of a Red Notice, especially considering the flawed process for publishing such notices.[38] These decisions highlight the critical need for additional safeguards and checks within the Interpol communications system.

Similar concern was expressed by all participants in a Sept. 12, 2019 hearing held by the bipartisan Commission on Security and Cooperation in Europe, commonly known as the U.S. Helsinki Commission. The hearing on the "Tools of Transnational Repression" focused on the politically-motivated abuse of Interpol. Sen. Roger Wicker, co-chairman of the commission, said in his opening statement, "Repressive regimes have seized on INTERPOL's potent tools to harass and detain their perceived enemies anywhere in the world. . . . The organization is in dire need of greater transparency, and countries should face consequences . . . for repeated abuses."[39] It was with this emphasis on accountability and deterrence that the commission proposed the bipartisan TRAP Act after its hearing.

IV. The TRAP Act: Improving Interpol's Accountability and Deterrence

The TRAP Act is framed as a response to the problem of transnational repression, a problem that is wider than Interpol abuse. "Transnational repression" is a relatively new term which summarizes the way that authoritarian regimes exercise coercive power outside their borders to target—through assassination, policing, threats, or surveillance—opposing individuals or groups abroad in order to deter or impose costs on dissent when it is expressed.[40] While these practices are not new, autocratic regimes do have access to new tools to extend their reach, including tools such as Interpol's I-Link and Red Notices.

The TRAP Act requires that the U.S. use its "voice, vote, and influence . . . within INTERPOL's General Assembly and Executive Committee to . . . improv[e] the transparency of INTERPOL and ensur[e] its operation consistent with its Constitution."[41] The problem Interpol faces is not with its rules, but with the failure of some member nations and Interpol itself to *follow* the rules.

The Act assumes that, if Interpol does not deter abuse by imposing penalties on violators, the abuse is guaranteed to

31 *Merkel Attacks Turkey's 'Misuse' of Interpol Warrants*, Reuters, August 20, 2017, https://www.reuters.com/article/us-eu-turkey-election/merkel-attacks-turkeys-misuse-of-interpol-warrants-idUSKCN1B00IP.

32 Parliamentary Assembly of the Council of Europe, *Abusive Recourse to the Interpol System: The Need for More Stringent Legal Safeguards*, Resolution 2161 (2017), April 26, 2017, http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=23714&lang=en.

33 *See, e.g.*, *Strengthening INTERPOL: An Update*, Fair Trials International, February 20, 2018, https://www.fairtrials.org/publication/strengthening-interpol-update.

34 Ted R. Bromund and David Kopel, *Necessary Reforms Can Keep Interpol Working in the U.S. Interest*, Heritage Foundation Backgrounder #2861, December 11, 2013, https://www.heritage.org/global-politics/report/necessary-reforms-can-keep-interpol-working-the-us-interest.

35 *See, e.g.*, *Witness Statement of Sandra A. Grossman*, U.S. Commission on Security and Cooperation in Europe, September 12, 2019, https://www.csce.gov/sites/helsinkicommission.house.gov/files/GROSSMAN%20Sandra%20-%20Testimony.pdf.

36 *See* Borbot v. Warden Hudson County Correction, 906 F.3d 274 (3d Cir. 2018).

37 *Id.* at 280.

38 *See, e.g.,* Radiowala v. Attorney Gen. United States, 930 F.3d 577 (3d Cir. 2019) (explaining that a Red Notice is not sufficient basis for an arrest or an independent ground for removal); *Kharis v. Sessions*, No. 18-CV-04800-JST (N.D. Cal. Nov. 6, 2018) (finding that Immigration Judges may place some weight on the existence of a Red Notice in making bond determinations, but recognizing that there are serious flaws in the Red Notice process).

39 Sen. Roger Wicker, *Opening Statement of Helsinki Commission Co-Chairman Roger Wicker*, U.S. Commission on Security and Cooperation in Europe, September 12, 2019, https://www.csce.gov/sites/helsinkicommission.house.gov/files/WickerStatementToolsofTransnationalRepression.pdf. This emphasis was repeated by co-chairman Sen. Ben Cardin in his own opening statement. Sen. Ben Cardin, *Opening Statement of Senator Ben Cardin, Ranking Member*, U.S. Commission on Security and Cooperation in Europe, September 12, 2019, https://www.csce.gov/sites/helsinkicommission.house.gov/files/CardinStatementToolsofTransnationalRepression_0.pdf.

40 *See, e.g., Witness Statement of Alexander Cooley*, U.S. Commission on Security and Cooperation in Europe, September 12, 2019, https://www.csce.gov/sites/helsinkicommission.house.gov/files/COOLEY%20Alex%20-%20Testimony.pdf.

41 Transnational Repression Accountability and Prevention Act of 2019, S. 2483, 116th Cong., § 4(1) (2019).

continue. It therefore breaks new ground by seeking to require Interpol—in accordance with its own rules—to "impose penalties on countries for regular or egregious violations of INTERPOL's Constitution . . . , including the temporary suspension of member countries' access to INTERPOL systems."[42] The Act also requires extensive improvements in Interpol's own reporting, and that the U.S. oppose the election of candidates to senior Interpol positions from countries that do not respect the rule of law.[43] In short, the Act establishes a framework for exposing and deterring abuse that addresses Interpol's policies, publications, and personnel.

Importantly, the TRAP Act also indicates the sense of Congress, which clearly acknowledges the reality of Interpol abuse.[44] This section will be particularly useful to attorneys defending clients who have been detained wholly or partly on the basis of a Red Notice. For the first time, they will be able to point to an authoritative statement in law that Red Notices are not the reliable and objective statement some U.S. authorities believe them to be. According to the Act:

> It is the sense of Congress that the Russian Federation and other autocratic countries have abused INTERPOL's databases and processes, including Notice and Diffusion mechanisms and the Stolen and Lost Travel Documents Database, for political and other unlawful purposes, such as intimidating, harassing, and persecuting political opponents, journalists, members of civil society, and non-pliant members of the business community.[45]

The Act makes clear in its findings that it is not seeking to condemn Interpol, and that the U.S. regards Interpol as a valuable tool in combatting international crime and terrorism.[46] The point of the Act is to require that the U.S. act to ensure that Interpol lives up to the requirements of its own constitution to focus solely on ordinary crime and avoid any involvement in politics.

Given the Helsinki Commission's emphasis on accountability, much of the TRAP Act understandably focuses on the need for greater transparency in Interpol and greater openness about the problem of Interpol abuse. The Act requires the State Department to include examples of "credible reporting of likely attempts by countries to misuse international law enforcement tools, such as INTERPOL's communications, for politically motivated reprisals" in its annual country reports on human rights practices.[47] This requirement will allow lawyers, judges, and journalists to draw on these widely respected reports in opposing efforts at transnational repression through Interpol in the United States.

Even more significantly for the purposes of shedding light on and combating Interpol abuse, the Act requires that the Attorney General submit a report to Congress assessing how member countries have abused Interpol over the past three years.[48] It requires that the Justice Department 1) explain how it monitors and responds to Interpol abuse that could affect the interests of U.S. citizens or others with lawful claims to be in the United States, 2) set out a strategy for improving this monitoring and response, and 3) describe the U.S. advocacy for reform and good governance within Interpol.[49] The Section 5 report must also contain comprehensive information about common Interpol abuse tactics, the volume of this abuse, the nations responsible for it, the penalties to which the abusers have been subjected, and the adequacy of the mechanisms within Interpol for challenging abuse.[50] In short, if the TRAP Act becomes law, the Section 5 reporting will provide information about Interpol abuse that goes far beyond the journalism and anecdotal evidence that has so far shaped the policy debate.

While much of the TRAP Act emphasizes the need to improve Interpol's accountability, it also makes important changes in the way the U.S. deals with Interpol communications, such as Red Notices. First, the Act directs relevant U.S. departments or agencies to respond to abusive Notices by alerting other Interpol member nations to the abuse, lodging diplomatic complaints with the abusing nation, and engaging with foreign immigration and security services to prevent abusive Notices from affecting the freedom of the targets of the abuse.[51] The Act makes a particular point of emphasizing that Interpol abuse can work through the financial system, and that the U.S. must work with other nations to protect the freedom of lawful commerce of targets of abuse.[52] Given that one of the goals of Interpol abuse is often to legitimize the official theft of foreign assets by stigmatizing the victims of abuse as criminals, this emphasis is important and welcome.

Secondly, the Act includes a "Prohibition on Denial of Services."[53] This section may not appear to be particularly significant on its face, but in practice, it could be an essential contribution to preventing abusive Red Notices from leaching into the U.S. judicial system. Section 6(a) emphasizes that U.S. law does not allow the U.S. government to arrest an individual based solely on a Red Notice unless the U.S. and the requesting nation have a valid treaty of extradition, unless the U.S. receives a diplomatic request from the requesting nation, and unless the U.S. issues a valid arrest warrant.[54] In short, Section 6(a) reemphasizes that in the United States, a Red Notice is not an arrest warrant, and that it cannot serve as the basis for circumventing the normal requirement for securing an arrest warrant.

While Section 6(a) reiterates existing U.S. law, Section 6(b) goes beyond existing law. It bars the U.S. government from denying services to any individual on the basis of an Interpol communication that comes from a nation with no valid

42 *Id.* at § 4(1)(C).

43 *Id.* at § 4(1)(E).

44 *Id.* at § 3.

45 *Id.*

46 *Id.* at § 2(1)-(2).

47 *Id.* at § 7.

48 *Id.* at § 5.

49 *Id.* at § 5(b)(4), (6)-(7).

50 *Id.* at § 5(b)(1)(A)-(C), (b)(2).

51 *Id.* at § 4(2)(A)-(D).

52 *Id.* at § 4(E).

53 *Id.* at § 6.

54 *Id.* at § 6(a).

extradition treaty with the U.S. unless the U.S. first verifies that the communication is likely not abusive.[55] This is perhaps the most complicated provision in the entire Act, and it is also among the most significant. This provision on the denial of services prevents federal agencies from relying on an unverified Red Notice as the sole ground to detain and remove individuals from the United States, or to deny them immigration benefits like applications for a visa, asylum, or citizenship.[56] The provision requiring Red Notices to be verified when the U.S. lacks a valid extradition treaty reflects the fact that most Interpol abuse comes from nations—like Russia—with which the U.S. lacks such a treaty. Thus, Section 6(b) imposes a special burden on Interpol communications from nations such as Russia: these communications cannot be used to deny services unless the U.S. is reasonably certain that they are not abusive.

V. Critique

The TRAP Act is not flawless. While it does recognize the importance of protecting the freedom of commerce, it does not prevent the U.S. or U.S.-based financial institutions from relying on abusive Red Notices to limit this freedom. It would have been better if the Act had extended its groundbreaking provisions on the denial of services to prevent the U.S. Treasury from enforcing rules that would deny banking privileges on the basis of an abusive Red Notice. As it stands, the Act's emphasis on the importance of freedom of commerce applies only to U.S. efforts to ensure other nations will not credit abusive Red Notices; it does not apply to the U.S. itself.

The Act also has no provisions to protect non-U.S. citizens who have a U.S. nexus. In spite of the fact that William Browder is the best known victim of Interpol abuse, the Act would not allow the U.S. to intervene on his behalf because he is not an American citizen, and he is not seeking asylum or other lawful residence in the United States. While there are good reasons the U.S. should not seek to police the entire Interpol system—it would be excessive, for example, to require the U.S. to examine all Red Notices for abuse—it is regrettable that the TRAP Act does not capture U.S. nexus cases. The Act could have done this by giving the State Department the formal role of raising such cases within the U.S. policy process and requiring other executive agencies to treat such cases as though a U.S. citizen was involved. This would strike a balance between requiring the U.S. to protect everyone and limiting the U.S.'s diplomatic efforts against Interpol abuse solely to citizens or other lawful residents of the United States.

Finally, while Section 6(b) takes a valuable step by preventing the U.S. from denying services on the basis of potentially abusive Red Notices from nations with which the U.S. does not have an extradition treaty, it could be read to imply that services *can* be denied on the basis of a Red Notice if that notice comes from a nation with which the U.S. *does* have an extradition treaty. This implication is undesirable because not all nations with which the U.S. has extradition treaties are lawful actors. It would be better if the Act banned *any* denial of services as a result of a Red Notice from *any* country unless the U.S. followed a defined policy process for assessing the Red Notice. It seems unreasonable that a U.S. citizen could be expelled from the Global Entry program on the basis of a Red Notice from Turkey—with which the U.S. has an extradition treaty—without any further process. The Act rightly emphasizes that a Red Notice is not an arrest warrant, but it does leave the door open for known abusers like Turkey to continue to use Red Notices to affect administrative procedures inside the United States.

VI. Conclusion

Interpol stands outside the normal world of law enforcement, a world of publicly available evidence that gives accused criminals the right to challenge government actions both before and after enforcement actions. In Interpol's world, evidence is secret, and there is no way to challenge a Red Notice before it is published. Yet Red Notices can and do have wide-ranging effects, up to and including imprisonment. The TRAP Act's emphasis on openness and accountability, coupled with its prohibitions and limits on how Red Notices can be used in the U.S. legal system, are appropriate initial responses to the abuse that has been fostered and enabled by a system that gives autocratic regimes the power to accuse individuals largely with impunity and harass them beyond national borders. The TRAP Act is a necessary first step to help ensure the basic due process rights of persons who are present in the United States and subject to the jurisdiction of our legal system.

It is unreasonable to believe that lawless nations will reliably abide by the provisions of Interpol, which require them to clearly distinguish between ordinary and political crime. The only way to protect Interpol and the victims of abuse from such nations is to sanction those nations for repeated abuses until they come to recognize that the game of abuse is not worth the candle. If abuses do not meet a proportionate response—if there is no deterrence—then the abuses will continue. The TRAP Act is ultimately based not just on openness, but on a clear-eyed recognition that while all nations are equal in their sovereignty, they are not equally responsible in their use of their sovereignty, and that Interpol must recognize this fact. The TRAP Act contributes to sanity in international relations—and Interpol—by setting out the principle that an organization that is supposed to support law enforcement organizations cannot relentlessly turn a blind eye to the defects of its member nations.

The TRAP Act makes a valuable contribution to assessing and combating Interpol abuse in the United States. If passed, it would shed significant light on the volume and kinds of Interpol abuse around the world, and it would significantly reduce the effects of this abuse in the United States. The TRAP Act has the potential to be a significant step forward in the effort to protect international institutions from malign misuse by autocratic nations. It therefore has the potential not just to protect individuals from abuse through Interpol, but to protect Interpol from the consequences of that abuse. If left unchecked, continuing abuse of Interpol by autocratic regimes, will eventually discredit the organization and diminish the value of the services it provides by connecting reputable and democratic law enforcement agencies around the world.

55 *Id.* at § 6(b).

56 *Id.*

NY v. HHS and the Challenge of Protecting Conscience Rights in Healthcare

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Other Views:

• New York v. United States HHS, No. 19 Civ. 4676 (PAE), 2019 U.S. Dist. LEXIS 193207 (S.D.N.Y. Nov. 6, 2019), *available at* https://s3.amazonaws.com/becketnewsite/CMDA-ruling.pdf.

• *Recent Case: New York v. Department of Health and Human Services*, Harv. L. Rev. Blog, Nov. 18, 2019, https://blog.harvardlawreview.org/recent-case-_new-york-v-department-of-health-and-human-services_/.

• Mary Anne Pazanowski, Shira Stein, and Paige Smith, *Trump Health-Worker Religious Rule Is Tossed by Federal Judge*, Bloomberg Law, Nov. 6, 2019, https://news.bloomberglaw.com/health-law-and-business/new-york-federal-judge-tosses-trump-health-worker-religious-rule.

• Benjamin Weiser and Margot Sanger-Katz, *Judge Voids Trump-Backed 'Conscience Rule' for Health Workers*, N.Y. Times, Nov. 6, 2019, https://www.nytimes.com/2019/11/06/upshot/trump-conscience-rule-overturned.html.

• Tanya Albert Henry, *Why the HHS conscience-rights rule was blocked in court*, American Medical Ass'n, Dec. 11, 2019, https://www.ama-assn.org/health-care-advocacy/judicial-advocacy/why-hhs-conscience-rights-rule-was-blocked-court.

While debates about *Roe v. Wade* and the legalization of abortion have long divided the nation, for decades there was bipartisan consensus that pro-life doctors, nurses, and other medical professionals should not face discrimination for refusing to personally participate in abortions. This consensus was reflected in the twenty-five federal laws providing conscience protections to people and entities with a religious or moral objection to certain medical procedures—primarily abortion, sterilization, and euthanasia. Without laws like these, individuals risk losing their jobs or being driven from the medical profession because of their ethical positions on controversial medical procedures.

However, existing federal statutory protections have not always been enforced by the federal government, and some of these laws offer no private right of action. Consequently, some medical professionals who have been illegally coerced into participating in procedures they object to, such as abortions, can neither turn to the government agency charged with protecting them nor bring a lawsuit to vindicate their rights.

To ensure that existing laws were enforced, President George W. Bush's Department of Health and Human Services (HHS or the Department) issued a final rule in 2008 enabling the agency to enforce three key federal conscience provisions.[1] President Barack Obama's administration, after considering whether to strike the rule entirely,[2] instead chose to pare down the rule in 2011.[3] In 2019, President Donald Trump's HHS decided to restore and expand the Bush-era rule to cover twenty-five federal conscience laws.[4]

In November 2019, Judge Paul A. Engelmayer of the Southern District of New York struck down the Trump administration's rule as violative of the Administrative Procedure Act and the U.S. Constitution in *State of New York v. United States Department of Health and Human Services* (*NY v. HHS*).[5] The decision is currently being appealed to the U.S. Court of Appeals for the Second Circuit.

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1 Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law, 73 Fed. Reg. 78072 (Dec. 19, 2008) (codified at 45 C.F.R. Part 88).

2 Rescission of the Regulation Entitled "Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law"; Proposal, 74 Fed. Reg. 10207 (proposed Mar. 10, 2009).

3 Regulation for the Enforcement of Federal Health Care Provider Conscience Protection Laws, 76 Fed. Reg. 9968 (Feb. 23, 2011) (codified at 45 C.F.R. Part 88).

4 Protecting Statutory Rights in Health Care, 84 Fed. Reg. 23170 (May 21, 2019) (codified at 45 C.F.R. Part 88) (Conscience Rule).

5 New York v. United States HHS, No. 19 Civ. 4676 (PAE), 2019 U.S. Dist. LEXIS 193207 (S.D.N.Y. Nov. 6, 2019), *available at* https://s3.amazonaws.com/becketnewsite/CMDA-ruling.pdf.

This article reviews the legal landscape that set the stage for HHS's conscience protection rule, critiques the reasoning of the *NY v. HHS* decision, and looks at the future of federal conscience protections.

I. Background

A. Existing Federal Conscience Protections

Of the twenty-five provisions enforced by the Trump administration's final Conscience Rule, most of the discussion revolves around four key provisions concerning abortion, sterilization, and euthanasia in specified contexts. These are the Church Amendments, the Coats-Snowe Amendment, the Weldon Amendment, and portions of the Affordable Care Act.

The Church Amendments are the federal statutory provisions listed in 42 U.S.C. § 300a-7. They were enacted with bipartisan support during the 1970s in the wake of *Roe v. Wade*.[6] Essentially, the Church Amendments ensure that recipients of certain federal funds are not required to perform abortions or sterilizations[7] and that recipients of those federal funds may not discriminate against health care personnel with religious or moral objections to abortions or sterilizations.[8] The Church Amendments also protect medical school students from being required to participate in abortions or sterilizations.[9]

The Coats-Snowe Amendment to the Public Health Service Act was enacted in 1996 with bipartisan support.[10] It provides that recipients of federal financial assistance may not discriminate against individuals or entities that refuse to provide or participate in training for abortion procedures.

The Weldon Amendment has been included in congressional federal appropriations bills every year since 2004. As the Conscience Rule states:

> Weldon provides that none of the funds made available in the applicable Labor, HHS, and Education appropriations act be made available to a Federal agency or program, or to a State or local government, if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions.[11]

The Affordable Care Act contains two conscience provisions. The first, Section 1303(b)(4), provides that "No qualified health plan offered through an Exchange may discriminate against any individual health care provider or health care facility because of its unwillingness to provide, pay for, provide coverage of, or refer for abortions."[12] The second, Section 1553, provides that recipients of federal financial assistance under the ACA may not discriminate against entities that do not participate in "assisted suicide, euthanasia, or mercy killing."[13]

B. The Regulatory History

HHS promulgated its first version of the conscience rule in 2008 under the Bush administration. The final rule was titled, "Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law."[14] As the title implies, the rule was designed to ensure that HHS funds did not support discriminatory practices that violated the Church Amendments, the Coats-Snowe Amendment, or the Weldon Amendment.

The Department offered multiple reasons for adopting the 2008 rule. First, HHS explained that it was concerned about "the development of an environment in sectors of the health care field that is intolerant of individual objections to abortion or other individual religious beliefs or moral convictions," which "may discourage individuals from entering health care professions."[15] Discrimination against individuals with these beliefs could exacerbate the shortage of health care professionals and undermine HHS's goal of expanding patient access to healthcare.[16] HHS also explained that the rule serves to protect "the integrity of the doctor-patient relationship" and to protect doctors from being compelled to provide services that they are not comfortable providing.[17]

In 2009, the Obama administration proposed to rescind the rule.[18] According to the proposal, the Department was reviewing the rule "to ensure its consistency with current Administration policy" and to reevaluate the necessity for regulations implementing the three federal conscience provisions.[19] Ultimately, instead of rescinding the rule, HHS decided to keep a pared down version of the rule. The 2011 final rule simply stated that the purpose of the rule was to enforce the Church, Coats-Snowe, and Weldon Amendments and enabled HHS's Office for Civil Rights to receive complaints of violations of these laws.[20] The 2011 rule eliminated the 2008 rule's definitions, stating that the previous rule's language may have caused confusion about the scope of the rule.[21]

In 2019, the Trump administration promulgated a final rule titled "Protecting Statutory Rights in Health Care" (Conscience

6 410 U.S. 113 (1973).

7 42 U.S.C. § 300a-7(b).

8 42 U.S.C. § 300a-7(c).

9 42 U.S.C. § 300a-7(e).

10 42 U.S.C. § 238n.

11 84 Fed. Reg. at 23172.

12 42 U.S.C. § 18023(b)(4).

13 42 U.S.C. § 18113.

14 73 Fed. Reg. 78072.

15 *Id.* at 78073.

16 *Id.*

17 *Id.* at 78073-74.

18 74 Fed. Reg. 10207.

19 *Id.*

20 76 Fed. Reg. at 9975.

21 *Id.* at 9974 ("The Department rescinds the definitions contained in the 2008 Final Rule because of concerns that they may have caused confusion regarding the scope of the federal health care provider conscience protection statutes. The Department is not formulating new definitions because it believes that individual investigations will provide the best means of answering questions about the application of the statutes in particular circumstances.").

Rule).[22] This rule resuscitated and expanded the Bush rule, explaining that the Obama rule's *lack* of definitions had caused confusion.[23] The rule argued that a new regulation was needed because the conscience protection laws had not been vigorously enforced in recent years.[24] It also pointed to an increase in complaints as evidence of the need for greater enforcement.[25] Finally, the rule explained that because courts have held some of the conscience statutes do not afford a private right of action,[26] administrative agencies may be the only venue in which those protected by federal conscience laws are able to vindicate their rights.[27]

II. The Structure of the Conscience Rule

The Conscience Rule narrowly implements twenty-five laws that condition the receipt of federal funds on meeting certain non-discrimination requirements. The four main laws implemented by the rule—the Church Amendments, the Coats-Snowe Amendment, the Weldon Amendment, and portions of the Affordable Care Act—concern abortion, sterilization, and euthanasia. All of the conscience statutes at issue have been on the books for years, and some have been law for decades.

The Conscience Rule aims to protect doctors, nurses, and other healthcare professionals from being discriminated against for refusing to participate in certain medical procedures that they believe are unethical or that violate their religious beliefs. But rather than broadly declare that no one may be forced to participate in *any* healthcare procedure or service that they find objectionable, the Conscience Rule is tailored to follow the language of the statutes passed by Congress. It does not extend into healthcare contexts not addressed by Congress, such as the treatment of individuals with gender dysphoria, despite speculation by some groups.[28] The regulation defines terms in the statutes and clarifies available enforcement mechanisms, as virtually all regulations do. But overall, the rule closely follows the existing statutory provisions.

III. *NY v. HHS* Litigation

This regulation was struck down in *NY v. HHS*. In his opinion, Judge Engelmayer concluded that HHS's Conscience Rule violated the Administrative Procedure Act (APA) and the Constitution in six ways:[29]

1. HHS exceeded its authority by too broadly defining four statutory terms and by requiring entities to certify that they would not discriminate.
2. HHS lacked the authority to enforce the rule by terminating all HHS funds for noncompliance.
3. HHS "acted contrary to law in promulgating the Rule" because the rule conflicted with Title VII of the Civil Rights Act of 1964 and the Emergency Medical Treatment and Labor Act.
4. HHS acted arbitrarily and capriciously because its rationale for the rule was not substantiated by the record before the agency, it did not adequately explain its change in policy, and it failed to consider important aspects of the problem.
5. The final definition of "discriminate or discrimination" was not a logical outgrowth of HHS's notice of proposed rulemaking.
6. The Conscience Rule's enforcement mechanisms violated the separation of powers and the Spending Clause of the Constitution.

The court concluded, therefore, that the Conscience Rule must be stricken and that the Obama-era 2011 rule implementing three of the statutory provisions should be in effect in its place.[30] Yet the court erred at each step, fundamentally because it substituted its own judgment for that of HHS, which promulgated the Conscience Rule as a modest attempt to implement the will of Congress. This article will look at and critique each of the court's six arguments.

1. Exceeding Regulatory Authority to Define Terms

In *NY v. HHS*, the federal court said HHS violated the APA when it exceeded its authority by defining four terms the way it did.[31] Courts confronted with challenges to agency rules should be concerned with agencies smuggling substantive changes into purported definitions.[32] Yet definitions remain necessary, and HHS took pains to define terms modestly in the Conscience Rule.[33] Instead of giving one broad definition of a term that covers all of the conscience statutes, the Conscience Rule defined terms with respect to each statute at issue.

For instance, the Conscience Rule defines the term "health care entity" differently with respect to the Weldon and the

22 84 Fed. Reg. 23170, *supra* note 4.

23 *Id.* at 23175.

24 *Id.*

25 *Id.*

26 *See*, *e.g.*, Cenzon-DeCarlo v. Mount Sinai Hosp., 626 F.3d 695, 698-99 (2d Cir. 2010); Hellwege v. Tampa Family Health Centers, 103 F. Supp. 3d 1303 (M.D. Fla. 2015); Nat'l Instit. of Family and Life Advocates v. Rauner, No. 3:16-cv-50310 (N.D. Ill. July 19, 2017).

27 84 Fed. Reg. at 23178.

28 *See*, *e.g.*, *HHS Denial of Care Rule FAQ*, Lambda Legal (last accessed Nov. 17, 2019), *available at* https://www.lambdalegal.org/faq_hhs-denial-of-care.

29 *NY v. HHS*, 2019 U.S. Dist. LEXIS 193207, at *187-89.

30 *Id.* at *197 n.76.

31 *Id.* at *74-82.

32 *See, e.g.*, Franciscan Alliance, Inc. v. Burwell, No. 7:16-cv-00108 (N.D. Tex. Dec. 31, 2016) (holding "HHS's expanded definition of sex discrimination exceeds the grounds incorporated by Section 1557").

33 Especially compared with the way previous administrations have used definitions to make substantive policy changes. *See*, *e.g.*, Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. at 31467. The regulation implementing the Affordable Care Act's prohibition of sex discrimination interpreted "sex" to include "gender identity," and it further defined "gender identity" to include male, female, and non-binary identities. It was one of the first times, if not the first time, that non-binary gender identities were expressly included in a federal regulation.

Coats-Snowe Amendments. The relevant text of the Weldon Amendment passed by Congress reads, "the term 'health care entity' includes an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan."[34] For purposes of implementing the Weldon Amendment, the Conscience Rule defines a health care entity as:

> an individual physician or other health care professional, including a pharmacist; health care personnel; a participant in a program of training in the health professions; an applicant for training or study in the health professions; a post-graduate physician training program; a hospital; a medical laboratory; an entity engaging in biomedical or behavioral research; a pharmacy; a provider-sponsored organization; a health maintenance organization; a health insurance issuer; a health insurance plan (including group or individual plans); a plan sponsor or third-party administrator; or any other kind of health care organization, facility, or plan.[35]

The court concluded that HHS exceeded its authority by including health care insurance plan sponsors and third-party administrators of health care insurance plans as health care entities.

The text of the Coats-Snowe Amendment reads, "The term 'health care entity' includes an individual physician, a postgraduate physician training program, and a participant in a program of training in the health professions."[36] For purposes of implementing the Coats-Snowe Amendment, the Conscience Rule defines a health care entity as:

> an individual physician or other health care professional, including a pharmacist; health care personnel; a participant in a program of training in the health professions; an applicant for training or study in the health professions; a post-graduate physician training program; a hospital; a medical laboratory; an entity engaging in biomedical or behavioral research; a pharmacy; or any other health care provider or health care facility.[37]

The court concluded that it was too broad to include pharmacists and medical laboratories in the rule's definition.

The court declined to defer to the agency interpretation and was not persuaded by HHS's argument that the statutes both use the term "includes" followed by a list of examples, indicating that the lists are non-exhaustive. Instead, the court concluded that the rule's definition "extends beyond what the face of these statutes disclose."[38] According to the court, these definitions were impermissibly substantive because they would "impos[e] substantive obligations" on additional entities, rather than simply spelling out "what [the] statute has always meant."[39] The other three definitions with which the court took issue—"discriminate or discrimination," "assist in the performance," and "referral or refer for"—were similarly reasoned.[40]

2. Non-Discrimination Enforcement Mechanisms and the Threat of Withdrawal of Federal Funds

The *NY v. HHS* court was most troubled by one of the Conscience Rule's enforcement mechanisms. Section 88.7(i)(3)(iv) of the final rule authorizes HHS to withhold all of a recipient's HHS funding as one of several potential penalties for non-compliance. The court concluded that this enforcement mechanism went beyond the standard rules for HHS grants that provide for the termination of the grant at issue, and therefore HHS exceeded its delegated authority in violation of the APA, specifically 5 U.S.C. § 706(2)(C).[41]

The court did not find persuasive HHS's explanation that the federal conscience statutes authorize HHS to ensure that HHS administers its programs in compliance with federal nondiscrimination laws. HHS argued in its brief:

> in addition to statutes that explicitly authorize HHS to ensure that its grant recipients comply with the conditions found in federal law, the Federal Conscience Statutes implicitly authorize HHS to ensure that recipients of the funds that it disburses and administers comply with those statutes; otherwise, the statutes would be unenforceable and thus meaningless.[42]

Conditioning the receipt of federal funds on meeting non-discrimination requirements has been a standard feature of executive enforcement for decades. For instance, Executive Order 11246, dating back to September 24, 1965, conditions eligibility to receive any federal government contract on compliance with non-discrimination requirements. Title IX also has been interpreted to authorize the termination of Department of Education funds as an enforcement mechanism.[43] Similarly, other

34 Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2019, Pub. L. No. 115-245, Div. B., § 507(d)(2), 132 Stat. 2981, 3118 (2018).

35 84 Fed. Reg. at 23264.

36 42 U.S.C. § 238n(c)(2).

37 84 Fed. Reg. at 23264.

38 *NY v. HHS*, 2019 U.S. Dist. LEXIS 193207, at *78-79.

39 *Id.* at *80 (quoting Guedes v. Bureau of Alcohol, Tobacco, Firearms, and Explosives, 920 F.3d 1, 19 (D.C. Cir. 2019)).

40 *Id.* at *74-82.

41 *NY v. HHS*, 2019 U.S. Dist. LEXIS 193207, at *57, *94-99 (citing Uniform Administrative Requirements, Cost Principles, and Audit Requirements for HHS Awards, 79 Fed. Reg. 75889 (Dec. 19, 2014)). The court concluded separately that the remedy also violated the Spending Clause of the U.S. Constitution. *See infra* at section III.6.

42 Defs.' Consolidated Reply Supp. Mot. Dismiss at 5, *NY v. HHS*, 1:19-cv-04676 (Sept. 19, 2019), ECF No. 224.

43 Dear Colleague Letter, U.S. Dep't of Education (Apr. 4, 2011), *available at* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf (If "a recipient does not come into compliance voluntarily, OCR may initiate proceedings to withdraw Federal funding by the Department or refer the case to the U.S. Department of Justice for litigation."), *rescinded on other grounds by* Dear Colleague Letter, U.S. Dep't of Education (Sept. 22, 2017).

non-discrimination provisions of the ACA have been interpreted to authorize the withdrawal of all federal funds.[44]

To the extent the Conscience Rule's enforcement mechanism for any particular statute exceeded the bounds of the statute, the *NY v. HHS* court could have struck the offending portion of the rule, which HHS argued was the proper remedy. The court instead struck the regulation in its entirety, in light of all of the supposed defects of the rule.[45]

After holding that the Conscience Rule's enforcement mechanism violated the APA, the court determined that the proper remedy was to revert back to the Obama-era version of the rule.[46] However, the court's opinion does not mention that the 2011 rule appears to employ the same enforcement mechanisms, including the termination of funding:

> Enforcement of the statutory conscience protections will be conducted by staff of the Department funding component, in conjunction with the Office for Civil Rights, through normal program compliance mechanisms. . . . If, despite the Department's assistance, compliance is not achieved, the Department will consider all legal options, *including termination of funding*, return of funds paid out in violation of health care provider conscience protection provisions under 45 CFR parts 74, 92, and 96, as applicable.[47]

As stated in the 2011 rule, this enforcement mechanism is consistent with the rule's stated purpose of withholding federal funding for entities that discriminate. The 2011 rule reads, "The conscience provisions contained in 42 U.S.C. 300a–7 (collectively known as the 'Church Amendments') were enacted at various times during the 1970s to make clear that receipt of Federal funds did not require the recipients of such funds to perform abortions or sterilizations."[48] Furthermore:

> the Federal health care provider conscience protection statutes, including the Church Amendments, the PHS Act Sec. 245, and the Weldon Amendment, require, among other things, that the Department and recipients of Department funds (including state and local governments) refrain from discriminating against institutional and individual health care entities for their participation in certain medical procedures or services, including certain health services, or research activities funded in whole or in part by the Federal government.[49]

The rule describes the receipt of federal funds generally and appears to not be limited to individual funding streams. In short, the court found the Trump agency's error so problematic that it withdrew the entire rule and replaced it with an earlier rule with the same error.

3. Conflict with Laws Using Different Frameworks

Next, the *NY v. HHS* court held that the Conscience Rule's framework conflicted with that of other nondiscrimination statutes, primarily Title VII of the Civil Rights Act of 1964.[50] Title VII provides a general rule that employers are required to provide religious accommodations to religious employees absent an "undue hardship."[51] By contrast, the Conscience Rule—which was specifically tailored to prohibit discrimination in healthcare-related contexts—did not include exceptions and did not use the term "undue hardship." According to the court, Title VII preempts the entire field of employment discrimination law and, by using the term "discrimination" in the conscience statutes, Congress meant to incorporate the undue hardship exception found in Title VII. The opinion reasons:

> While Congress was at liberty to displace these aspects of the Title VII framework and adopt a unique definition of "discrimination" for purposes of the Conscience Provisions, the Conscience Provisions that contain that term do so without elaboration. And HHS has not pointed to any evidence of congressional intent to supersede the Title VII framework. Therefore, even assuming HHS had statutory rulemaking authority to define "discrimination" for purposes of the Conscience Provisions, its latitude to do so in the employment context was bounded by Title VII.[52]

There are various ways to combat discrimination, and federal laws often take different approaches. To say that Congress incorporated a particular framework simply by using the term "discrimination" is a novel argument.

Moreover, it is a canon of legal construction that when two laws appear to cover the same territory, the more specific law usually trumps the more general law. Here, the *NY v. HHS* court apparently flipped that canon on its head to require the more specific laws to conform to the structure of the more general laws. Both the conscience statutes and Title VII aim to protect religious employees from discrimination. Title VII addresses the issue broadly, whereas the conscience statutes address only discrimination in healthcare with respect to religious or moral

44 Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. at 31439 ("We further noted that where noncompliance or threatened noncompliance cannot be corrected by informal means, the enforcement mechanisms provided for and available under the civil rights laws referenced in Section 1557 include suspension of, termination of, or refusal to grant or continue Federal financial assistance; referral to the Department of Justice with a recommendation to bring proceedings to enforce any rights of the United States; and any other means authorized by law.").

45 *NY v. HHS*, 2019 U.S. Dist. LEXIS 193207, at *194-97.

46 *Id.* at *197 n.76 ("The 2011 Rule, which has governed HHS's administration of the Conscience Provisions for eight years and is unaffected by this decision, will remain in place, and continue to provide a basis for HHS to enforce these laws.").

47 76 Fed. Reg. at 9972, *supra* note 3 (emphasis added). *Compare* 84 Fed. Reg. at 23184 (similarly worded Conscience Rule).

48 76 Fed. Reg. at 9969.

49 *Id.* at 9975.

50 *NY v. HHS*, 2019 U.S. Dist. LEXIS 193207, at *145-49. The court also held that the rule conflicted with the 1986 Emergency Medical Treatment and Labor Act (EMTLA), 42 U.S.C. § 1395dd. *Id.* at 142-45. The court did not mention that the 2011 rule under the Obama administration also considered EMTLA and found no conflicts. 76 Fed. Reg. at 9973 ("The conscience laws and the other federal statues have operated side by side often for many decades.").

51 42 U.S.C. § 2000e(j).

52 *NY v. HHS*, 2019 U.S. Dist. LEXIS 193207, at *101-02.

exemptions in certain circumstances, primarily with respect to abortion, sterilization, or euthanasia. Congress deemed these health care issues important enough to address specifically, without exceptions, and the Conscience Rule implements those provisions.

As HHS explains in its brief and in the regulation itself, Title VII is a "comprehensive regulation of American employers" that applies "in far more contexts, and is more vast, variable, and potentially burdensome (and, therefore, warranting of greater exceptions)."[53] By contrast, the Church Amendments, Coats-Snowe Amendment, Weldon Amendment, and relevant section of the ACA "are health care specific, and often procedure specific, and . . . are specific to the exercise of Congress's Spending Clause authority."[54] Because Congress set forth targeted protections for employees in the healthcare context, that more specific framework should be given effect even where it is not aligned with the broader Title VII framework.

As with the enforcement issue, the Obama-era 2011 rule addressed Title VII in a similar way as the Trump rule.[55] Neither rule followed the Title VII framework or incorporated an undue hardship standard. Yet the failure to incorporate Title VII's exceptions was one of the reasons the court abandoned the Trump rule in favor of the Obama rule.

4. Arbitrary and Capricious Standard When Agencies Change Policy Positions

The court concluded that the agency violated the APA by acting arbitrarily and capriciously in three ways: lack of evidentiary support for the Conscience Rule, insufficient explanation for the policy change, and failure to address important aspects of the problem.[56] This section focuses on the arguments about whether and how agencies may alter previous policies because the question of whether HHS is bound by prior policies is the most fundamental of the three issues.

The arbitrary and capricious standard of review is supposed to be a deferential standard. Under *FCC v. Fox Television Stations, Inc.*, "a court is not to substitute its judgment for that of the agency."[57] This standard is not heightened when an agency changes its policy provided the agency shows that "the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better."[58] In another context, Judge Engelmayer has held that, provided a reasoned explanation for the departure is given, "an agency's reconsideration and revision of an earlier outcome to conform it to the law does not render its change of course arbitrary and capricious."[59]

Here, the *NY v. HHS* court concluded that the Department did not meet *Fox Television Stations*' requirement of a "reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy."[60] Specifically, the court pointed to the 2011 rule's conclusion that the 2008 rule was causing confusion and that the 2008 rule may negatively impact access to care if interpreted broadly.

Yet, contrary to the court's conclusion, it is not clear that the Conscience Rule in fact represents a departure or about face compared to HHS's previously enacted rules. Instead, it can be seen as supplementing or strengthening the previous rules. The final rules under Bush, Obama, and Trump all accepted complaints based upon violations of the Church, Coats-Snowe, and Weldon Amendments. The purpose of all three rules was to ensure that HHS was not funding entities that discriminated in violation of these statutes. It was only the scope and detail of the regulations that varied.

Other courts have previously held that where a new policy is not in conflict with an old policy, no special analysis for the change is required. According to *Abraham Lincoln Memorial Hospital v. Sebelius*:

> Were HHS to have abandoned a long-standing policy and taken a new direction, we would require a reasoned analysis of its reasons for doing so. The Administrator's Decision, however, does not constitute such a change in course. Prior to this case, HHS had not issued any construction of the statute or applicable regulations that was in tension with the application here of the regulatory provisions at issue.[61]

Because the Conscience Rule was not in tension with the previous rule but rather a refinement that strengthened it, the court should not have held that HHS was arbitrary and capricious when it promulgated the new rule without regard to the Obama administration's claim that providing definitions is confusing or may limit access to health care.

5. Logical Outgrowth of NPRM

The *NY v. HHS* court concluded that the final rule's definition of "discriminate"[62] was not a logical outgrowth of the notice of proposed rulemaking (NPRM).[63] The APA requires agencies to provide notice of "either the terms or substance of the proposed rule or a description of the subjects and issues involved."[64] The final rule need only be a "logical outgrowth" of the NPRM, not identical to it.[65] The dispositive question is "whether

53 Defs.' Consolidated Reply Supp. Mot. Dismiss at 32, *NY v. HHS*, 1:19-cv-04676 (Sept. 19, 2019), ECF No. 224.

54 *Id.*

55 76 Fed. Reg. at 9973.

56 *NY v. HHS*, 2019 U.S. Dist. LEXIS 193207, at *111.

57 556 U.S. 502, 513-14 (2009).

58 *Id.* at 515.

59 Glara Fashion, Inc. v. Holder, No. 11 Civ. 889 (PAE), 2012 U.S. Dist. LEXIS 13660, at *21 (S.D.N.Y. Feb. 3, 2012); *see also* Noroozi v. Napolitano, 905 F. Supp. 2d 535, 543 (S.D.N.Y. 2012).

60 *NY v. HHS*, 2019 U.S. Dist. LEXIS 193207, at *124-25 (quoting *Fox Television Stations*, 556 U.S. at 516).

61 698 F.3d 536, 555 (7th Cir. 2012).

62 45 C.F.R. § 88.2(4)-(6).

63 *NY v. HHS*, 2019 U.S. Dist. LEXIS 193207, at *150-158.

64 5 U.S.C. § 553(b)(3).

65 Cooling Water Intake Structure Coal. v. EPA, 905 F.3d 49, 61 (2d Cir. 2018).

the agency's notice would fairly apprise interested persons of the subjects and issues of the rulemaking."[66]

The Conscience Rule's NPRM defined "discriminate" by listing six ways in which discrimination may manifest itself.[67] The *NY v. HHS* court concluded that subsections 1 through 3 remained substantially the same, but took issue with the additions of subsections 4 through 6 in the final rule. Sections 4 through 6 provide specific safe harbor situations that do not count as discrimination.

For example, section 5 allows entities to require advanced notification of a conscience objection under certain conditions:

> (5) Notwithstanding paragraphs (1) through (3) of this definition, an entity subject to any prohibition in this part may require a protected entity to inform it of objections to performing, referring for, participating in, or assisting in the performance of specific procedures, programs, research, counseling, or treatments, but only to the extent that there is a reasonable likelihood that the protected entity may be asked in good faith to perform, refer for, participate in, or assist in the performance of, any act or conduct just described. Such inquiry may only occur after the hiring of, contracting with, or awarding of a grant or benefit to a protected entity, and once per calendar year thereafter, unless supported by a persuasive justification.[68]

The Conscience Rule explained its modification by stating that it was responding to public comments, and that the modification was designed "to acknowledge the reasonable accommodations that entities make for persons protected by Federal conscience and anti-discrimination laws."[69] Nevertheless, the court concluded that the proposed rule did not give sufficient notice that "the ground rules for the accommodation of employees were in play at all."[70]

The purpose of the notice and comment procedure is to help administrative agencies address and resolve potential problems with the proposed rule. Here, in response to comments about the practical application of the rule and how to accommodate conscientious objectors, HHS added detail to its rule which provided safe harbors for entities who provide accommodations to their employees. Still, the court found the Conscience Rule's notice insufficient and therefore held that it violated the APA.

6. Separation of Powers and the Spending Clause of the Constitution

Finally, the *NY v. HHS* court said the rule violated the separation of powers and the Spending Clause of the U.S. Constitution. Specifically, the court concluded that Section 88.7(i)(3)(iv) of the final rule, which authorizes HHS to withhold all of a recipient's HHS funding as a penalty for non-compliance, violates both.

With respect to the separation of powers, the court held that withholding federally appropriated funds is not authorized by the statutes and thus represents an executive agency assuming Congress's legislative power.[71] In an analysis that mirrored its APA delegation analysis,[72] the court again rejected HHS's argument that Congress did grant such authorization through the conscience provisions or other statutes.[73]

With respect to the Spending Clause, the court held that the final rule violated the principles that conditions for receiving federal funds must be set out unambiguously and that the financial inducement may not be impermissibly coercive.[74] Essentially, the court concluded that the possibility of revoking all federal HHS funds from entities that engage in discrimination is too coercive to be constitutional.[75]

IV. Looking Ahead

The *NY v. HHS* decision is currently being appealed to the Second Circuit. While the case is pending, the 2011 Obama-era rule is in effect. Consequently, HHS is still empowered to enforce and receive complaints based upon three of the federal conscience provisions. But because the previous rule offered no definitions or clarification of the statutory provisions, the scope of HHS's enforcement power for those three provisions remains undefined.

If administrative efforts to protect conscience rights in health care continue to be stymied by the courts, Congress may choose to step in. For the past few years, proposals such as the Conscience Protection Act of 2019 have been introduced to address some of the enforcement issues involving existing conscience laws.[76] For example, the bill's language would expressly provide a private right of action to enable the private enforcement of these laws.[77]

For those skeptical of the ever-expanding reach of the administrative state, the intense scrutiny of executive agency action demonstrated by the *NY v. HHS* opinion may be a welcome change. Yet it is difficult to imagine how any but the narrowest regulations could pass muster under such scrutiny. It remains to be seen whether courts will consistently apply this exacting standard in future administrations, or even whether *NY v. HHS* is itself upheld on appeal.

66 *Id.*

67 Protecting Statutory Conscience Rights in Health Care, 83 Fed. Reg. 3880, 3923-24 (proposed Jan. 26, 2018).

68 Protecting Statutory Rights in Health Care, 84 Fed. Reg. at 23263.

69 *Id.* at 23191-92.

70 *NY v. HHS*, 2019 U.S. Dist. LEXIS 193207, at *151.

71 *Id.* at *158-160.

72 *See supra* section III.2.

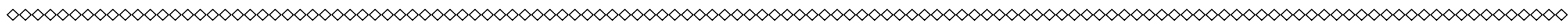
73 *NY v. HHS*, 2019 U.S. Dist. LEXIS 193207, at *158-160.

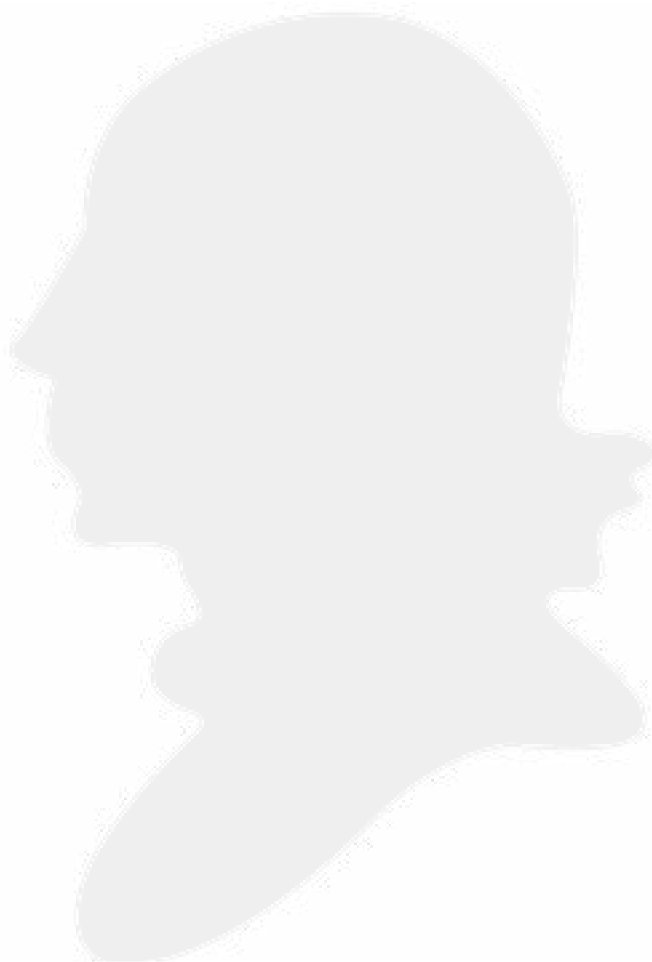
74 *Id.* at *169.

75 *Id.* at *181-82.

76 S. 183, 116th Congress (2019-2020).

77 *Id.* (proposing adding 42 U.S.C. § 245B).





The Mythical *McCulloch*

By Nelson Lund

Federalism & Separation of Powers Practice Group

A Review of:

The Spirit of the Constitution: John Marshall and the 200-Year Odyssey of *McCulloch v. Maryland*, by David S. Schwartz
https://www.amazon.com/Spirit-Constitution-Marshall-200-Year-McCulloch/dp/0190699485

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Note from the Editor:

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Generations of lawyers have been taught that *McCulloch v. Maryland*[1] is the foundational precedent that "established an expansive view of national power under the U.S. Constitution."[2] In *The Spirit of the Constitution*, David S. Schwartz maintains that this is a myth created by twentieth-century progressives in order to make the expansive view they favored seem more venerable than it really is.[3] I am satisfied that he has proved his case, though I am less sure that his revisionist history throws any new light on the spirit of the Constitution. Schwartz's detailed commentary does sharpen the issues raised by recent efforts to cabin the expansive view of national power that *McCulloch* supposedly established, and that may be the chief value of his book.

As every law student learns, *McCulloch* held that Congress had an implied power to establish the Second Bank of the United States and that Maryland's tax on the operations of the Bank was unconstitutional.[4] Schwartz observes that Marshall's opinion is ambiguous about the extent of the federal legislature's implied powers and about the Supreme Court's role in enforcing whatever limits the Constitution places on those powers.[5] This is not a revelation. Anyone who reads the case with care and an open mind can see that the opinion is by turns vague, ambiguous, and equivocal. Marshall sometimes suggests that the Constitution imposes virtually no limits on the reach of congressional power, or at least that it is up to Congress itself to decide what those limits are. At other points, he emphasizes that judicially enforceable limits on implied powers can be found in the Constitution's text as well as in its "spirit" and in the principle that lawful powers may not be exercised as a pretext for accomplishing unauthorized ends.

Notwithstanding the fog created by the opinion's conflicting signals, modern lawyers have tended to assume that *McCulloch* established that Congress has a very expansive range of implied

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1 17 U.S. 316 (1819).

2 J.M. Balkin and Sanford Levinson, *The Canons of Constitutional Law*, 111 Harv. L. Rev. 963, 973 (1998).

3 David S. Schwartz, The Spirit of the Constitution: John Marshall and the 200-Year Odyssey of *McCulloch v. Maryland* 4, 178-86, 213 (2019) (hereinafter Schwartz).

4 Schwartz has little to say about the tax ruling, and some of his comments are unfounded. He assumes without evidence that Maryland was trying to drive the Bank's Baltimore branch out of business. *Id.* at 9. The Court did not say this, and it is probably wrong. *See* Nelson Lund, *The Destructive Legacy of* McCulloch v. Maryland, *in McCulloch v. Maryland* at 200 (Gary J. Schmitt ed., forthcoming), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3436876. Schwartz then asserts that the Court's ambiguous and incomplete discussion of the tax is a preemption analysis that Marshall "thoroughly" explained. Schwartz at 15. In fact, the *McCulloch* opinion did not clearly indicate whether the tax was preempted by the Constitution itself or by the federal statute that established the Bank. Nor did the opinion point to anything in either the Constitution or the statute that conflicted with Maryland's tax law. *See* Lund, *supra*.

5 Schwartz at 54-58.

powers, especially under the Commerce Clause. Schwartz shows that the case was largely ignored by the Court for several decades, and then at different times invoked for broad and narrow understandings of implied powers. As he summarizes this point at the very end of his book, "The interpretation given to *McCulloch* through successive generations tells us much about each generation's spirit of the Constitution. The truth is that *McCulloch* did not make great constitutional law. Rather, constitutional law made *McCulloch* great."[6]

* * *

Many readers will be surprised to learn that the putatively foundational *McCulloch* opinion on implied powers was essentially ignored by Marshall himself, and by the Taney Court, and then for many years after the Civil War. Although Schwartz understandably wants to emphasize the novelty of his description of *McCulloch*'s "200-year Odyssey," much of the story is familiar.

Until the late nineteenth century, Congress did not enact much legislation that tested the limits of its delegated powers.[7] When Congress began to adopt more aggressive laws dealing with commercial activities, the Court sought to establish doctrines that would permit the effective regulation of interstate commerce without unleashing a tool for displacing the states' authority over their internal affairs. The New Deal Court abandoned that effort and appeared to remove virtually all restraints on Congress, save what the Justices might find from time to time in the Bill of Rights. More recently, majorities in the Rehnquist and Roberts Courts have resumed the search for limits on implied powers.

As Schwartz recognizes, *McCulloch* generated considerable controversy the moment it was decided, largely because it could be construed as a green light for congressional interference with the internal affairs of the states. But the Marshall and Taney Courts declined either to confirm or to repudiate that construction. The most obvious explanation is that Congress did not try to exploit any such green light, but Schwartz offers a different interpretation. Noting that legislation under the Commerce Clause would be the natural way for Congress to displace a great deal of state authority (as it eventually did), he maintains that *Gibbons v. Ogden*[8] quickly put a damper on *McCulloch*'s nationalist potential.[9]

Like *McCulloch*, *Gibbons* is now regarded as a canonical case that established a broad view of federal power. But it, too, offers a confusing assemblage of mixed signals. The case held that navigation is a part of commerce and that Congress therefore had the authority to preempt a state-created monopoly that restricted commercial navigation between New York and other states. *Gibbons* did not cite *McCulloch*, and Schwartz contends that Marshall characterized navigation as a part of commerce in order to avoid applying the kind of implied-power analysis toward which *McCulloch* pointed. This was important, he believes, because it "made the potential scope of the Commerce Clause more concrete and *smaller* in order to reduce the potential displacement of state laws were the Court ever to adopt an exclusive commerce theory."[10]

I find this argument unconvincing. Schwartz maintains, on the basis of very little evidence, that the definition of the word "commerce" was generally thought to cover only trade, not the transportation without which trade can seldom take place.[11] Even if one accepts that questionable claim,[12] cross-border commercial transportation (including navigation) is so closely and necessarily bound up with interstate and foreign trade that a "*McCulloch* analysis" need not have recognized any broader power than the definitional approach taken in *Gibbons*. And whether or not the Court were to adopt the theory that Congress has exclusive authority over interstate and foreign commerce, which it never has, *Gibbons* would not preclude the use of implied-powers analysis. Nor has the Court ever suggested that *Gibbons* constitutes an obstacle to the implied-powers analysis that is routinely employed in Commerce Clause cases.

What's more, *Gibbons* contains language that can easily, if improperly, be interpreted to give Congress authority to regulate intrastate commerce that affects other states, no matter how remote or small the effects may be.[13] This would amount to *McCulloch* on steroids. Even if one assumes that Marshall only meant to approve the regulation of intrastate activities that have *substantial* effects in other states, the scope of congressional power would be very wide, as we know from the modern cases. It is quite implausible that *Gibbons* was as an effort by Marshall to reduce the potential scope of implied congressional powers.

For Schwartz, *Gibbons* was just the first example of the Supreme Court's repeated refusals to draw the most appropriate inferences from *McCulloch*. This affected both the Commerce

6 Schwartz at 255.

7 Some important exceptions occurred during the Civil War, including the Legal Tender Act of 1862, which required creditors to accept paper money issued by the government as payment even when the debtor had promised to pay with gold. The Court purported to rely on *McCulloch* when it declared the statute unconstitutional. Hepburn v. Griswold, 75 U.S. 603, 614-16 (1870). The next year, the Court overruled *Hepburn*, purporting to rely once again on *McCulloch*, this time for exactly the opposite conclusion. Legal Tender Cases, 79 U.S. 457, 538-53 (1871).

8 22 U.S. 1 (1824).

9 Schwartz at 71-80.

10 *Id.* at 80. The exclusive commerce theory, which Justice Johnson adopted in his *Gibbons* concurrence, holds that Congress alone has the authority to regulate interstate and foreign commerce, thus forbidding the states to do so even when Congress has not enacted any preemptive legislation.

11 *Id.* at 73-74.

12 Based on a much more thorough review of the evidence, a serious student of the relevant source materials concluded that navigation is probably (though not indubitably) included within the meaning of the term "commerce." *See* Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101, 125-28 (2001).

13 "It is not intended to say that these words [commerce 'among the several states'] comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States." 22 U.S. at 194. The impropriety of interpreting this as a license to regulate anything that affects other states is confirmed by the opinion's reference to the "immense mass of legislation" left to the states, which embraces such measures as "[i]nspection 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." *Id.* at 203.

Clause and the enforcement provisions of the Reconstruction Amendments. As I understand his argument, it goes like this.

McCulloch might have established the expansive view of national power that the modern myth attributes to it because the potential was there in Marshall's opinion.[14] But for way too long, the Supreme Court was unable or unwilling to drop the pernicious assumption that state governments must have significant reserved powers.

Possibly in the Marshall Court and certainly in the Taney Court, Schwartz maintains, this reflected pro-slavery sentiments.[15] After the Civil War, the Court was determined to sustain social inequality between the races by narrowly construing the enforcement provisions of the Reconstruction Amendments.[16] The Court's misbegotten solicitude for state prerogatives continued with such decisions as *Hammer v. Dagenhart*[17] and *Carter v. Carter Coal Co.*,[18] in what Schwartz tendentiously calls the "*Lochner* era."[19] As he must know, *Lochner*'s substantive due process restriction on the states' police power was doctrinally disconnected from questions about the scope of Congress's implied powers. But *Lochner* is now reviled by a wide range of judges and commentators,[20] so the use of this term serves mainly to smear the Court's reserved-powers decisions through guilt by association.

In *United States v. Darby,*[21] the Court finally woke up and adopted the view Schwartz favors, namely that the regulatory powers reserved to the states constitute a null set.[22] Although he thinks that *Wickard v. Filburn*[23] returned to the *Gibbons* "definitional" approach he dislikes, Schwartz admits that the two approaches will usually lead to the same result.[24] In any event, neither the Tenth Amendment nor a fetish about enumerated powers would henceforth inhibit congressional efforts to foster the welfare of the nation. For more than half a century, this understanding of the Constitution appeared to be settled.

Regrettably, in Schwartz's view, the Court has more recently been attempting to resuscitate the "Tenth Amendment" view of the powers available to Congress. Ironically, perhaps, Schwartz credits Justice Scalia with being the only member of the Court who ever explained the distinction Schwartz draws between the approaches taken in *McCulloch*/*Darby* and in *Gibbons*/*Wickard*.[25] In his concurrence in *Gonzalez v. Raich*, Scalia stressed that Congress has the power to enact regulations that would otherwise be ultra vires, so long as they are needed to make an authorized regulation effective.[26] And it is true that Scalia distinguished this principle from the doctrine that Congress may regulate intrastate activities that have substantial effects on interstate commerce.[27] But he also noted that the Court has acknowledged at least since 1838 that authority over activities that are not part of interstate commerce derives from the Necessary and Proper Clause.[28]

14 Schwartz at 22-23.

15 *Id.* at 65-67, 109-10. I have no doubt that the Court became extremely solicitous of the interests of slaveowners in the years leading up to the Civil War, perhaps because of pro-slavery sentiments or perhaps from a fear of triggering the dissolution of the Union. There is no other plausible way to explain such legally preposterous decisions as *Prigg v. Pennsylvania*, 41 U.S. 539 (1842) (forbidding free states to protect innocent black citizens from being kidnapped and sent into slavery), and *Scott v. Sandford*, 60 U.S. 393 (1857) (invalidating a statute that outlawed slavery in federal territories). These decisions relied on restrictions putatively derived directly from the Fugitive Slave and Due Process of Law Clauses, respectively, so they imply little or nothing about the scope of powers that may be inferred from Article I. But any signals suggesting that Congress could use the Commerce Clause to regulate matters internal to the states would presumably have been very alarming to slave interests, and the Justices likely would have thought it prudent not to send such signals.

16 Schwartz at 135-38. Schwartz focuses on the *Civil Rights Cases*, 109 U.S. 3 (1883), which held that the Fourteenth Amendment prohibits racial discrimination by the states, not by private businesses that serve the public. Schwartz agrees with the first Justice Harlan's dissent, which cited *McCulloch* for the proposition that Congress has broad discretion to choose the means best adapted for achieving a lawful end. *Id.* at 50-51. Although Schwartz laments the fact that this precedent has not been overruled, the Warren Court effectively adopted Harlan's position. *See, e.g.*, Heart of Atlanta Motel v. United States, 379 U.S. 241, 258 (1964); Katzenbach v. Morgan, 384 U.S. 641, 651 (1966).

17 247 U.S. 251 (1918). The case held that a federal statute restricting the interstate shipment of goods produced by child labor was an ultra vires effort to regulate the production of those goods.

18 298 U.S. 238 (1935). The case held that local labor disputes did not have a sufficiently direct relation with interstate commerce to justify federal regulation of employment contracts, even if such disputes had economic effects in other states. The Court cited *McCulloch* for the proposition that "to a constitutional end many ways are open; but to an end not within the terms of the Constitution, all ways are closed." *Id.* at 291.

19 Schwartz at 186-92, 203-04.

20 The few dissenters from this consensus include my colleague David Bernstein. *See* David Bernstein, Rehabilitating *Lochner*: Defending Individual Rights Against Progressive Reform (2011).

21 312 U.S. 100 (1941). The case upheld the Fair Labor Standards Act of 1938, declared that the Tenth Amendment "states but a truism that all is retained which has not been surrendered," and expressly overruled *Hammer v. Dagenhart*.

22 Schwartz at 218-23.

23 317 U.S. 111 (1942). The case held that Congress may limit how much wheat a farmer may grow for use on his own property because such home consumption by many farmers would substantially affect the price of wheat in other states.

24 Schwartz at 223-28. I think Schwartz is mistaken about the nature of *Wickard*'s "substantial effects" test. *Gibbons* does not say or imply that intrastate commerce that affects other states comes within the definition of "commerce among the several states." Nor do I think that *Wickard* suggests that the definition of "commerce," let alone the term "commerce among the several states," includes the consumption of wheat that one grew on one's own land. *Wickard* is therefore best understood as an implied-powers decision.

25 Schwartz at 242-43.

26 545 U.S. 1, 36-37 (Scalia, J., concurring in the judgment) (relying especially on *Darby* and *United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942)). *Raich* held that Congress has the authority to forbid the possession of marijuana that was grown within the state and approved for medical uses by the state government.

27 Scalia noted that *Wickard* was a case in which the two principles led to the same conclusion. 545 U.S. at 37 n.2.

28 *Id.* at 34. *United States v. Coombs*, 37 U.S. 72 (1838), involved a statute that punished theft from shipwrecks even when the goods were taken from above the high water line. Schwartz never mentions this implied-powers decision, perhaps because the opinion did not cite *McCulloch*.

Schwartz then claims that Scalia contradicted himself by concluding, in his dissent in *National Federation of Independent Business v. Sebelius*,[29] that the Commerce Clause does not empower Congress to "regulate inactivity" by forcing individuals to purchase certain kinds of health insurance. According to Schwartz, Scalia's *Raich* concurrence "irrefutably supported" the constitutionality of this individual mandate because the regulation was reasonably adapted to the effectiveness of the statute's regulation of the health care market.[30]

Schwartz is irrefutably wrong. The two cases are easy to distinguish, and in just the way implicitly suggested by the *Sebelius* opinion that Scalia co-authored:

> What is absolutely clear, affirmed by the text of the 1789 Constitution, by the Tenth Amendment ratified in 1791, and by innumerable cases of ours in the 220 years since, is that there are structural limits upon federal power—upon what it can prescribe with respect to private conduct, and upon what it can impose upon the sovereign States. Whatever may be the conceptual limits upon the Commerce Clause . . ., they cannot be such as will enable the Federal Government to regulate all private conduct . . . .
>
> That clear principle carries the day here. The striking case of *Wickard v. Filburn,* 317 U.S. 111 (1942), which held that the economic activity of growing wheat, even for one's own consumption, affected commerce sufficiently that it could be regulated, always has been regarded as the *ne plus ultra* of expansive Commerce Clause jurisprudence. To go beyond that, and to say the *failure* to grow wheat (which is *not* an economic activity, or any activity at all) nonetheless affects commerce and therefore can be federally regulated, is to make mere breathing in and out the basis for federal prescription and to extend federal power to virtually all human activity.[31]

In *McCulloch* terms, a principle that would allow Congress to exert control over virtually all private conduct cannot be "appropriate" because it is inconsistent with "the spirit of the Constitution."[32] For that reason, even though the individual mandate might have been conducive to regulating an interstate health care market, Scalia rejected it on the ground that it violates what he called "structural limits upon federal power." Whether or not Scalia was right to vote with the majority in *Raich*, his concurrence did not imply approval of a federal power to regulate everything in human life.

* * *

Schwartz is confident that a proper understanding of *McCulloch*'s logic "allows Congress to legislate about most things that 'we the people' need it to."[33] But he worries that debunking the *McCulloch* myth, according to which the Great Chief Justice established this principle two hundred years ago, might undercut arguments for "liberal constitutional values I agree with."[34]

This concern is almost certainly misplaced. Schwartz fervently believes that the Supreme Court was "fairly liberal" for thirty-two years before President Nixon came along, and that the current "long conservative Court" has made profound and baleful doctrinal changes affecting such matters as abortion, gun violence, protections for criminal defendants, affirmative action, sovereign immunity, and campaign financing.[35] None of these issues has anything to do with implied congressional powers under Article I. Notwithstanding his assertion that the Court's conservatives have turned *McCulloch* into a "splendid bauble,"[36] he offers no actual evidence that meaningful limits have been imposed on implied congressional powers. On the contrary, his most effective jab at the modern federalism revival targets the Court's failure to articulate any principle or theory that would identify such limits.

When the revival began with *United States v. Lopez* in 1995, Chief Justice Rehnquist insisted that the Constitution's enumeration of powers implies that Congress does not possess a general police power, and he criticized Justice Breyer's dissent for its failure to identify any activity that only the states may regulate.[37] Schwartz ridicules this argument, calling it "the mustbesomething rule."[38] I think Rehnquist's point was perfectly valid, but Schwartz is right that it leaves the important questions unanswered. Neither *Lopez* nor subsequent cases have told us how to identify the reserved powers of the states.

So far at least, the Court has identified only a few trivial ways in which Congress may not supplant the regulatory authority of the states. Nor do the Court's opinions suggest that it will ever go beyond such symbolic concessions to the "mustbesomething rule." Consider just two examples. *Lopez* struck down a statute that criminalized the possession of a gun in or near a school. Congress simply amended the statute to require that the gun have moved in interstate commerce.[39] *NFIB v. Sebelius* held that a statute requiring the purchase of specified insurance policies was not authorized by the Commerce Clause, but then upheld the mandate as an exercise of the taxing power.[40]

As this second case should remind us, almost anything that the Court might decide is beyond congressional power under the Commerce Clause can be accomplished through the spending power that the Court has purported to find in the Taxation Clause.

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29 567 U.S. 519 (2012).

30 Schwartz at 245.

31 *Sebelius*, 567 U.S. at 647-48 (dissenting opinion of Scalia, Kennedy, Thomas, and Alito, JJ.)

32 *See McCulloch*, 17 U.S. at 421.

33 Schwartz at 252.

34 *Id.* at 253.

35 *Id.* at 237-38. I can't help wondering what Schwartz would regard as a "really liberal" Court. I also wonder about the suggestion that the Court became "conservative" in 1969 and stayed that way until now.

36 *Id.* at 237. *McCulloch* warned against an interpretation of the Constitution under which it would merely be a "splendid bauble." 17 U.S. at 420-21.

37 514 U.S. 549, 564-65 (1995).

38 Schwartz at 242.

39 *See* United States v. Dorsey, 418 F.3d 1038 (9th Cir. 2005); United States v. Danks, 221 F.3d 1037 (8th Cir. 1999), *cert. denied*, 528 U.S. 1091 (2000).

40 *See* 567 U.S. at 562-74.

New York v. United States offers a vivid example.[41] The Court's spending power jurisprudence is a version of the Anti-Federalist claim that the Taxation Clause amounts to a warrant for Congress to do whatever it thinks necessary for the common defense or general welfare. In *The Federalist No. 41*, Madison responded to this claim by saying, "No stronger proof could be given of the distress under which these writers labour for objections, than their stooping to such a misconstruction."

As the Necessary and Proper Clause confirms, Congress is certainly authorized to spend money in order to execute its enumerated powers. But the Taxation Clause does not constitute an independent authorization to spend money in any way that Congress thinks will serve the general welfare. The incoherent opinion in *United States v. Butler*,[42] which dismissed Madison's arguments without even trying to refute them, is merely an illustration of the Supreme Court's proclivity for enacting constitutional amendments in the guise of legal opinions.

Schwartz should probably celebrate the Court's "mustbesomething" approach, rather than mock it. Those who are more concerned with recovering the original meaning of the Constitution than with promoting Schwartz's "liberal constitutional values" may take a different view.[43] But everyone should be able to agree that *McCulloch v. Maryland* did not itself establish much of anything.

41 505 U.S. 144 (1992).

42 297 U.S. 1 (1936).

43 *See* Lund, *supra* note 4.

New Evidence on the Constitution's Impeachment Standard: "high . . . Misdemeanors" Means Serious Crimes

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Note from the Editor:

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I. The Problem

The Constitution permits impeachment and removal of federal officers for "Treason, Bribery, or other high Crimes and Misdemeanors."[1] Records from the Founding tell us that the adjective "high" modifies both "Crimes" and "Misdemeanors."[2] Thus, the Impeachment Clause may be read as permitting removal if an official has committed (1) treason, (2) bribery, (3) another high crime, or (4) a high misdemeanor.

But what is a high misdemeanor? As I pointed out in a prior article in *Federalist Society Review*,[3] commentators and scholars have agitated this question for many years. Exemplifying the disagreement was the testimony of the four constitutional scholars called to testify before the U.S. House Judiciary Committee during the impeachment proceedings against President Donald Trump.

Each interpreted the impeachment standards somewhat differently. Professor Jonathan Turley advocated the most exacting test. He argued that high misdemeanors are acts that "reach a similar level of gravity and seriousness" as criminal activity.[4] Professor Noah Feldman defined high crimes and misdemeanors as comprising "abuses of power and public trust connected to the office of the presidency."[5] Professor Michael Gerhardt contended that high crimes and misdemeanors encompassed, among other infractions, political crimes, abuse of power, breaches of the public trust and "serious injuries to the Republic."[6] Professor Pamela S. Karlan argued that subverting an election and disregarding the public interest were both impeachable offenses.[7]

My prior article suggested yet another standard: that a high misdemeanor is what modern lawyers call breach of

1 U.S. Const. art. II, sec. 4.

2 For example, the records of the 1787 Constitutional Convention contain several uses of the phrase "high misdemeanors." *E.g.*, 2 The Records of the Federal Convention 174 (Max Farrand ed., 1937) [hereinafter Farrand] records of the committee of detail); *id.* at 187 (committee of detail draft) (James Madison) (Aug. 6, 1787); *id.* at 348 (using the phrase when drafting the Treason Clause) (James Madison) (Aug. 20, 1787).

3 Robert G. Natelson, *Impeachment: The Constitution's Fiduciary Meaning of "High . . . Misdemeanors*," 19 Fed. Soc'y Rev. 68 (2018), *available at* https://fedsoc.org/commentary/publications/impeachment-the-constitution-s-fiduciary-meaning-of-high-misdemeanors.

4 Jonathan Turley, *Testimony*, House Judiciary Committee, Dec. 4, 2019, at 11, https://i2i.org/wpcontent/uploads/TurleyTestimony.pdf.

5 Noah Feldman, *Testimony*, House Judiciary Committee, Dec. 4, 2019, at 1, https://i2i.org/wpcontent/uploads/FeldmanTestimony.pdf.

6 Michael Gerhardt, *Testimony*, House Judiciary Committee, Dec. 4, 2019, at 5, https://i2i.org/wpcontent/uploads/GerhardtTestimony.pdf.

7 Pamela S. Karlan, *Testimony*, House Judiciary Committee, Dec. 4, 2019, at 3 & 4, https://i2i.org/wpcontent/uploads/KarlanTestimony.pdf.

fiduciary duty and Founding-era lawyers called breach of trust.[8] My position had several advantages to commend it. First, the fiduciary standard squared most closely with the kind of evidence impeachment scholars commonly consult.[9] Second, it was consistent with the Founders' concept of republican government as a fiduciary enterprise—as a public trust.[10] Third, it accommodated the prevailing view that an action need not be a crime to be impeachable.[11] Fourth, because fiduciary law was fairly well developed in the Founding era,[12] the "breach of trust" formulation is more precise than phrases such as "abuse of power" and "disregarding the public interest." Of course, a certain amount of precision is desirable to protect the constitutional independence of the president from congressional whim.

Why has there been so much conflict on this subject? One reason, no doubt, is that political agendas unduly influence constitutional scholarship: Conclusions often are fixed before the research begins.[13] Certainly it is not coincidental that the three witnesses advocating the more lenient grounds for impeaching President Trump are all outspoken critics of the president, and they were called by the Democratic majority. Professor Turley, who advocated the strictest standard, while not exactly a Trump supporter, was called by the Republicans.

But there is another reason for the variation in professorial opinion: The evidence consulted thus far when viewed in isolation is simply not determinative. This lack of determinativeness has led some scholars to conclude that ascertaining the precise meaning of high misdemeanors is not practical, that the process is inherently political, and that the grounds for impeachment should be worked out on case by case basis.[14]

As the House Judiciary Committee testimony demonstrates, the evidence consulted thus far consists principally of the Constitutional Convention debates, a relatively small sample from the large corpus of ratification-era writings (primarily *The Federalist*), some English and American impeachment history, and Joseph Story's monumental, but unreliable, *Commentaries on the Constitution*.[15] Rarely consulted is the contemporaneous Anglo-American jurisprudence, with the occasional exception of Blackstone's *Commentaries*. Of course, Blackstone is an excellent source, but he is sometimes mistaken, more often unclear, and (because his work is a mere summary of the law) necessarily incomplete. Moreover, Blackstone's *Commentaries* is only one of the hundreds of readily available Founding-era law books.[16]

As the result, modern commentators read sources such as Madison's convention notes in isolation from the wider legal background, without underlying legal terminology or concepts to clarify them. Yet they *must* be read against the contemporaneous legal background to be fully understood.

The Constitution is a legal document, the "supreme Law of the Land."[17] The majority of its framers were lawyers, as were most of those who explained the document in the ratifying conventions and to the American public—a public legally sophisticated by today's standards. The document itself is laden with legal terms of art. These include not only obvious legal phrases like habeas corpus and trial by jury, but phrases that, while common in the eighteenth century, are not widely used in modern law. Examples are "Privileges and Immunities," "necessary and proper," and "regulate . . . Commerce"—phrases with specific legal meanings during the Founding era.[18] That one must read the Constitution in the context of eighteenth century jurisprudence should be obvious, particularly to lawyers and law professors. But apparently it is not.

One of the few writers who have ventured beyond Blackstone is Raoul Berger. Berger was not a legal scholar but a Harvard political scientist who authored a leading book on impeachment.[19] Perhaps because he wrote before electronic search methods were available, however, Berger's investigation into contemporaneous law was cursory. His conclusion was that "high misdemeanors" were "words of art confined to impeachments, without roots in the ordinary criminal law."[20] But as this article demonstrates, this conclusion could not have been more wrong.

8 *Natelson, supra* note 3.

9 *Infra* notes 14-16 and accompanying text.

10 Robert G. Natelson, *The Constitution and the Public Trust,* 52 Buff. L. Rev. 1077 (2004).

11 Michael Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives*, 68 Tex. L. Rev. 1, 83 (1989) ("But attempts to limit the scope of impeachable offenses have rarely proposed limiting impeachable offenses only to indictable offenses. Rather, the major disagreement among commentators has been over the range of nonindictable offenses for which someone may be impeached."); *see also id.* at 85 (concluding that impeachment is not limited to indictable offenses).

12 Robert G. Natelson, *Judicial Review of Special Interest Spending: The General Welfare Clause and the Fiduciary Law of the Founders*, 11 Tex. J. L. & Pol. 239 (2007).

13 Henry P. Monaghan, *Our Perfect Constitution*, 56 NYU L. Rev. 353, 377-78 (1981) (pointing out that this has been especially true since law professors started to dominate constitutional scholarship).

14 *Gerhardt, supra* note 11, at 87.

15 Joseph Story, Commentaries on the Constitution of the United States (1833) was published more than four decades after the ratification, when most of the Founders were dead, and it did not rely on important historical documents accessible to later historians, including Madison's convention notes and most of the ratification records.

16 John Worrall's 1788 bibliography of English law books consumed over 250 pages. Many of its entries are available today at databases such as *Eighteenth Century Collections Online*. John Worrall, Bibliotheca Legum Angliae (1788), https://i2i.org/wpcontent/uploads/2015/01/Constitution_Worrallocr.pdf.

17 U.S. Const. art. VI.

18 Co-authors and I have examined the meaning of these phrases in a series of writings, including *The Original Meaning of the Privileges and Immunities Clause*, 43 Ga. L. Rev. 1117 (2009); *The Legal Meaning of "Commerce" In the Commerce Clause*, 80 St. John's L. Rev. 789 (2006); Gary Lawson, Geoffrey P. Miller, Robert G. Natelson, & Guy I. Seidman, The Origins of the Necessary and Proper Clause (2010).

19 Raoul Berger, Impeachment: The Constitutional Problems (1973).

20 *Id.* at 66.

My earlier conclusion was wrong too.[21] Founding-era legal materials reveal that "high misdemeanor" was a frequently used legal term of art with a fixed and specific meaning. By adopting it, the Founders raised the bar for impeachment well above the House of Commons' standard in the then-current Warren Hastings case and well above the standards codified in most state constitutions.

II. What the Legal Sources Tell Us

The Founders came of age and received their legal educations as colonists in the British Empire. Their law and their law books were overwhelmingly English. Part II.A examines their English legal sources. Part II.B examines Founding-era American sources confirming the English materials.

A. English Legal Sources

During the eighteenth century, offenses against the British Crown were interchangeably labeled misdemeanors, offenses, contempts, and crimes. All misdemeanors were crimes, and all crimes were misdemeanors. However, in common speech, as in common speech today, people often called more serious offenses "crimes" and lesser offenses "misdemeanors."[22] Exemplifying how the terminology operated is the entry for "misdemeanour" in the 1778 edition of the *Encyclopaedia Britannica*:

> MISDEMEANOUR, in law, signifies a crime. Every crime is a misdemeanor; yet the law has made a distinction between crimes of a higher and a lower nature; the latter being denominated *misdemeanours*, the former *felonies,* &c.[23]

The traditional distinction between felonies and other crimes was that felonies were punishable by death. The most serious felony was high treason (against the Crown),[24] followed by petit treason. The latter was "where one, out of malice, takes away the life of a subject, to whom he owes special obedience."[25] Lesser felonies derived either from the common law or from parliamentary enactment. The common law felonies included, but were not limited to, murder, burglary, robbery, larceny, rape, and arson.[26]

High treason was punishable by drawing-and-quartering and forfeiture of all property.[27] Petit treason was punishable by forfeiture plus drawing and hanging for men and drawing and burning for women.[28] Other felonies resulted in death by hanging and, depending on the felony, forfeiture of all property or of goods only.[29]

The system was cruel, but by the eighteenth century it was not quite as cruel as it first appears. Courts often avoided the death penalty through devices such as "benefit of clergy" for first-time offenders[30] and "transportation" to distant colonies. Moreover, petty larceny, while still accounted a felony, no longer carried the death penalty.[31]

Felonies formed a subset in a set of crimes called *high misdemeanors*—also called great misdemeanors, high offenses,[32] and misprisions. Originally, a misprision was merely an act of neglect. Eighteenth century commentators called this its negative meaning.[33] But by the eighteenth century, misprision also served

21 *Supra* notes 3 and 8.

22 Giles Jacob, A New Law-Dictionary (10th ed. 1782) (unpaginated) (defining misdemeanor) ("This word in the laws of *England*, signifies a *crime*.—Every crime is a misdemeanor, yet the law hath made a distinction between crimes of a higher and a lower nature, the latter being denominated *misdemeanors,* the former *felonies,* &c.") (italics in original); *cf.* 2 Richard Burn & John Burn, A New Law Dictionary (1792) (unpaginated) ("MISDEMEANOR, in its usual acceptation, is applied to all those crimes and offenses for which the law hath not provided a particular name; and it may be punished, according to the degree of the offense, by fine, or imprisonment, or both.").

See also James Buchanan, A New English Dictionary (1769) (unpaginated) (defining "Misdemeanour" as "A crime").

23 7 Encyclopaedia Britannica 5138 (2d ed., 1778) (italics in original). The abbreviation "&c." means et cetera.

24 Jacob, *supra* note 22 (defining felony) ("*Felony* is included in high treason"—meaning that high treason is a species of felony) (italics in original).

25 *Id.* (defining petit treason).

26 *Id.* ("at this day *felony* includes petit treason, murder, homicide, sodomy, rape, burning of houses, burglary, robbery, breach of prison (where the prisoner is chargeable with a felony), rescue and escape, after one is imprisoned or arrested for *felony*") (italics in original).

27 The gory details are in 4 William Blackstone, Commentaries *92.

28 *Id.* at *204.

29 Jacob, *supra* note 22 (defining felony).

30 When a statute did not specifically deny benefit of clergy, a first-time offender would be branded in the hand (to indicate the first offense) and then released. *Id.* (defining "clergy").

31 *Id.* (defining felony).

32 *E.g.*, 1 William Hawkins, A Treatise of the Pleas of the Crown 266 (6th ed. 1787) ("very high offense") & table ("very high misdemeanor").

33 Some lay sources report only the negative meaning, e.g., James Buchanan, A New English Dictionary (1769) (unpaginated) (defining "Misprision" as "Oversight or neglect").

as an exact synonym for high misdemeanor.[34] This was called its positive meaning.[35]

Although treason and other felonies were technically high misdemeanors/misprisions,[36] in common speech "high misdemeanor" and "misprision" denoted serious crimes other than felonies—that is, "under the degree of capital, but nearly bordering thereon."[37] If a statute created a crime but was unclear about whether that crime was to be a felony, then the offense was treated as a high misdemeanor.[38] Punishments for high misdemeanors included long imprisonment, stiff fines, forfeiture, and sometimes the pillory.[39]

Founding-era sources frequently emphasize the serious and criminal nature of high misdemeanors. One lay dictionary, for example, defined "misdemeanor" merely as "a behaving one's self ill; an offense or fault."[40] However, it characterized "high misdemeanour" as "a crime of a heinous nature, next to High Treason."[41] Similarly, a 1778 encyclopedia stated that "*High crimes and misdemeanours* denote offenses of a heinous nature, next to high treason."[42] Some examples of high misdemeanors are:

- attempted murder,[43]
- receiving stolen goods,[44]
- otherwise treasonous words not accompanied by an overt act,[45]
- assault not resulting in death,[46]
- judicial bribery,[47]
- jail-break by a prisoner not accused or convicted of felony,[48]

34 Jacob, *supra* note 22:

> Misprision: neglect or oversight . . . In a larger sense, *misprision* is taken for many great offenses, which are neither treason nor felony, or capital, but very near them; and every great misdemeanor, which hath no certain name appointed by the law, is sometimes called *misprision* . . . And *misprision* being included in every treason or felony, the King may cause him to be indicted and arranged of *misprision* only, if he please.

See also 7 Encyclopaedia Britannica 5138-39 (2d ed. 1778):

> MISPRISIONS . . . are, in the acceptation of our law, generally understood to be all such high offenses as are under the degree of capital, but nearly bordering thereon; and it is said, that a misprision is contained in every treason and felony whatsoever; and that, if the king so please, the offender may be proceeded against for the misprision only. And upon the same principle, while the jurisdiction of the star-chamber subsisted, it was held that the king might remit a prosecution for treason, and cause the delinquent to be censured in that court, merely for a high misdemeanour . . . .

35 4 William Blackstone, Commentaries *121 ("MISPRISIONS, which are merely positive, are generally denominated contempts or high misdemeanors"); 7 Encyclopaedia Britannica, *supra* note 34, at 5139 (similar language).

36 2 Richard Burn & John Burn, A New Law Dictionary (1792) (unpaginated) (defining "misprision" and explaining that "a misprision is contained in every treason and felony whatsoever; and that, if the king so please, the offender may be proceeded against for the misprision only"); 4 Matthew Bacon, A New Abridgment of the Law (5th ed. 1786) (unpaginated, but under the subject of "Rescue") (a rescuer of one committed for high treason may be guilty of high treason, but "he may be immediately proceeded against for a Misprision only, if the King please").

37 2 Richard Burn & John Burn, *supra* note 36 (defining "misprision").

38 1 Richard Burn, The Justice of the Peace and Parish Officer xxvi-xxvii (15 ed. 1785) ("But an offense shall never be made felony by the construction of any doubtful or ambiguous words of a statute; and therefore . . . it shall amount unto no more than a high misdemeanor, punishable by imprisonment or the like.").

39 *E.g.*, 4 William Blackstone, Commentaries *91 (detracting from the established royal line was at one time "a high misdemeanor, punishable with forfeiture of goods and chattels"); *id.* at *211 (firing one's own house in a town "is a high misdemeanor, and punishable by fine, imprisonment, pillory, and perpetual sureties for the good behaviour"); T.W. Williams, A Compendious Digest of the Statute Law 117 (1787) ("Subjects going to the *East Indies* (except lawfully authorized) may be seized, brought home and prosecuted for high crimes and misdemeanors, and are liable to conviction, to corporal punishment, fine, and imprisonment."); 2 Anonymous, A General Treatise of Naval Trade and Commerce 127 (1753) (same).

40 Nathan Bailey, An Universal Etymological English Dictionary (1783) (unpaginated).

41 *Id.*

42 3 Nicholas Chambers, Cyclopaedia: or, An Universal Dictionary of Arts and Sciences (1778) (unpaginated) (defining "misdemeanour"). This work also paraphrased Blackstone to the effect that, technically, crime and misdemeanor were synonymous. *Id.* Of judges trying a case without a commission to do so, Blackstone wrote, "it being a high misdemeanor in the judges so proceeding, and little (if any thing) short of murder in them all, in case the person so attainted be executed and suffer death." 4 William Blackstone, Commentaries *384.

43 Case of William Nicholas [K.B. 1748] Fost. 85, 168 Eng. Rep. 32, 33 (stating that attempted murder by poison was a high misdemeanor).

44 4 William Blackstone, Commentaries *132 ("RECEIVING of stolen goods, knowing them to be stolen, is also a high misdemeanor").

45 3 Edward Coke, Institutes of the Laws of England *14 (1644) ("But words without an overt deed are to be punished in another degree, as an high misprision."); 1 Richard Burn, *supra* note 38, at 327 ("by the common law and the statute of *Ed.* 3 words spoken amount only to a high misdemeanor, and no treason"); 4 William Blackstone, Commentaries *80 ("[I]t seems clearly to be agreed, that, by the common law and the statute of Edward III, words spoken amount only to a high misdemeanor, and no treason.").

46 King v. Williams [K.B.1790] 1 Leach 529, 168 Eng. Rep. 366 (headnote) (stating that assault not qualifying as a felony is a high misdemeanor).

47 Hawkins, *supra* note 32 (table) ("Bribery in a judge formerly punished as high treason. 314 f. 6 . . . It is now a very high misdemeanor."); *cf.* 3 Coke 145 (stating that if a judge receives bribes he is guilty of a "great misprision").

48 2 Bacon Abridgment, *supra* note 36 (unpaginated, but under the topic "Gaol and Gaoler") (jail-breaks are not a felonies if the prisoner is not a felon, but are "still punishable as High Misprisions by Fine and Impeachment.").

- permitting an accused or convicted felon to escape without active assistance,[49]
- challenging to or assisting at a duel,[50]
- criminal libel,[51]
- burning one's own house in a town, thereby gravely endangering others,[52] and
- a jailor's coercion of a prisoner to obtain a conviction against an innocent person.[53]

Moreover, in England, medical malpractice was a high misdemeanor because of the danger it posed to human life.[54] Parliament also created high misdemeanors, such as unauthorized travel to the East Indies.[55]

B. American Legal Sources

American sources using the term "high misdemeanor" employed it the same way English writers did. Two illustrations appear in what was perhaps the earliest law book published in America: George Webb's *The Office and Authority of a Justice of the Peace*, printed in Williamsburg, Virginia in 1733.[56] Webb stated that "Uttering false money, knowing it to be so, is not High Treason, but a great Misdemeanor, and Finable."[57] He further wrote that, "It hath been held a great Misdemeanor in a Justice of the Peace, to entice an Infant [then a person under age 21] to enter into a Recognisance, knowing him to be an Infant. One *Hickes* was fined 100 *l* [pounds] and committed for his Offence."[58] Both these passages reflect an understanding that a high (or great) misdemeanor was a criminal offense meriting severe punishment.

Jeremy Belknap's 1784 history of New Hampshire was not a law book but it did record a legal transaction: the case of one Abraham Corbett, who was fined severely for issuing warrants on several occasions in the king's name but without authority. The court deemed Corbett's conduct a great misdemeanor.[59]

Article IV of the Articles of Confederation provided for interstate extradition of fugitives "charged with, treason, felony, or other high misdemeanor in any State."[60] The reader can see how the language reflects the criminal law's nesting-doll categories: treason, felony, and *other* high misdemeanor. Moreover, the maxims noscitur a sociis[61] and ejusdem generis[62] strongly suggest that because treason and felony are serious crimes, "other high misdemeanor" refers to serious crimes as well. In a September 28, 1787 letter to Congress, Foreign Secretary John Jay alluded to this portion of the Articles. His letter discussed the case of an irresponsible sea captain who abused his passengers so severely that some of them died—and then abandoned others on a deserted coast of Maine (then part of Massachusetts). Jay wrote:

> [H]e has committed Felony, if not Murder, on the high Seas . . . The Captain's Conduct as affecting Massachusetts may also be by their Laws a high Misdemeanour; but if that be the case, they have by the 4th Article of the Confederation a Right to demand the Offender from any of the States in which he may be found.[63]

The Constitutional Convention had adjourned only a few days before Jay's letter. The convention records show that the delegates employed the term "high misdemeanor" on several occasions. The Constitution's first draft, reported to the

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49 2 Hawkins, *supra* note 32, at 189:

> But if a person, knowing another to have been guilty of such a crime [felony], barely receive him, and permit him to escape, without giving him any manner of advice, assistance, or encouragement in it, as. by directing him how to do it in the safest manner, or furnishing him with money, provisions, or other necessaries, it seems he is guilty of a high misdemeanor only, but no capital offence.

See also 2 Timothy Cunningham, A New and Complete Law-Dictionary (3d ed. 1783) (unpaginated) (defining "Receiver"):

> And the receiving a felon, and concealing him and his offence, makes a person accessory to the felony. . . [but] if a person knowing of one to have been guilty of felony, barely receive him, and permit him to escape, without giving him any advice, assistance, or encouragement, it is a high misdemeanor, but no capital offence.

50 1 Hawkins, *supra* note 32, "Table" ("And barely to challenge to a duel, by letters, words, or provoking language or to be the messenger thereof, is a very high misdemeanor.").

51 Anonymous, A Digest of the Law of Libels 52 (1770) (stating that crime of libel is a high misdemeanor).

52 1 Joseph Shaw, The Practical Justice of the Peace 75 (5th ed. 1751) ("'Tis high Treason in such as agree to arm themselves, and from House to House to get Assistance to pull down Inclosures & c. but if such Persons have an Interest [in the property], it amounts but to an High Misdemeanor."); 4 William Blackstone, Commentaries *221 ("However such wilful firing one's own house, in a town, is a high misdemeanor, and punishable by fine, imprisonment, pillory, and perpetual sureties for the good behaviour.").

53 3 Coke, *supra* note 45, at 91. Under the common law, if the victim was hanged, the jailor was guilty of felony; if he was acquitted, the jailer was guilty of a "great misprision." As Coke reports, Parliament changed the latter to felony by statute. *Id.*

54 3 William Blackstone, Commentaries *122.

55 2 Naval Trade, *supra* note 39, at 127.

56 George Webb, The Office and Authority of a Justice of the Peace (1733).

57 *Id.* at 84.

58 *Id.* at 274.

59 Jeremy Belknap, The History of New-Hampshire 107-08 (1784).

60 Arts. of Confed., art. IV.

61 Literally, "it is known by its comrades" or, loosely, "birds of a feather flock together."

62 "Of the same kind (or class)." When an item on a list is unclear in meaning, both this maxim and noscitur a sociis tend to show that it has a meaning analogous to other items on the list. For example, in the list, "cabbage, carrots, celery, and other vegetable matter," the maxims suggest that "other vegetable matter" may refer to items such as spinach and green peppers, rather than to trees.

63 Letter from John Jay to Congress, Sept. 28, 1787, 33 J. Cont. Cong. 553, 544 (Sept. 28, 1787).

convention by the Committee of Detail on August 6, 1787, included the following extradition clause:

> Any person charged with treason, felony or high misdemeanor in any State, who shall flee from justice, and shall be found in any other State, shall, on demand of the Executive power of the State from which he fled, be delivered up and removed to the State having jurisdiction of the offense.[64]

Of course, if a high misdemeanor had not been criminal, there would have been no need for extradition. Madison later moved successfully to substitute "other crime" so as to "comprehend all proper cases: it being doubtful whether 'high misdemeanor' had not a technical meaning too limited."[65] As his amendment indicates, Madison recognized that "high misdemeanor" was a technical term. Presumably he did not want the provision to exclude misdemeanors that were not "high" but still merited extradition.

When discussing limits on the Constitution's Treason Clause, Rufus King noted that if the Constitution barred prosecutions for treason against individual states, those states could still "punish offenses as high misdemeanors."[66] Thus King drew an equivalency between treason and high misdemeanor.

The new federal Congress also employed the term "high misdemeanors" in the same way. The 1789 statute establishing the Treasury Department banned certain conflicts of interest, and defined each violation as "a high misdemeanor," punishable by removal from office, incapacity, and a $3000 fine.[67] During the 1790s,[68] Congress passed several laws prohibiting activities that interfered with United States foreign policy and the enforcement of federal laws. Those offenses with penalties that included incarceration for more than a year were designated "high misdemeanors."[69] One with lesser punishments was designated merely as a "misdemeanor."[70]

The same understanding continued in American courts during the 1790s. At least six cases including the phrase "high misdemeanor" were decided during that decade. Two merely applied federal statutes designating crimes as high misdemeanors.[71] However, the other four specifically identified crimes of the sort considered high misdemeanors in English law to be such under American law.

Thus, in *State v. Wilson*, a Connecticut court held that stabbing a victim and threatening to murder him constituted high misdemeanors justifying incarceration.[72] In *Bradley's Lessee v. Bradley*, the Supreme Court suggested that by accepting a bribe a juror was guilty of a high misdemeanor[73]—a comment consistent with the established rule that a judge accepting a bribe was guilty of a high misdemeanor.[74] In *Lessee of Culbertson v. Martin*, the Pennsylvania Supreme Court held that another kind of jury tampering—influencing the sheriff's staffing of a jury—was also a high misdemeanor.[75] Finally, in arguing before a South Carolina appeals court, a prosecutor claimed, without contradiction, that an unauthorized return from banishment for treason was a high misdemeanor.[76]

III. Conclusion

The constitutional phrase "high misdemeanors" means non-capital, but serious, crimes, whether statutory or at common law, state or federal. "High misdemeanors" is a higher standard than abuse of power, violation of the public trust, or disregard of the national interest—even though, of course, criminal behavior may breach those standards as well. This conclusion follows from the legal sources.

This conclusion also is confirmed by how it clarifies two uncertainties that otherwise would go unanswered. The first uncertainty is the significance of a colloquy occurring near the end of the 1787 convention. Under consideration was a draft constitution that limited impeachment to treason and bribery. According to Madison, the colloquy proceeded as follows:

> Col. Mason. Why is the provision restrained to Treason & bribery only? Treason as defined in the Constitution will not reach many great and dangerous offences. Hastings is not guilty of Treason. Attempts to subvert the Constitution may not be Treason as above defined—As bills of attainder which have saved the British Constitution are forbidden, it is the more necessary to extend the power of impeachments.

64 2 Farrand, *supra* note 2, at 187-88 (Aug. 6, 1787) (James Madison).

65 *Id.* at 443 (Aug. 28, 1787) (James Madison).

66 *Id.* at 348 (Aug. 20, 1787) (James Madison).

67 An Act to establish the Treasury Department, 2 Annals of Congress, Appendix, 2231, 1 Stat., c. 12 (Sept. 2, 1789).

68 Rhode Island was the thirteenth state to ratify, doing so on May 29, 1790. As a rule I do not consider records arising after that date to be very probative of the meaning of the unamended Constitution. In this case, however, the material is merely corroborative of extensive evidence arising earlier.

69 Thomas Herty, A Digest of the Laws of the United States of America 71-74 (1800) (accepting a commission in foreign military forces; enlisting in a foreign army; outfitting a warship for a foreign government; warring against a nation with which America is at peace; conspiring to impede the operation of law). The statutes are at 3 Stat., c. 50 (Jun. 5, 1794) and 5 Stat., c. 74 (Jul. 14, 1798).

70 Herty, *supra* note 69, at 73 ("augmenting" a foreign warship), 3 Stat., c. 50 (Jun. 5, 1794).

71 United States v. Owners of the Unicorn, 3 Am. Law. J. 188 (D. Md. 1796) (construing 1 Stat. 381, outfitting ship to war on nations with which the U.S. is at peace); United States v. Guinet, 2 U.S. 321 (1795) (convicting one accused under that statute).

72 2 Root 63 (Conn. Super. 1793).

73 4 U.S. 112, 114 (1792).

74 *Supra* note 47 and accompanying text.

75 2 Yeates 433 (Pa. 1799).

76 State v. Fraser, 2 Bay 96 (S.C. Const. Ct. App. 1797) (reporting the prosecution's argument).

He movd. to add after "bribery" "or maladministration" Mr. Gerry seconded him—

Mr Madison So vague a term will be equivalent to a tenure during pleasure of the Senate.

Mr Govr Morris, it will not be put in force & can do no harm—An election of every four years will prevent maladministration.

Col. Mason withdrew "maladministration" & substitutes "other high crimes & misdemeanors" <agst. the State">

On the question thus altered

N. H— ay. Mas. ay— Ct. ay. <N. J. no> Pa no. Del. no. Md ay. Va. ay. N. C. ay. S. C. ay.* Geo. ay. [Ayes — 8; noes — 3.][77]

George Mason seems to have suggested "maladministration" to lower the Constitution's standard for impeachment to the level applied by the House of Commons in the Hastings impeachment.[78]

Mason's proposed standard also had the virtue of being more consistent with the impeachment standards in several state constitutions. Those documents generally prescribed a strong legislature with a dependent executive, and the bar for impeachment was accordingly low. Indeed, the state with the highest standard was Mason's Virginia: "offending against the State, either by mal-administration, corruption, or other means, by which the safety of the State may be endangered."[79] Delaware followed a similar formula,[80] but standards in other states were even lower.[81] Pennsylvania authorized impeachment but prescribed no grounds at all.[82]

The essential problem with Mason's proposal was that it was at odds with the convention's plan for a strong, independent executive; hence the opposition from Madison. In the face of resistance, Mason compromised by offering the phrase "other high crimes & misdemeanors," which the convention accepted. This higher standard was more appropriate for a federal executive that was to be stronger and more independent than the executive of any state.

If "high misdemeanors" are serious crimes, this colloquy makes sense. Mason claimed the grounds for impeachment in the draft were too narrow and offered to widen them significantly. Madison objected, hoping to ensure that the president would not merely serve at "the pleasure of Senate." The parties compromised with language somewhere in the middle.

Equating high misdemeanors with serious crimes also resolves a problem that had long bothered me: In this elegantly written Constitution, why does the Impeachment Clause seem so clumsy?

If we interpret "high misdemeanors" to mean non-criminal conduct, then "Treason, Bribery, or other high Crimes and Misdemeanors" communicates "very serious crimes—and some legal conduct, too." This is both inelegant and violates the ejusdem generis maxim. On the other hand, if we apply the correct meaning of high misdemeanors, then "Treason, Bribery, or other high Crimes and Misdemeanors" provides (1) one example of a high crime (treason), (2) one example of a high misdemeanor (bribery), (3) a general clause covering other high crimes, and (4) a general clause covering other high misdemeanors.

It appears that the endless debate on the meaning of "high misdemeanors" has really been unnecessary: The answer has been available all along.

77 2 Farrand, *supra* note 2 at 550 (Sept. 8, 1787) (James Madison).

78 The Articles of impeachment against Hastings charged him with "high crimes and misdemeanors," but some of those charges really amounted to mal-administration. Perhaps a reason is that at one point Blackstone can be read as equating high misdemeanors in office with mal-administration, 4 William Blackstone, Commentaries *121 ("MISPRISIONS, which are merely positive, are generally denominated contempts or high misdemeanors; of which 1. THE first and principal is the mal-administration of such high officers, as are in public trust and employment."). However, Blackstone could be stating only that committing a high misdemeanor in office is necessarily a form of mal-administration—an inference strengthened by the fact that he otherwise uses "high misdemeanor" in the normal sense of "a serious, but not capital, crime."

Ultimately, the Lords disagreed with the Commons and acquitted Hastings. P.J. Marshall, *Warren Hastings: Colonial Administrator*, Encyclopaedia Britannica, https://www.britannica.com/biography/Warren-Hastings/War-in-India ("It is difficult not to regard this long-drawn-out ordeal as a serious injustice.").

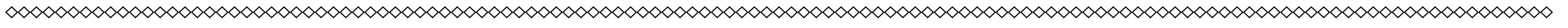
79 Va. Const. of 1776 (unsectioned).

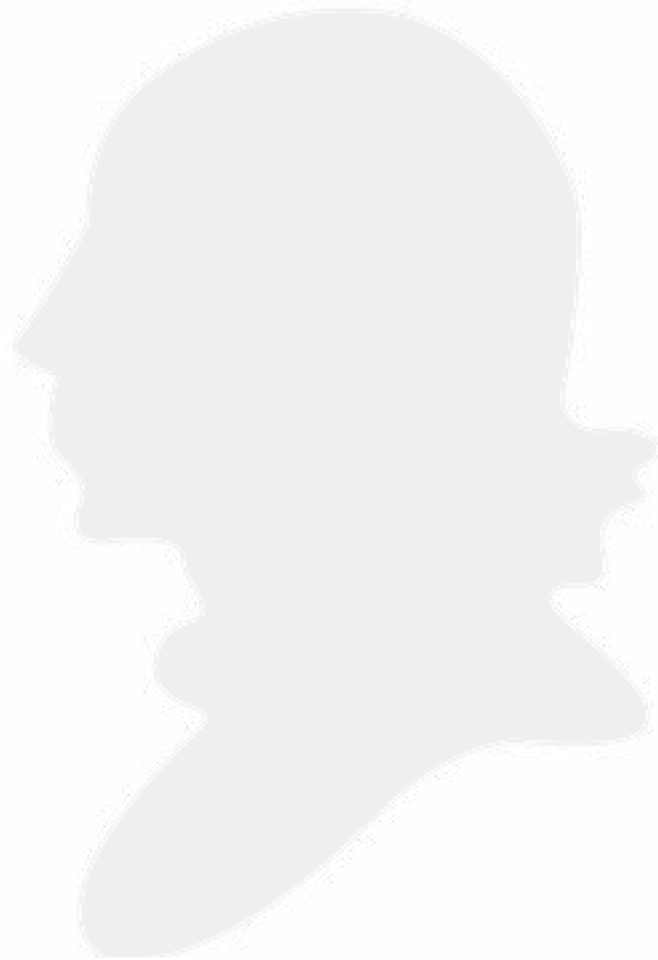
80 Del. Const. of 1776, art. 23 ("maladministration, corruption, or other means, by which the safety of the Commonwealth may be endangered").

81 Md. Const. of 1780, art. VIII ("misconduct and maladminstration"); N.C. Const. of 1776, art. XXII ("violating any part of this Constitution, mal-administration, or corruption"); N.H. Const. of 1784 (unsectioned) ("mal-conduct"); N.J. Const. of 1776, art. XII ("misbehaviour"); N.Y. Const. of 1777, § 33 ("mal and corrupt conduct); S.C. Const. of 1776, § 22 ("mal and corrupt conduct"); Vt. Const. of 1786, § XXI ("mal-administration").

The Georgia constitution did not provide for impeachment and Connecticut and Rhode Island were governed by modified versions of their colonial charters.

82 Pa. Const. of 1776, § 23 ("Every officer of state, whether judicial or executive, shall be liable to be impeached by the general assembly").





The Preemption Predicament Over Broadband Internet Access Services

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Other Views:

• Tom Wheeler, *California Will Have an Open Internet. And So Will Lots Of Other States, Despite The FCC's Decision,* N.Y. Times, Oct. 2, 2019, https://www.nytimes.com/2019/10/02/opinion/net-neutrality-fcc-wheeler.html.

• Jon Brodkin, *FCC's "illogical" claim that broadband isn't telecommunications faces appeal*, Ars Technica, Dec. 13, 2019, https://arstechnica.com/tech-policy/2019/12/fccs-illogical-claim-that-broadband-isnt-telecommunications-faces-appeal/.

• Caitlin Chin, *In the net neutrality debate, what might follow Mozilla v. FCC?*, Brookings Techtank, Oct. 7, 2019, https://www.brookings.edu/blog/techtank/2019/10/07/in-the-net-neutrality-debate-what-might-follow-mozilla-v-fcc/.

Throughout the history of modern telecommunications regulation, there has been an uneasy jurisdictional relationship between the Federal Communications Commission ("FCC") and the fifty states. As a result, complex issues of federalism routinely haunt the broadband debate.[1] A spate of recent court cases speaks to such tensions, and we now find ourselves at another crucial legal juncture in this relationship.

When Congress enacted the Communications Act of 1934, it required the old Bell System monopoly to provide telecommunications services on a common carrier basis.[2] Given the vertically-integrated nature of the Bell System, Congress drew the jurisdictional line between *intra*state telecommunications services (regulated exclusively by the states)[3] and *inter*state telecommunications services (regulated exclusively by the FCC under Title II of the Act).[4] If there was a dispute between state and federal policy regimes, the Commission would invoke what has become known as the "impossibility exception."[5] Under this legal doctrine, the FCC is allowed to preempt state regulation of a service which would otherwise be subject to dual federal and state regulation when (a) it is impossible or impractical to separate the service's intrastate and interstate components and (b) the state regulation interferes with valid federal rules or policies.[6] When the extent of Americans' telecommunications options were pretty much limited to "local" and "long distance" switched telephone service (and you could only get a landline phone from the phone company in basic black), this binary legal regime between interstate and intrastate telecommunications services functioned fairly well.

Starting in the 1980s, however, things began to get a bit more complicated. Enlightened minds at the FCC came to realize that it might be possible to carve out select pieces of the old vertically integrated Bell System monopoly which could potentially sustain

1 *See, e.g.,* L.J. Spiwak, *Federalist Implications of the FCC's Open Internet Order*, Phoenix Center Perspective No. 11-01 (Feb. 8, 2011), http://www.phoenix-center.org/perspectives/Perspective11-01Final.pdf; T.R. Beard, G.S. Ford, L.J. Spiwak, & M. Stern, *A Legal and Economic Primer on Municipal Broadband: Causes and Consequences,* 72 Fed. Comm. L.J. (forthcoming winter 2020); T.R. Beard, G.S. Ford, T.M. Koutsky, & L.J. Spiwak, *Developing A National Wireless Regulatory Framework: A Law and Economics Approach,* 16 CommLaw Conspectus 391 (2008), *available at* https://www.phoenix-center.org/papers/CommLawConspectusNationalWirelessFramework.pdf.

2 *See* 47 U.S.C. § 153(11). In its most simplified form, "common carriage" means any firm that provides service to the public must take all traffic on a non-discriminatory basis.

3 *See* 47 U.S.C. § 153(48).

4 *See* 47 U.S.C. § 151; 47 U.S.C. § 153(28).

5 *See* Louisiana Public Service Commission v. FCC, 476 U.S. 355, 368 (1986).

6 *Id.*

competition. These segments included "enhanced services" (e.g., voicemail), customer premises equipment (e.g., home telephones), terminal equipment (e.g., telephone switching equipment), and, ultimately, long-distance service. To help facilitate these market transitions from monopoly to competition, the Commission embraced a simple and straightforward economic idea: encourage new entry by reducing federal—and, where possible, state—regulatory burdens on new firms.[7] Unfortunately for the Commission, it expressly lacked both clear forbearance and preemption authority under then-current law to meaningfully implement this policy.[8]

This statutory deficiency was remedied by the Telecommunications Act of 1996. Under the then-new Section 10 of the 1996 Act, Congress provided the Commission with a clear statement that it may forbear from enforcing certain statutory provisions of Title II under a delineated set of conditions.[9] And with the then-new Section 253, Congress provided the FCC with a clear mandate that it may preempt states laws and regulations that have "the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[10] Significantly, with the internet still in its nascency, Congress did not want the Commission to be timid with its new deregulatory powers: Congress made it clear in Section 230(b)(2) of the Telecommunications Act that it shall be "policy of the United States" to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation*."[11]

While this new preemption and forbearance statutory authority was certainly welcome, the Commission was essentially limited to a case-by-case approach. As a result, particularly as IP-enabled services such as broadband and Voice over Internet Protocol ("VoIP") took off in the late 1990s, the FCC came to recognize that a case-by-case approach was cumbersome and inadequate to fulfill Congress's directive in Section 230(b)(1) to "promote the continued development of the Internet."[12] To move the ball forward, the Agency adopted a bold, alternative legal strategy: rather than adopt a case-by-case approach to preemption and forbearance—building on the precedent set by its *Computer II Inquiries* for "enhanced services"[13]—the Agency removed IP-enabled services from the ambit of legacy common carrier regulations under Title II altogether by classifying them as "information services" under Title I of the Communications Act[14] "subject to exclusive federal jurisdiction."[15] The hope was that this "light touch" regulatory policy would, in the words of former FCC Chairman Bill Kennard, ensure the "unregulation" of the internet.[16]

States were none too pleased. Despite the FCC's efforts at preemption by nonregulation via Title I classification, over the years many states have nonetheless asserted jurisdiction over information services. But these efforts, for the most part, have been rebuffed by the courts. For example, the Eighth Circuit has twice ruled—in 2007 in *Minnesota Public Utilities Commission v. FCC*[17] and in 2018 in *Charter Advanced Services v. Lange*[18]—that state regulation of a Title I information service "conflicts with the federal policy of nonregulation" and is therefore preempted.

But for those who are interested in the federalism debate in telecom, two recent court opinions—released within three weeks of each other—have thrown a wrench into the FCC's long-standing policy of preemption via nonregulation of Title I information services.

The first case came on October 1, 2019, when the D.C. Circuit released its decision in *Mozilla v. FCC*[19]—the latest case in the long-running net neutrality debate. At issue in *Mozilla* was the legality of the FCC's 2018 *Restoring Internet Freedom Order* (hereinafter "*RIFO*"),[20] which reversed the Obama-era *2015 Open*

7 For a more detailed description of this paradigm, see L.J. Spiwak, *What Hath Congress Wrought? Reorienting Economic Analysis of Telecommunications Markets After The 1996 Act,* 11 Antitrust Mag. 32 (Spring 1997).

8 *See, e.g., Louisiana Public Service Commission*, 476 U.S. at 368-69; MCI Telecommunications Corp. v. American Tel. & Tel. Co., 512 U.S. 218 (1994).

9 47 U.S.C. § 160. For a discussion of the Commission's exercise of that forbearance authority, see, e.g., G.S. Ford & L.J. Spiwak, *Section 10 Forbearance: Asking the Right Questions to Get the Right Answers*, 23 CommLaw Conspectus 126 (2014); L.J. Spiwak, USTelecom *and its Aftermath,* 71 Fed. Comm. L.J. 39 (2019).

10 47 U.S.C. § 253(a).

11 47 U.S.C. § 230(b)(2) (emphasis supplied).

12 47 U.S.C. § 230(b)(1).

13 *See, e.g.*, Computer and Commc'ns Indus. Ass'n v. FCC, 693 F.2d 198, 214–18 (D.C. Cir. 1982) (concluding the FCC may preempt state regulation to promote a federal policy of fostering competition in the market for customer premises equipment).

14 When Congress passed the Telecommunications Act of 1996, it changed the nomenclature from "enhanced services" to "information services." *See* 47 U.S.C. § 153(24). By statute, Title I information services are not subject to common carrier regulation. *See* 47 U.S.C. § 153(51) ("A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services . . .").

15 *See infra* Section I.

16 *The Unregulation of the Internet: Laying a Competitive Course for the Future,* Remarks by FCC Chairman William E. Kennard Before the Federal Communications Bar Northern California Chapter, San Francisco, CA (July 20, 1999), *available at* https://transition.fcc.gov/Speeches/Kennard/spwek924.html). *See also* J. Oxman, *The FCC and the Unregulation of the Internet,* OPP Working Paper No. 31, Office of Plans and Policy, Federal Communications Commission (July 1999), *available at* http://transition.fcc.gov/Bureaus/OPP/working_papers/oppwp31.pdf.

17 483 F.3d 570 (8th Cir. 2007).

18 903 F.3d 715 (8th Cir. 2018), *cert. denied sub nom.,* 589 U.S. __, 140 S. Ct. 6 (2019).

19 Mozilla v. FCC, 940 F.3d 1 (D.C. Cir. 2019), *reh'g en banc denied*, (D.C. Cir. 18-1051) (February 6, 2020).

20 Restoring Internet Freedom, FCC 17-166, 33 FCC Rcd. 311 (rel. January 4, 2018) (Declaratory Ruling, Report, and Order). For more detail on the *Mozilla* case, see *infra* Section III.

Internet Order that imposed Title II on the internet.[21] While the court upheld the Agency's decision to return classification of broadband internet access back to a Title I information service, the court also rejected the Commission's attempt to prophylactically and expressly preempt state efforts to regulate information services in all cases. Although acknowledging that principles of conflict preemption still apply when state laws conflict with federal law, the D.C. Circuit reasoned that because Title I is not an affirmative source of independent regulatory authority (unlike the legacy common carrier ratemaking and conduct provisions of Title II), the Commission "lacked the legal authority to categorically abolish all fifty States' statutorily conferred authority to regulate intrastate communications."[22] In so doing, the court essentially invited states to enact laws and regulations that push the limits of what is a conflict, potentially resulting in a Death by Fifty State Regulatory Cuts for the internet.[23]

Members of the Supreme Court were apparently watching. On October 21, 2019—a mere three weeks after the D.C. Circuit released its decision in *Mozilla*—the Supreme Court denied certiorari in the aforementioned *Charter v. Lange* (the case name became *Lipschultz v. Charter* at the Supreme Court).[24] While most certiorari petitions are addressed per curiam without fanfare, Justice Clarence Thomas, with whom Justice Neil Gorsuch joined, issued a statement concurring in the denial of certiorari.[25] The concurring Justices stated that although they agreed that the Eighth Circuit's decision in *Charter* did not satisfy the criteria for certiorari, they invited an "appropriate case" in which the Court "should consider whether a federal agency's policy can preempt state law."[26] In particular, the Justices were quite skeptical about "whether a federal policy—let alone a policy of nonregulation—is 'Law' for purposes of the Supremacy Clause."[27]

At the time of this writing, parties are contemplating their appellate options for the D.C. Circuit's decision in *Mozilla*. Could *Mozilla* be the case Justices Thomas and Gorsuch have invited? And if the Court does take the case, is the skepticism of Justices Thomas and Gorsuch toward FCC preemption the majority or minority view? It is hard to say. Accordingly, the purpose of this paper is not to prognosticate, but rather to provide a review of the legal history of the FCC's policy of preemption via nonregulation to better understand the competing arguments.

This paper is therefore organized as follows: To provide context for the Commission's approach in its *RIFO* and the D.C. Circuit's ruling in *Mozilla,* Section I provides an abridged history of the FCC's policy of preemption via nonregulation of Title I information services, starting with a discussion of the FCC's seminal 2004 *Pulver Order.* Given this context, Section II provides a brief description of the FCC's approach to preemption by nonregulation in the *RIFO.* Section III summarizes the D.C. Circuit panel majority's rejection of the Agency's preemption efforts in *Mozilla*, as well as the dissent's critiques of the majority's reasoning. Some additional thoughts and observations about the majority's preemption reasoning in *Mozilla* are set forth in Section IV. Section V then looks at the questions raised by Justices Thomas and Gorsuch's separate statement in *Lipschultz v. Charter*. Conclusions are set forth in Section VI.

I. A Simplified History of FCC "Preemption by Nonregulation"

As noted above, in the 1980s, the Commission started to peel off those portions of the old Bell system that it believed were capable of sustaining competition. While the big enchilada was the long-distance market, the FCC also attempted to foster competition for what the FCC described as "enhanced services" such as voicemail via its *Computer Inquiries*, customer premises equipment, and terminal equipment. Regulation is the enemy of competition, so the Commission sought to promote competitive entry by reducing federal—and, where possible, state—regulatory burdens on new firms.

As also noted above, even though Congress granted the Commission the express authority both to forbear from applying certain provisions of the Communications Act and to preempt state laws and regulations under an assortment of legal parameters with the Telecommunications Act of 1996,[28] the FCC recognized that a case-by-case approach to preemption and forbearance was too cumbersome to fulfill the directive in Section 230(b)(1) to "promote the continued development of the Internet."[29] So the Agency moved boldly: rather than adopt a case-by-case approach to preemption and forbearance, the Agency took IP-enabled services out of the ambit of Title II regulation altogether by classifying them as "information services" under Title I of the Communications Act "subject to exclusive federal jurisdiction." The Agency's efforts to preempt regulation of IP-enabled services by intentional nonregulation began in earnest with its seminal 2004 "*Pulver Order*"[30]—a template the Commission then proceeded to apply to an assortment of other IP-based services.[31]

A. The Pulver Order

At issue in the *Pulver Order* was whether pulver.com's "Free World Dial-up" ("FWD")—a predecessor to online messaging services such as Skype, Facetime, and Facebook Messenger—was an "unregulated information service subject to the Commission's

21 *See infra* note 61.

22 *Mozilla,* 940 F.3d at 86.

23 *C.f.,* T. Wheeler, *California Will Have an Open Internet. And So Will Lots Of Other States, Despite The FCC's Decision,* N.Y. Times, Oct. 2, 2019, *available at* https://www.nytimes.com/2019/10/02/opinion/net-neutrality-fcc-wheeler.html.

24 Lipschultz v. Charter, 589 U.S. __, 140 S. Ct. 6 (2019).

25 *Id.*

26 *Id.* at 7.

27 *Id.*

28 *See supra* notes 9 and 10.

29 47 U.S.C. § 230(b)(1).

30 *See, e.g.,* Petition for Declaratory Ruling that Pulver.Com's Free World Dialup is Neither Telecommunications nor a Telecommunications Service, FCC 04-27, 19 FCC Rcd. 3307 (rel. February 19, 2004) (Memorandum Opinion and Order) (hereinafter "*Pulver Order*").

31 *See infra* Section I.B.

jurisdiction."[32] The Commission ruled that it was. In so doing, the Commission held that state regulation was therefore preempted because "any state regulations that seek to treat FWD as a telecommunications service or otherwise subject it to public-utility type regulation would almost certainly pose a conflict with our policy of nonregulation."[33]

According to the Commission, two separate lines of reasoning compelled its determination that Title I services are subject to exclusive federal jurisdiction. First, the Commission argued that federal authority is "preeminent in the area of information services, and particularly in the area of the Internet and other interactive computer services, which Congress has explicitly stated should remain free of regulation."[34] And second, the Agency reasoned that "state-by-state regulation of a wholly Internet-based service is inconsistent with the controlling federal role over interstate commerce required by the Constitution."[35] Let's look briefly at both of the Commission's contentions.

As to the first rationale, the Commission argued that in the Telecommunications Act of 1996 "Congress expressed its clear preference for a national policy 'to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services' unfettered by Federal or State regulation."[36] While the Commission recognized that at the time of this order most states had not "acted to produce an outright conflict between federal and state law that justifies Commission preemption," the Commission held that it "does have the authority to act in this area if states promulgate regulations applicable to FWD's service that are inconsistent with its current nonregulated status."[37]

As to the Commission's second rationale, the Commission pointed out that it was quite a stretch to argue that FWD was a "purely intrastate" information service, or even that it was "practically and economically possible" to separate FWD into interstate and intrastate components.[38] As it was impossible to separate interstate traffic from intrastate traffic in this case, the Commission held, consistent with its precedent, that the service should be considered an interstate service.[39] Accordingly, reasoned the Commission, because the Commerce Clause denies "the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce," an "attempt by a state to regulate any theoretical intrastate FWD component [is] an impermissible extraterritorial reach."[40]

The FCC also proffered several compelling policy reasons as to why state jurisdiction should be preempted in this case. For example, the Commission noted that absent preemption, it could not "envision how state economic regulation of the FWD service described in this proceeding could benefit the public."[41] In contrast, argued the Commission, "the burdens upon interstate commerce would be significant."[42] As the Commission observed, given the way the internet works,

> Even if it were relevant and possible to track the geographic location of packets and isolate traffic for the purpose of ascertaining state jurisdiction over a theoretical intrastate component of an otherwise integrated bit stream, such efforts would be impractical. Tracking FWD's packets to determine their geographic location would involve the installation of systems that are unrelated to providing its service to end users. Rather, imposing such compliance costs on providers such as Pulver would be designed simply to comply with legacy distinctions between the federal and state jurisdictions."[43]

Furthermore, the Commission reiterated a familiar (and proven) refrain: in the absence of preemption, FWD "would have to satisfy the requirements of more than 50 state and other jurisdictions with more than 50 different certification, tariffing and other regulatory obligations."[44] As such, the Agency pointed out that

> allowing the imposition of state regulation would eliminate any benefit of using the Internet to provide the service: the Internet enables individuals and small providers, such as Pulver, to reach a global market simply by attaching a server to the Internet; requiring Pulver to submit to more than 50 different regulatory regimes as soon as it did so would eliminate this fundamental advantage of IP-based communication.[45]

Thus, concluded the Commission, "it is this kind of impact Congress considered when it made clear statements about leaving the Internet and interactive computer services free of unnecessary federal and state regulation noted above."[46]

Finally, the Commission observed (albeit in a footnote) that even though it was declaring FWD to be a Title I information service, that decision did not mean that it was abdicating its jurisdiction under the Communications Act altogether. As the Commission noted, even though "Congress has clearly indicated that information services are not subject to the economic and entry/exit regulation inherent in Title II," Congress has nonetheless provided "the Commission with ancillary authority under Title I to impose such regulations as may be necessary to carry out its other mandates under the Act."[47]

32 *Pulver Order, supra* note 30 at ¶ 1.

33 *Id.* at ¶ 15.

34 *Id.* at ¶ 16

35 *Id.*

36 *Id.* at ¶ 18 (citations omitted).

37 *Id.*

38 *Id.* at ¶ 20.

39 *Id.* at ¶ 22.

40 *Id.* at ¶ 23.

41 *Id.* at ¶ 24.

42 *Id.*

43 *Id.*

44 *Id.* at ¶ 25.

45 *Id.*

46 *Id.*

47 *Id.* at ¶ 69.

B. "Preemption by Nonregulation" Goes Full Bore: The FCC Reclassifies An Assortment of Broadband Internet Access Services as "Information Services" Under Title I

With the precedent of preemption by nonregulation in the *Pulver Order* thus established, the FCC stuck to its guns and went full bore under its new legal template. Over the next several years, the Agency proceeded to declare a variety of IP-enabled services to be information services under Title I subject to exclusive federal jurisdiction, including cable modem service,[48] wireline broadband service,[49] wireless broadband service,[50] and even Broadband over Powerline Service.[51] Yet notwithstanding the clear interstate nature of the internet and IP-enabled services, as highlighted below, state efforts to regulate broadband nonetheless continue to this day.

C. The Courts Weigh In on the FCC's Policy of "Preemption by Nonregulation" of IP Services

As noted above, there are two related Eighth Circuit cases which deal directly with the FCC's efforts to preempt by nonregulation state regulation of Title I information services—*Minnesota Public Utilities Commission v. FCC*[52] and *Charter v. Lange*.[53] Both are briefly discussed below.

1. *Minnesota Public Utilities Commission v. FCC*

The central issue in *Minnesota Public Utilities Commission* was whether state regulation of VoIP services was preempted. Although the FCC refused (and continues to refuse) to make a definite ruling on whether VoIP is an information service under Title I or a telecommunications service under Title II, the FCC argued that under the "impossibility exception" set out by the Supreme Court in *Louisiana Public Service Commission*, it had the authority to preempt state regulation because it was impossible and impractical to separate the intrastate components of VoIP service from its interstate components. The Eighth Circuit agreed.

First, the court agreed with the Commission that given the nature of IP-enabled services, it was impossible to separate the interstate and intrastate components. Among other observations, the Agency noted that there was no "practical means . . . of directly or indirectly identifying the geographic location of a [VoIP] subscriber."[54] Similarly, the court agreed with the Commission that communications over the internet are very different from traditional landline-to-landline telephone calls because of the multiple service features which might come into play during a VoIP call. Finally, the Court upheld the Commission's conclusion that the economic burden of forcing providers to identify the geographic endpoints of a VoIP service and separate them into their interstate and intrastate components far outweighed the benefits. As the court noted, "[s]ervice providers are not required to develop a mechanism for distinguishing between interstate and intrastate communications merely to provide state commissions with an intrastate communication they can then regulate," and the "Communications Act does not require 'construction of wholly independent intrastate and interstate networks.'"[55]

Second, the court agreed with the Commission's finding that state regulation of VoIP services would interfere with valid federal rules or policies. As the court observed,

> The FCC has promoted a market-oriented policy allowing providers of information services to "burgeon and flourish in an environment of free give-and-take of the marketplace without the need for and possible burden of rules, regulations and licensing requirements." Thus, any state regulation of an information service conflicts with the federal policy of nonregulation.[56]

But there was more. As the court further observed:

> The FCC's conclusions regarding the conflicts between state regulation and federal policy deserve "weight"—the agency has a "thorough understanding of its own [regulatory framework] and its objectives and is uniquely qualified to comprehend the likely impact of state requirements." Competition and deregulation are valid federal interests the FCC may protect through preemption of state regulation.[57]

The court in *Minnesota Public Utilities Commission* only focused on the validity of the impossibility exception and never reached a definitive ruling that state regulation of a Title I information service is preempted under the FCC's policy of nonregulation. But the Eighth Circuit took that next step in *Charter v. Lange*.

2. *Charter Advanced Services v. Lange*

A little over a decade after the Eighth Circuit ruled against the Minnesota Public Utility Commission, the state regulator was back at it in *Charter v. Lange*.[58] At issue, again, was whether VoIP should be considered a telecommunications service (and thus subject to potential regulation at the state level) or an information service (and thus state regulation would be preempted). Because the FCC had steadfastly refused to decide one way or the other, the Eighth Circuit stepped into the void and ruled that VoIP was an information service under Title I of the Communications

48 Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, 17 FCC Rcd. 4798, 4802-4803, ¶ 9, 2002 WL 407567 (2002), *aff'd* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Services, 545 U.S. 967 (2005).

49 Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, FCC 05-150, 20 FCC Rcd. 14853, 14862 (2005), *aff'd* Time Warner Telecom, Inc. v. FCC, 507 F.3d 205 (3d Cir. 2007).

50 Appropriate Reg. Treatment for Broadband Access to the Internet over Wireless Networks, FCC 07-30, 22 FCC Rcd. 5901 (2007).

51 United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service, FCC 06-165, 21 FCC Rcd. 13281, 13281 (2006).

52 *Minnesota Public Utilities Commission*, *supra* note 17.

53 *Lange, supra* note 18.

54 *Minnesota Public Utilities Commission*, 483 F.3d at 578 (citations omitted).

55 *Id.*

56 *Id.* at 580 (citations omitted)

57 *Id.* (citing Geier v. Am. Honda Motor Co., 529 U.S. 861, 883, 120 S. Ct. 1913, 146 L.Ed.2d 914 (2000) (internal quotations and citations omitted)).

58 *Supra* note 18.

Act.[59] Citing its earlier decision in *Minnesota Public Utilities Commission*, the court concluded once again that "'any state regulation of an information service conflicts with the federal policy of nonregulation,' so that such regulation is preempted by federal law."[60]

II. "Preemption by Nonregulation" Continues: The FCC's 2018 *Restoring Internet Freedom Order*

As highlighted above, for nearly two decades, the FCC on a bipartisan basis had classified broadband internet access as a lightly regulated information service under Title I of the Communications Act of 1934 subject to exclusive federal jurisdiction. The one aberration in this policy came in 2015, when the FCC under the leadership of Chairman Tom Wheeler reclassified broadband internet access back to a common carrier service under Title II of the Communications Act in order to provide legal justification for the imposition of federal net neutrality regulation.[61]

Although there were great arguments over the legal merits and economic effects of reclassification in 2015, it is notable that one policy remained constant: the Commission never wavered from its belief that the American consumer would not benefit from a hodgepodge of different regulatory regimes and that it was therefore better to establish a nationwide "comprehensive regulatory framework governing broadband Internet access services."[62] Understanding that putting broadband internet access back under the umbrella of legacy common carrier regulations of Title II could open the door to aggressive state regulation (and taxation) of the internet,[63] the Commission in its *2015 Open Internet Order* announced its "firm intention to exercise our preemption authority to preclude states from imposing obligations on broadband service that are inconsistent with the carefully tailored regulatory scheme we adopt in this Order."[64] Unlike the *RIFO*, however, the *2015 Open Internet Order* said the Commission would make such preemption decisions "on a case-by-case basis in light of the fact specific nature of particular preemption inquiries."[65]

The Obama administration's policy of applying legacy common carrier regulation to the internet did not last long. Finding that imposing rules designed for the old Bell monopoly on the internet had a negative effect on broadband investment, in 2018 the Trump administration's FCC reversed the *2015 Open Internet Order* with its *RIFO* and returned broadband internet access back to a "light touch" regulatory regime under Title I subject to exclusive federal jurisdiction.[66]

Given its long-standing policy of preemption by nonregulation of Title I information services, no doubt the Commission thought this question closed. It was wrong. Once again, the politics of net neutrality forced the Commission in its *RIFO* to tackle the thorny issue of potential aggressive state regulation of the internet. To address this question, the Commission returned to its time-tested argument on preemption by again recognizing that:

> Allowing state and local governments to adopt their own separate requirements, which could impose far greater burdens than the federal regulatory regime, could significantly disrupt the balance we strike here. Federal courts have uniformly held that an affirmative federal policy of deregulation is entitled to the same preemptive effect as a federal policy of regulation. In addition, allowing state or local regulation of broadband Internet access service could impair the provision of such service by requiring each ISP to comply with a patchwork of separate and potentially conflicting requirements across all of the different jurisdictions in which it operates.[67]

The Commission also reiterated its longstanding view that "regulation of broadband Internet access service should be governed principally by a uniform set of federal regulations, rather than by a patchwork that includes separate state and local requirements."[68] It therefore concluded that it was exercising its "authority to preempt any state or local requirements that are inconsistent with the federal deregulatory approach we adopt today."[69] In particular, the Commission preempted "any state or local measures that would effectively impose rules or requirements that we have repealed or decided to refrain from imposing in this order or that would impose more stringent requirements for any aspect of broadband service that we address in this order."[70]

The Commission offered up two familiar legal arguments in support of its position: First, that it was entitled to invoke the impossibility exception as articulated by the Supreme Court in *Louisiana Public Service Commission v. FCC*,[71] and second, that the Commission has independent authority to displace state and

59 *Lange,* 903 F.3d at 719.

60 *Id.* at 718 (citations omitted).

61 Protecting and Promoting the Open Internet, FCC 10-201, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015), *aff'd* United States Telecom Ass'n v. FCC, 825 F.3d 674 (D.C. Cir. 2016), *pet. for rehearing en banc denied,* 855 F.3d 381 (2017), *cert. denied,* 139 S. Ct. 453 (2018) (hereinafter "*2015 Open Internet Order*"). For a thorough critique of the legal gymnastics used in these decisions, see L.J. Spiwak, USTelecom *and its Aftermath, supra* note 9.

62 *2015 Open Internet Order, supra* note 61 at ¶ 433.

63 *See, e.g., Federalist Implications of the FCC's Open Internet Order, supra* note 1; *see also* City of Eugene v. Comcast*,* 359 Or. 528 (2016) (finding that with the FCC's reclassification of broadband internet access as a telecommunications service in the *2015 Open Internet Order,* the City of Eugene, Oregon was entitled to impose a license fee on cable modem service on top of the cable franchise fee already paid by Comcast).

64 *2015 Open Internet Order, supra* note 61 at ¶ 433.

65 *Id.* Interestingly, in the one paragraph in the *2015 Open Internet Order* where the Commission discusses preemption, the agency provided no citation showing that its preemption authority derives from Section 253. *Id.*

66 *RIFO, supra* note 20 at ¶¶ 95-98.

67 *Id.*

68 *Id.* at ¶ 194.

69 *Id.*

70 *Id.* at ¶ 195.

71 476 U.S. at 375 n.4.

local regulations in accordance with the longstanding federal policy of nonregulation for information services. Each argument is briefly summarized below.

A. The Impossibility Exception

As noted above, under the impossibility exception to state jurisdiction, the FCC may preempt state law when (a) it is impossible or impractical to regulate the intrastate aspects of a service without affecting interstate communications and (b) the Commission determines that such regulation would interfere with federal regulatory objectives.[72] According to the Commission, the facts of this case satisfied both conditions "because state and local regulation of the aspects of broadband Internet access service . . . would interfere with the balanced federal regulatory scheme" contained in the *RIFO*.[73]

The Commission argued that because both interstate and intrastate communications can travel over the same internet connection (and indeed may do so in response to a single query from a consumer), "it is impossible or impracticable for Internet Service Providers ("ISPs") to distinguish between intrastate and interstate communications over the Internet or to apply different rules in each circumstance."[74] As such, reasoned the Commission, ISPs "generally could not comply with state or local rules for intrastate communications without applying the same rules to interstate communications."[75] Accordingly, because the Commission found that any effort by states to regulate intrastate traffic would interfere with its treatment of interstate traffic, it considered the first condition for conflict preemption under the impossibility exception to be satisfied.[76] For similar reasons, the Commission found the second condition for the impossibility exception to be satisfied because "state and local regulation of the aspects of broadband Internet access service . . . would interfere with the balanced federal regulatory scheme" adopted in the *RIFO*.[77]

B. Federal Policy of Nonregulation

The Commission also reiterated its argument that it has independent authority to displace state and local regulations in accordance with the longstanding federal policy of nonregulation for information services.[78] According to the Commission, multiple provisions of the 1996 Act "confirm Congress's approval of our preemptive federal policy of nonregulation for information services."[79] For example, the Commission pointed to Section 230(b)(2) of the Act, as added by the Telecommunications Act of 1996, which declares it to be "the policy of the United States" to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services"—including "any information service"—"unfettered by Federal or State regulation."[80] The Commission also pointed to Section 3(51) of the Act, which provides that a communications service provider "shall be treated as a common carrier under [this Act] only to the extent that it is engaged in providing telecommunications services."[81] As the Commission highlighted, this statutory language "forbids any common-carriage regulation, whether federal or state, of information services."[82]

Finally, the Commission argued that its "preemption authority finds further support in the Act's forbearance provision[s]" contained in Section 10 of the Communications Act.[83] Under Section 10(e), "A State commission may not continue to apply or enforce any provision of this chapter that the Commission has determined to forbear from applying under subsection (a) of this section."[84] In the Commission's view, it would be

> incongruous if state and local regulation were preempted when the Commission decides to forbear from a provision that would otherwise apply, or if the Commission adopts a regulation and then forbears from it, but not preempted when the Commission determines that a requirement does not apply in the first place.[85]

Indeed, argued the Commission, nothing "in the Act suggests that Congress intended for state or local governments to be able to countermand a federal policy of nonregulation or to possess any greater authority over broadband Internet access service than that exercised by the federal government."[86]

C. The States Respond to the RIFO

Needless to say, advocates for aggressive regulation of the internet were not thrilled with the FCC's *RIFO*. They launched a two-pronged counterattack. First, seeking more politically friendly forums, these advocates shifted their attention to state legislatures.[87] Some of these efforts proved successful. For example, New Jersey, Oregon, Vermont, and Washington have all enacted legislation or adopted resolutions supporting the regulation of the internet.[88] Most notably, in 2018 California

72 *See supra* note 6.

73 *RIFO, supra* note 20 at ¶ 198.

74 *Id.* at ¶ 200.

75 *Id.*

76 *Id.*

77 *Id.* at ¶ 201.

78 *Id.* at ¶ 202.

79 *Id.* at ¶ 203.

80 *Id.* (citing 47 U.S.C. § 253(b)(2)).

81 47 U.S.C. § 153(51).

82 *RIFO, supra* note 20 at ¶ 203 (citations omitted).

83 *Id.* at ¶ 204 (citing 47 U.S.C. § 160(e)).

84 *Id.*

85 *Id.*

86 *Id.*

87 *See, e.g.*, Fight for the Future, *These States Are Fighting for Net Neutrality. Is Yours One of Them?* (visited Jan. 28, 2020), https://actionnetwork.org/petitions/these-states-are-fighting-for-net-neutrality-is-yours-one-of-them.

88 H. Morton, *Net Neutrality Legislation in States,* National Conference of State Legislatures (Jan. 23, 2019), *available at* https://www.ncsl.org/research/telecommunications-and-information-technology/net-neutrality-legislation-in-states.aspx.

passed a sweeping net neutrality law which, by some accounts, went well-beyond the FCC's *2015 Open Internet Order* by, among other things, banning "zero rating" of broadband services.[89] As of this writing, the Vermont and California laws are both in litigation, and both states have agreed to suspend enforcement until the appeals process for the D.C. Circuit's ruling in *Mozilla* is ultimately resolved.[90] The second prong of the counterattack, as detailed in the next section, involved the *Mozilla v. FCC* lawsuit, in which several states successfully challenged the Commission's preemption efforts.

III. Throwing a Wrench into Precedent: The D.C. Circuit's Ruling in *Mozilla v. FCC*

As with all other net neutrality rulings from the FCC, the *RIFO* was appealed. Grounding its decision in the Supreme Court's ruling in *Brand X*,[91] the D.C. Circuit in *Mozilla* affirmed the Agency's decision to re-reclassify broadband internet access back to a Title I information service.[92] But, to the surprise of many, the court also rejected the Commission's statutory preemption arguments, thereby opening the door for state and local governments to regulate where the FCC has purposely refrained from doing so. The latter ruling destroyed the FCC's nearly twenty-year belief that it had the authority to expressly and broadly preempt all state regulation by classifying something as a Title I information service subject to exclusive federal regulation. This section summarizes the majority's reasoning and the dissent's critiques in *Mozilla*.

A. Per Curiam Majority Opinion

At bottom, the D.C. Circuit in *Mozilla* struck down the FCC's efforts to preempt prospectively all state regulation of the internet via reclassification—or, as the court came to call it, the FCC's "Preemption Directive"—because, in the court's view, the "Commission ignored binding precedent by failing to ground its sweeping Preemption Directive . . . in a lawful source of statutory authority."[93] This lack of statutory authority, reasoned the court, was "fatal" to the Commission's effort to invoke express preemption.[94]

1. Statutory Abdication

The crux of the court's decision was its determination that when the FCC deliberately placed "broadband *outside* of its Title II jurisdiction" by reclassifying it as a Title I information service,[95] the Commission had essentially abdicated *all* legal authority (express or ancillary) under Title II.[96] In the court's words, the agency's efforts to preempt state regulation of broadband "could not possibly be an exercise of the Commission's express statutory authority" under the Communications Act.[97] Thus, for example, the court rejected the FCC's argument that it had express authority to preempt because Congress did not "statutorily grant the Commission freestanding preemption authority to displace state laws . . . in areas in which it does not otherwise have regulatory power."[98] Following the same reasoning, the court rejected the argument that the Commission's Preemption Directive was supported by ancillary jurisdiction because the Agency had specifically disavowed all of its authority under Title II by reclassifying broadband internet access as a Title I information service. In other words, the Agency's abdication meant that there was no longer any specific statutory authority to which the Commission's preemption efforts could be ancillary.[99]

The court then went on to use this finding of statutory abdication to reject specifically the Agency's two asserted legal theories of preemption: the impossibility exception and the policy of federal nonregulation.

As to the former, the court reasoned that the FCC's use of the impossibility exception failed because "[a]ll the impossibility exception does is help police the line between those communications matters falling under the Commission's authority

89 *See, e.g.,* Remarks of FCC Chairman Ajit Pai at the Maine Heritage Policy Center, Portland, Me (Sept. 14, 2018), *available at* https://docs.fcc.gov/public/attachments/DOC-354099A1.pdf. For those unfamiliar with the term, a common example of "zero rating" would be when a carrier exempted particular data from counting against a user's data cap.

90 *See, e.g.,* H. Kelly, *California Just Passed Its Net Neutrality Law. The DOJ Is Already Suing,* CNN Business (Oct. 1, 2018), *available at* https://www.cnn.com/2018/10/01/tech/california-net-neutrality-law/index.html; K. Finley, *California Will Pause Net Neutrality Law for Federal Suit,* Wired, Oct. 26, 2018, *available at* https://www.wired.com/story/california-will-pause-net-neutrality-law-for-federal-suit. J. Eggerton, *ISPs, Vermont Agree to Delay Net Neutrality Preemption Fight, Court Agrees to Stay Case Until Net Neutrality Decision,* Broadcasting and Cable (March 18, 2019), *available at* https://www.broadcastingcable.com/news/isps-vermont-agree-to-delay-net-neutrality-preemption-fight.

91 *Brand X*, 545 U.S. at 980–81.

92 *Mozilla*, *supra* note 19. As this article was going to press, Justice Thomas—the author of *Brand X*—dropped another bombshell in his dissent in *Baldwin v. United States,* 140 S. Ct. 690 (2020). The Justice asked the Court to revisit *Brand X* because has he has come to believe that his earlier reasoning "appears to be inconsistent with the Constitution, the Administrative Procedure Act (APA), and traditional tools of statutory interpretation." *Id.* at 690. Needless to say, any revision of *Brand X* would have direct and significant consequences for the first portion of the majority's reasoning in *Mozilla.* Discussion of this question is mercifully beyond the scope of this paper.

93 *Mozilla*, 940 F.3d at 74.

94 *Id.*

95 *Id.* at 76 (emphasis in original). The court also observed that the Commission similarly placed broadband outside of the definition of "radio transmission" under Title III and a "cable service" under Title VI. *Id.* at 75.

96 *Id.*

97 *Id.*

98 *Id.* at 76.

99 *Id.* Under well-established law, courts do not consider Title I to be an independent source of regulatory authority. As such, ancillary jurisdiction exists only when "(1) the Commission's general jurisdictional grant under Title I of the Communications Act covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities." Courts generally take this to mean those "statutorily mandated responsibilities" dictated by Titles II, III, or VI of the Act. *Mozilla,* 940 F.3d at 76. For a full discussion of the Commission's ancillary jurisdiction, see L.J. Spiwak, *What Are the Bounds of the FCC's Authority over Broadband Service Providers?—A Review of the Recent Case Law,* 18 J. Internet Law 1 (2015).

. . . and those remaining within the States' wheelhouse."[100] "In other words," reasoned the court, "the impossibility exception presupposes the existence of statutory authority to regulate; it does not serve as a substitute for that necessary delegation of power from Congress."[101]

As to the latter, the court also found that the Agency's lack of statutory authority could not sustain the Commission's argument that states were preempted due to a "federal policy of nonregulation for information services."[102] As noted above, the Agency in its *RIFO* had argued that it would be

> incongruous if state and local regulation were preempted when the Commission decides to forbear from a provision that would otherwise apply, or if the Commission adopts a regulation and then forbears from it, but not preempted when the Commission determines that a requirement does not apply in the first place.[103]

But the court did not bite. According to the court, "because the [*RIFO*] took broadband out of Title II . . . the Commission is not 'forbear[ing] from applying any provision' of the Act to a Title II technology."[104] As the court observed, Congress

> chose to house affirmative regulatory authority in Titles II, III, and VI, and not in Title I. And it is Congress to which the Constitution assigns the power to set the metes and bounds of agency authority, especially when agency authority would otherwise tramp on the power of States to act within their own borders.[105]

Accordingly, the court ruled that because the FCC took broadband out from under the rubric of Title II, "[n]o matter how desirous of protecting their policy judgments, agency officials cannot invest themselves with power that Congress has not conferred."[106] Indeed, reasoned the court, if "Congress wanted Title I to vest the Commission with some form of Dormant Commerce-Clause-like power to negate States' statutory (and sovereign) authority just by washing its hands of its own regulatory authority, Congress could have said so."[107]

2. Leaving Open the Door to Conflict Preemption

Notwithstanding the above, the court seemed to leave the door open to a future claim of conflict preemption, under which those portions of the *RIFO* that the court did uphold (including the information service classification and the elimination of most net neutrality mandates) would preclude the application of inconsistent state laws. As an initial matter, the court found that "because a conflict preemption analysis 'involves fact-intensive inquiries,' it 'mandates deferral of review until an actual preemption of a specific state regulation occurs.'"[108] Yet in this particular case, the court held that "[w]ithout the facts of any alleged conflict before us, we cannot begin to make a conflict-preemption assessment in this case, let alone a categorical determination that any and all forms of state regulation of intrastate broadband would inevitably conflict with the [*RIFO*]."[109] Still, the court ruled that if "the Commission can explain how a state practice actually undermines the [*RIFO*], then it can invoke conflict preemption."[110] As the court pointed out,

> What matters for present purposes is that, *on this record*, the Commission has made no showing that wiping out all "state or local requirements that are inconsistent with the [*RIFO*'s] federal deregulatory approach" is necessary to give its reclassification effect. And binding Supreme Court precedent says that mere worries that a policy will be "frustrate[d]" by "jurisdictional tensions" inherent in the Federal Communications Act's division of regulatory power between the federal government and the States does not create preemption authority.[111]

But until this case is brought before it (or another court), the court ruled that concurrent state and federal regulation of the internet "can co-exist as the Federal Communications Act envisions."[112]

B. Judge Williams' Dissent

In an extensive dissent, Judge Stephen Williams took great exception to the majority's reasoning vis-à-vis express preemption. At bottom, Judge Williams simply could not get his head around the majority's reasoning that the Commission lacked any authority to preempt state regulation once it decided to "step[] off the Title II escalator and choose[] Title I." As Judge Williams observed, the majority's statutory abdication logic puts "the Commission in paradoxical bind. The Commission could create an effective federal policy controlling communications brought under Title II, within a considerable range of intrusiveness, but if it finds the light-touch associated with Title I more apt, it then de facto yields authority over interstate communications to the states."[113]

While Judge Williams agreed with the majority that (1) congressional authority was an essential prerequisite to preemption, and that (2) Congress did not afford the Agency *express* authority to preempt, Judge Williams pointed out that, under Supreme Court precedent, "a federal agency's authority to

100 *Mozilla*, 940 F.3d at 77 (citations omitted).

101 *Id.* at 78.

102 *Id.*

103 *RIFO, supra* note 20 at ¶ 204.

104 *Mozilla*, 940 F.3d at 79.

105 *Id.* at 83

106 *Id.*

107 *Id.*

108 *Id.* at 81-82 (quoting Alascom, Inc. v. F.C.C., 727 F.2d 1212, 1220 (D.C. Cir. 1984)).

109 *Id.* at 82. As noted above in Section II, even though the Commission had a legally cleaner preemption argument under Section 253 in its *2015 Open Internet Order*, the agency did not attempt a sweeping preemption of all state regulation but instead opted for a case-by-case approach.

110 *Id.* at 85 (citations omitted).

111 *Id.* (emphasis supplied and citations omitted).

112 *Id.*

113 *Id.* at 98.

preempt state law need not be expressly granted."[114] And in this particular case, Judge Williams argued that

> the statute, its history and its interpretation give ample reason to infer a congressional intent that the Commission be authorized to preempt state laws that would make it 'impossible or impracticable' for ISPs to exercise the freedom that the Commission meant to secure by classifying broadband under Title I.[115]

Indeed, argued Judge Williams, for the majority to assume "without explanation that in allowing the Commission a choice between full-throttled regulation under Title II and very light regulation under Title I Congress had *no interest* in making sure that the Commission could, if it exercised the latter choice, establish an effective *national* broadband policy" simply makes no sense.[116] Stating the matter bluntly, Judge Williams wrote that the majority believed that "for an intrusive regulatory regime an agency's preemptive power can be inferred, while a deregulatory regime is a Cinderella-like waif, and can be protected from state interference only if Congress expressly reaches out its protective hand."[117]

To bring clarity to his argument, Judge Williams posited a simple rhetorical question: do "we see preemption as serving to protect the federal *regulations* from state frustration or to protect federal choice of a *regulatory regime* from state frustration."[118] In Judge Williams' view, the "majority staunchly believes that preemption serves solely to protect *affirmative* federal *regulations*."[119] Judge Williams contended that the majority's view was in error because:

> If an agency decides that a robust regulatory scheme is apt in a given sector (say, under Title II), the majority is ready to infer authority to preempt. But . . . if the agency determines that an industry will flourish best under competitive market norms and accordingly adopts a "light-touch" path, preemption is suddenly superfluous *because* the agency now has less "power to regulate services."[120]

In fact, argued Judge Williams, the practical effect of the majority's view that "*only* an agency's possession of affirmative regulatory authority can support authority to preempt state regulation" is that "because of the impossibility of separation," state regulation—which nominally applies only to intrastate communications—would "in practice engulf[] interstate communications."[121]

Judge Williams also had other issues with the majority's statutory abdication logic. For example, Judge Williams argued that if one were to follow the majority's statutory abdication reasoning to its logical conclusion, it would—despite the majority's dicta that it would entertain a potential conflict preemption argument—"render any conflict unimaginable."[122] In the majority's view, argued Judge Williams, "preemption is utterly dependent on the Commission's affirmative regulatory authority and cannot depend on its authority to apply a deregulatory regime to broadband."[123] As such, "when the Commission adopts a deregulatory regime under Title I, there's no there there."[124] Indeed, argued the judge, "if the handwaving toward conflict preemption is to mean anything, it requires a vision of a Commission exercise of power with which some state regulation could actually conflict. This the majority denies absolutely."[125]

Along the same lines, Judge Williams argued that the majority's statutory abdication logic also took any possibility of using ancillary jurisdiction as a source of preemption authority off the table. As Judge Williams noted, for the Commission to exercise ancillary authority, the Commission's actions must be "'reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities,' which are *exclusively* its responsibilities under Title II, III, at [sic] VI of the Act."[126] But as Judge Williams observed, the problem is that under the majority's interpretation of the law:

> There is no room in this concept for authority to establish a regulatory regime for broadband as an information service—meaning, given the extreme paucity of affirmative regulatory authority under Title I, a highly deregulatory regime. For the majority, the observation that by "reclassifying broadband as an information service, the Commission placed broadband *outside* of its Title II jurisdiction," is pretty much the end of the game. The majority conspicuously never offers an explanation of how a state regulation could ever conflict with the federal white space to which its reasoning consigns broadband.[127]

Finally, Judge Williams argued that the majority's statutory abdication logic was, in his words, "inapplicable."[128] As Judge Williams explained, given the D.C. Circuit's ruling in *USTelecom v. FCC*,[129] the Commission has authority to apply Title II to broadband. But by returning broadband internet access back to a Title I information service, the Commission simply "forswore any *current* intention to use Title II vis-à-vis broadband."[130] In other words, even though the FCC returned broadband internet access back to its original classification, "the authority to reclassify broadband back under Title II, and thus to subject it to all the

114 *Id.* at 96 (citations omitted).

115 *Id.* (citations omitted).

116 *Id.* at 100 (emphasis in original).

117 *Id.* at 104-05.

118 *Id.* at 99 (emphasis in original).

119 *Id.* (emphasis in original).

120 *Id.* at 99-100.

121 *Id.* at 100 (emphasis in original).

122 *Id.* at 106.

123 *Id.*

124 *Id.*

125 *Id.*

126 *Id.* (citations omitted and emphasis in original).

127 *Id.* (citations omitted).

128 *Id.* at 101.

129 825 F.3d 674.

130 *Mozilla*, 940 F.3d at 101.

authorities granted under Title II, remained."[131] Accordingly, argued Judge Williams, "*the Commission's choice not to exercise a power is not a permanent renunciation of that power.*"[132]

IV. Some Additional Thoughts and Observations on *Mozilla*

In addition to Judge William's critiques, there are a few other glaring oddities in the majority's reasoning on preemption that bear highlighting.

A. Problem #1: The Majority in Mozilla *Erroneously Believes There is an "Intrastate" Internet*

After digesting the majority's decision in *Mozilla,* it becomes clear that the majority's entire reasoning rests upon a single factual predicate—i.e., that there is a viable and indispensable intrastate component to the operation of the internet that states are free to regulate. As the court wrote, the FCC's efforts to "kick the States out of intrastate broadband regulation . . . overlooks the Communications Act's vision of dual federal-state authority and cooperation in this area specifically."[133] This factual predicate is simply wrong.

To begin, it is unclear exactly where in the Communications Act the court finds support for such a predicate—the statutes the majority points to for support offer no help. These provisions include 47 U.S.C. § 1301 et. seq., which basically sets up the broadband mapping and affiliated grant program under the 2008 Broadband Data Improvement Act; the now-hortatory Section 706 from the Telecommunications Act of 1996 (a reclassification, ironically, approved by the majority in *Mozilla*[134]); and Section 254 of the Communications Act, which deals with universal service.[135] While these assorted statutes do provide states with a role to work cooperatively with the FCC in areas of subsidy collection and distribution, the notion that these statutes provide a clear statement by Congress that each respective state should be able to regulate as it pleases the rates, terms and conditions—and, by extension, the network management practices of ISPs—over what is obviously an interstate service strains credulity.

More directly, the majority's factual predicate bears no relationship to how the internet actually works. As highlighted in the cases discussed in this article, for almost twenty years the Commission has repeatedly demonstrated the absurdity of the court's belief that there is a separate and distinct intrastate component to the internet.[136] Indeed, noted Judge Williams, if "Internet communications were tidily divided into federal markets and readily severable state markets, this might be no problem. But no modern user of the Internet can believe for a second in such tidy isolation . . ."[137] Given the D.C. Circuit's past practice of according great deference to the Commission's factual findings in other net neutrality litigation (deference often to the point of absurdity[138]), it is quite odd that the court petulantly rejected the Agency's expert determination that broadband internet access is an interstate service—a view that the Agency has articulated consistently and repeatedly for nearly twenty years—in this particular case.[139] Either the D.C. Circuit wants to operate (as Judge Williams wrote) in the "real world" or it does not.[140]

B. Problem #2: The D.C. Circuit Takes An Analyically Inconsistent View of the FCC's Alleged Statutory Abdication of its Title II Authority

As noted in Section II.A.1, the majority in *Mozilla* rejected the argument that the Commission's Preemption Directive was supported by ancillary jurisdiction because the Agency had specifically disavowed its authority under Title II by reclassifying broadband Internet access as a Title I information service and that therefore there was no specific statutory authority to which the Commission's preemption efforts were ancillary.[141] While this conclusion was perhaps made easier for the court because the Commission never claimed ancillary authority for its Preemption Directive in the *RIFO* or in its briefs,[142] it is hard to reconcile the court's hostility to the use of ancillary jurisdiction for preemption purposes with its finding that it was perfectly acceptable for the Commission to adopt its transparency rule under Section 257 of the Communications Act.

By way of background, a central component of the *RIFO* was the Commission's adoption of a transparency rule. Under this rule,

> Any person providing broadband Internet access service shall publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services sufficient to enable consumers to make informed choices regarding the purchase

131 *Id.*

132 *Id.* (emphasis supplied); *cf.,* Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375, 384 (1983) ("[A] federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision to regulate.") (emphasis in original). Judge Williams' argument apparently touched a nerve with the majority, whose opinion disagreed with any suggestion by Judge Williams that its holding on express preemption would prevent the application of conflict preemption when "the Commission can explain how a state practice actually undermines" portions of the *RIFO* the court upheld (including the information service classification and the elimination of most net neutrality mandates). *See supra* note 110.

133 *Mozilla*, 940 F.3d at 80-81.

134 *Id.* at 45-46. Prior to the *RIFO*, the Commission ruled, and the D.C. Circuit affirmed, that Section 706 provided an independent and affirmative grant of regulatory authority. For the bounds, and ultimately the abuses, of that authority, see Spiwak, *What Are the Bounds of the FCC's Authority over Broadband Service Providers?*, *supra* note 99; and Spiwak, USTelecom *and its Aftermath, supra* note 9.

135 *Mozilla,* 940 F.3d at 81 (citations omitted).

136 *See, e.g.,* the discussions of the *Pulver Order*, *supra* Section I.A, and the *RIFO, supra* Section II.

137 *Mozilla,* 940 F.3d at 95.

138 *See* Spiwak, USTelecom *and its Aftermath, supra* note 9.

139 *C.f. id.*

140 *Mozilla,* 940 F.3d at 95.

141 *Id.*

142 *Id.* at 76. Why the Commission adopted this legal strategy is unclear, particularly as the agency made the specific point in the *Pulver Order* that it retained its ancillary jurisdiction authority over Title I services. *See supra* note 47 and accompanying text.

> and use of such services and entrepreneurs and other small businesses to develop, market, and maintain Internet offerings. Such disclosure shall be made via a publicly available, easily accessible website or through transmittal to the Commission.[143]

The Commission's legal logic behind this transparency rule was straightforward: By requiring ISPs to outline their business practices and service offerings forthrightly and honestly, if ISPs nonetheless engaged in anticompetitive, unfair, or deceptive conduct in violation of these stated terms, then the Federal Trade Commission could take action under Section 5 of the FTC Act.[144]

To justify the imposition of the transparency rule, the Commission relied upon Section 257 of the Communications Act—a statutory provision which falls squarely under Title II.[145] Section 257(a) directs the Commission to "identify[] and eliminat[e] . . . market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services, or in the provision of parts or services to providers of telecommunications services and information services." Section 257(a) set a deadline of 15 months from the enactment of the 1996 Act for the Commission's initial effort to fulfill its mandate, and Section 257(c) directs the Commission, triennially thereafter, to report to Congress on such marketplace barriers and how they have been addressed by regulation or could be addressed by recommended statutory changes.[146]

The Commission reasoned that Section 257(c) is properly understood as imposing a continuing obligation on the Agency to identify barriers described in section 257(a) that may emerge in the future, rather than limited to those identified in the original section 257(a) proceeding. In the Commission's view, "because Sections 257(a) and (c) clearly anticipate that the Commission and Congress would take steps to help eliminate previously-identified marketplace barriers, limiting the triennial reports only to those barriers identified in the original section 257(a) proceeding could make such reports of little to no ongoing value over time."[147] Accordingly, the Commission found it

> far more reasonable to interpret section 257(c) as contemplating that the Commission will perform an ongoing market review to identify any new barriers to entry, and that the statutory duty to "identify and eliminate" implicitly empowers the Commission to require disclosures from those third parties who possess the information necessary for the Commission and Congress to find and remedy market entry barriers.[148]

As such, argued the Commission, its use of Section 257 was justified because "[o]ur disclosure requirements will help us both identify and address potential market entry barriers in the provision and ownership of information services and the provision of parts and services to information service providers."[149]

Yet despite the majority's steadfast view that preemption of state regulation of the internet was inappropriate because the Commission had abdicated all authority under Title II, the majority nonetheless accepted the Commission's Section 257 argument and upheld the transparency rule. To do so, the court drew water from the *Chevron* deference well: finding that the relevant language in Section 257 is sufficiently ambiguous—in particular, that Congress did not prescribe the means of "identifying" market barriers—the majority found that the Commission permissibly read the clause to apply only to the elimination of market barriers.[150]

But the logical problem with the majority's decisions is readily apparent: On the one hand the court's entire preemption argument rests upon the finding that the Commission affirmatively abdicated *all* authority under Title II, yet at the same time the court found it perfectly acceptable for the Commission to base its transparency rule on Section 257—a section of the statute which is unambiguously housed in Title II. The majority should not be allowed to have its cake and eat it too.

C. Problem #3: Absent Preemption, What About Extra-Jurisdictional Effects From Inconsistent State Regulation?

Another striking point about the majority's reasoning in *Mozilla* was a conspicuous absence of any discussion of Dormant Commerce Clause implications. Indeed, one does not have to be an expert to understand that allowing each state to regulate the rates, terms, and conditions of ISPs' service offerings as it deems fit will have adverse extra-jurisdictional effects on interstate commerce. The FCC recognized this problem nearly twenty years ago in the *Pulver Order*, and the economics of broadband deployment have not changed since then. When, as here, these extra-jurisdictional effects are significant, courts have not hesitated to hold that preemption is appropriate.[151]

A 2008 paper published in *CommLaw Conspectus* explains clearly the problem of having providers of a national service comply with different state rules—some of which may even go farther than the national rules.[152] As the paper's economic model details, when state law applies to a product or service that is actually national in scope such as telecommunications or the internet, even if each state acts with the purest of intentions to protect their respective constituents' interests, there is the risk of harmful conflicts in the rules as the states will inevitably vary in their legal regimes. As a result, there will be extra-jurisdictional

143 *RIFO, supra* note 20 at ¶ 215.

144 *See generally id.* at ¶ 244.

145 47 U.S.C. § 257.

146 *Id.*

147 *RIFO, supra* note 20 at ¶ 232.

148 *Id.*

149 *Id.* at ¶ 233.

150 *Mozilla*, 940 F.3d at 47.

151 *See, e.g.,* Cotto Waxo Co. v. Williams, 46 F.3d 790, 793 (8th Cir. 1995) ("Under the Commerce Clause, a state regulation is *per se* invalid when it has an 'extraterritorial reach,' that is, when the statute has the practical effect of controlling conduct beyond the boundaries of the state. The Commerce Clause precludes application of a state statute to commerce that takes place wholly outside of the state's borders.") (citation omitted).

152 *See Developing a National Wireless Regulatory Framework: A Law and Economics Approach, supra* note 1.

effects of state-by-state regulation on a national service, making society worse off. To quote former FCC Chief Economist Michael Katz on state-level business rules, "policies that make entry difficult in one geographic area may raise the overall cost of entering the industry and thus reduce the speed at which entry occurs in other areas."[153] Accordingly, when state and local regulation can spill across borders, economic theory dictates that society is typically better off with a single national regulatory framework.

More to the point, firms are not passive recipients of regulation. If we have learned anything from the FCC's 2015 efforts to impose legacy common carrier regulation on the internet at the federal level, it is that firms will not invest aggressively in the massive sunk costs necessary to widely deploy broadband when their economic profits are threatened.[154] Given this evidence, it is not unreasonable to expect that a potential Death by Fifty State Regulatory Cuts will send a similar chilling effect on the investment decision of ISPs. Accordingly, it strains credulity to argue that allowing the aggressive and, more importantly, *inconsistent* regulation of the internet from fifty different states will do anything to fulfill the congressional mandate in Section 230 for the FCC to "promote the continued development of the Internet"[155] and the now-hortatory command in Section 706 for the Agency to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."[156]

D. Problem #4: Under the Majority's Own Logic, the Communications Act Argues for "Catagorical" Express Premption

As noted above in Section II.A, the majority in *Mozilla* rejected the Commission's categorical express preemption of state internet regulation because the Agency "fail[ed] to ground its sweeping Preemption Directive . . . in a lawful source of statutory authority" in Title II.[157] However, while the majority would not condone the Agency's efforts to categorically preempt state regulation in the *RIFO*, it seemed to hold open the door to entertaining future arguments about possible conflict preemption provided the Commission could make a specific showing of where state rules conflict with its federal policy of nonregulation by classifying broadband internet access as an information service under Title I. But if the court is going to be a stickler for forcing the Commission to remain within the four corners of Title I, then the court cannot sweep Section 3(51) of the Act under the rug when trying to solve questions of conflict preemption. Indeed, if Section 3(51) is to have any meaning, then a conflict between state and federal policy regimes is right in front of our eyes and we need not to wait for future litigation.

Under the express terms of Section 3(51), a communications service provider "shall be treated as a common carrier under [this Act] only to the extent that it is engaged in providing telecommunications services."[158] In other words, the Communications Act expressly prohibits an information service from being treated as a common carrier service.[159] As noted above, this is why for nearly twenty years the Commission made the affirmative decision to classify broadband internet access as a Title I information service: to ensure specifically that such offerings would not be subject to common carrier price regulation by either subsequent Commissions or state governments.[160]

But consider a scenario in which, despite the FCC's classification of broadband internet access as a Title I information service, some states nonetheless decide to pass laws that would allow their respective public service commissions to regulate the price, terms, and conditions of ISPs. In so doing, these states are—by definition—attempting to treat information services as common carriers despite the FCC's decision to impose the contrary result.[161] Such state efforts should be considered prima facie evidence of a categorical conflict between state and federal policy regimes, making individual showings of conflict preemption unnecessary and wasteful of the judiciary's

153 M.L. Katz, *Regulation: The Next 1000 Years,* in Six Degrees Of Competition: Correlating Regulation With The Telecommunications Marketplace 27, 44 (2000).

154 G.S. Ford, *Regulation and investment in the U.S. telecommunications industry,* 56 Applied Economics 6073-6084 (2018), *available at* https://www.tandfonline.com/doi/abs/10.1080/00036846.2018.1489115.

155 47 U.S.C. § 230(b)(1).

156 47 U.S.C. § 1302(a). Whether the Court will view this investment problem through a Dormant Commerce Clause lens or as a policy dispute better left to Congress remains to be seen. *C.f., Louisiana Public Service Commission*, 476 U.S. at 359; Nixon v. Missouri Municipal League, 541 U.S. 124, 131-32 (2004) ("[I]t is well to put aside" the public policy arguments favoring municipal broadband to support any "generous conception of preemption" because the issue of preemption is one of constitutional law and, as such, "the issue does not turn on the merits of municipal telecommunications services.").

157 *Mozilla,* 940 F.3d at 74.

158 47 U.S.C. § 153(51).

159 In fact, the agency's attempt to effectively treat Title I services as common carriers was the central reason why the D.C. Circuit struck down the FCC's 2010 net neutrality rules in *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

160 *See supra* Section I. Contrary to popular belief, net neutrality regulation is unambiguously price regulation of the internet. As the D.C. Circuit in *Verizon v. FCC*—and ultimately the Commission in its *RIFO*—expressly recognized, the central pillars of the agency's *2015 Open Internet Order*—i.e., the "no paid prioritization" rule and the "no blocking" rule—amounted to nothing more than "zero price" rate regulation. *See Verizon*, 740 F.3d at 657 (such rules were intended to "bar providers from charging edge providers for using their service, thus forcing them to sell this service to all who ask at a price of $0."); *Id.* at 668 (Silberman, J., dissenting) (with intent, the Commission's rules establish "a regulated price of zero"); *RIFO, supra* note 20 at ¶ 101 (The *2015 Open Internet Order* "imposed price regulation with its ban on paid prioritization arrangements, which mandated that ISPs charge edge providers a zero price."). For a full discussion, see G.S Ford and L.J. Spiwak, *Tariffing Internet Termination,* 67 Fed. Comm. L.J. 1 (2015), *available at* http://www.fclj.org/wp-content/uploads/2015/02/Tariffing-Internet-Termination.pdf; Spiwak, USTelecom *and its Aftermath, supra* note 9. Accordingly, one could argue that the Commission's decision not to impose price regulation on broadband internet access in the *RIFO* was not an act of regulatory abdication of its responsibilities under Title I; instead, the Commission's decision was a laudable act of deregulatory precision. *Cf., Arkansas Electric*, *supra* note 132.

161 Indeed, the D.C. Circuit in *Verizon v. FCC*, specifically held that the FCC may not classify broadband internet access as a Title I service yet effectively attempt to regulate it as a common carrier service under Title II. 740 F.3d 623.

resources.[162] The *Mozilla* majority recognized that the FCC's information service classification might well establish a predicate for applying conflict preemption—e.g., in an individual case involving a state law that imposes common carrier obligations on broadband providers despite their federally recognized status as information service providers. But the court should have taken the next logical step of recognizing the categorical conflict that exists in such circumstances without requiring case-by-case adjudications.

V. Questions Raised by Justice Thomas in *Lipschultz v. Charter*

As highlighted above in Section I, shortly after the D.C. Circuit released its ruling in *Mozilla*, Justice Thomas—with whom Justice Gorsuch joined—issued a very interesting separate statement concurring in the Court's denial of certiorari in *Lipschultz v. Charter*. In this statement, Justice Thomas invited an appropriate case in which the Court "should consider whether a federal agency's policy can preempt state law."[163]

Justice Thomas began his invitation by pointing out that under the Supremacy Clause of the Constitution, the "Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[164] In Justice Thomas' view, this Clause contains a non obstante provision—"a common device used by 18th-century legislatures to signal the implied repeal of conflicting statutes"—and, as such, "[a]t the time of the founding, this Clause would have been understood to pre-empt state law only if the law logically contradicted the 'Constitution' [or] the 'Laws of the United States.'"[165] However, argued Justice Thomas, it

> is doubtful whether a federal policy—let alone a policy of nonregulation—is "Law" for purposes of the Supremacy Clause. Under our precedent, such a policy likely is not final agency action because it does not mark "the consummation of the agency's decisionmaking process" or determine Charter's "rights or obligations."

Moreover, Justice Thomas posited that even "if it were final agency action, the Supremacy Clause 'requires that pre-emptive effect be given only to those federal standards and policies that are set forth in, or necessarily follow from, the statutory text that was produced through the constitutionally required bicameral and presentment procedures.'"[166] Accordingly, reasoned Justice Thomas,

> Giving pre-emptive effect to a federal agency policy of nonregulation thus expands the power of both the Executive and the Judiciary. It authorizes the Executive to make "Law" by declining to act, and it authorizes the courts to conduct "a freewheeling judicial inquiry" into the facts of federal nonregulation, rather than the constitutionally proper "inquiry into whether the ordinary meanings of state and federal law conflict."[167]

Given the remarkably coincidental timing with the D.C. Circuit's ruling in *Mozilla* (along with the similar legal issues), is *Mozilla* the case Justice Thomas invited in *Lipschultz*? And if one of the *Mozilla* parties files for certiorari and the Supreme Court takes the case, are Justices Thomas and Gorsuch endorsing the majority's view in *Mozilla* that by "stepping off the Title II escalator," the FCC lacks any preemption authority because Title I is not an affirmative grant of authority "that was produced through the constitutionally required bicameral and presentment procedures"? It is impossible to know for sure and, given that *Mozilla* is still in litigation as of this writing, it would be inappropriate to comment further. But Justices Thomas and Gorsuch have given interested parties much to ponder as we wait to see what will happen as the *Mozilla* case proceeds.

VI. Conclusion

For nearly two decades, the notion that IP-enabled services should be treated as information services under Title I of the Communications Act subject to exclusive federal jurisdiction was a cornerstone of federal broadband policy. With the D.C. Circuit's ruling in *Mozilla*, the legality of this policy is now in dispute. Adding to this legal uncertainty, shortly after the D.C. Circuit released its decision in *Mozilla*, two Supreme Court Justices invited an "appropriate case" in which the Court "should consider whether a federal agency's policy can preempt state law." Where this litigation ultimately ends up is anyone's guess.

But as the courts wrangle through the complex issue of preemption in this case, one thing is for sure: these legal uncertainties regarding the appropriate jurisdictional roles of the states and the federal government vis-à-vis the internet do not benefit the American consumer. Unresolved questions over the appropriate respective jurisdictions of the federal government and the states over the internet—and, in particular, the FCC's ability to preempt state regulatory efforts—will do nothing to increase broadband deployment or win the proverbial "race for 5G." As noted above, firms are not passive recipients of regulation and the prospect of a potential Death by Fifty State Regulatory Cuts will chill investment of ISPs.[168]

Of course, the obvious option is for Congress to step in with bipartisan and comprehensive net neutrality legislation which includes clear federal preemption authority to end this dispute once and for all. It did so with Section 253 of the Telecommunications Act of 1996 for telecommunications services and could easily do the same for IP-enabled information services under Title I.

Unfortunately, given the vitriolic politics of broadband, the obvious path is rarely the one taken in Washington.

162 The FCC alluded to this exact fact scenario in the *RIFO*. *See supra* at Section II.

163 *Lipschultz,* 140 S. Ct. at 7.

164 *See* U.S. Const., art. VI, cl. 2.

165 *Lipschultz,* 140 S. Ct. at 7 (citations omitted).

166 *Id.* (citations omitted).

167 *Id.* at 8 (citations omitted).

168 Ford, *supra* note 154.

To Bear Arms for Self-Defense: A "Right of the People" or a Privilege of the Few?

By Stephen P. Halbrook

Civil Rights Practice Group

Part One of a Two-Part Series

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Note from the Editor:

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Other Views:

- Peruta v. County of San Diego, 824 F.3d 919 (9th Cir. 2016) (en banc), *available at* https://cdn.ca9.uscourts.gov/datastore/opinions/2016/06/09/10-56971.pdf.
- Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History versus Ahistorical Standards of Review*, 60 Clev. St. L. Rev. 1, 43 (2012), *available at* https://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=1001&context=clevstlrev.
- Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. Davis L. Rev. 309 (1998), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1465114.

During oral argument in the seminal case of *District of Columbia v. Heller*, Supreme Court Justice Anthony Kennedy asked counsel for the government whether the Second Amendment's second clause—"the right of the people to keep and bear arms"[1]—concerned something besides the militia. When counsel replied that those words referred only to "a military context," Justice Kennedy appeared to disagree by asking the further question, "It had nothing to do with the concern of the remote settler to defend himself and his family against hostile Indian tribes and outlaws, wolves and bears and grizzlies and things like that?"[2] This question suggested that he read the Amendment to protect individual rights. But it also implied that the right extends outside the home, where unfriendly humans and animals would be encountered.

On April 19, 1775, a group of Americans bearing their own firearms stood before a contingent of British Redcoat soldiers representing the greatest military power on Earth. These Americans did not bear arms in their living rooms or before their fireplaces, but carried and bore their private firearms prominently in public—specifically, on the town common of Concord, Massachusetts. In Ralph Waldo Emerson's words: "Here once the embattled farmers stood / And fired the shot heard round the world."[3] Thus was launched the American Revolution and, before long, a new country that became the United States of America.

The Founders who drafted the Bill of Rights in 1789 recalled the British efforts to confiscate private firearms from the American colonists as well as the use of such firearms to start and help win the American Revolution. They were also well aware that the same firearms were used for protection against persons and wild animals that would do harm. They would thus enshrine in the Second Amendment the right to bear arms.

In this article, I address the extent to which the Second Amendment guarantee that "the right of the people to . . . bear arms, shall not be infringed" protects the liberty to carry firearms outside the home for self-defense or other lawful purposes.

Today, the overwhelming majority of states already recognize a right to carry a loaded and unlocked handgun in public, either with or without a license and subject to place restrictions. Only six states—California, Hawaii, Maryland, Massachusetts, New Jersey, and New York—grant discretion to the government, acting through law enforcement agencies, to restrict that right to only those few persons it decides "need" or have "good cause" to carry a firearm. These outlier states make it a felony to bear arms for self-defense and routinely incarcerate their own citizens and

1 "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." U.S. Const., amend. II.

2 Transcript of Argument, *District of Columbia v. Heller*, No. 07-290, at 8 (Mar. 18, 2008).

3 Ralph Waldo Emerson, *Concord Hymn* (1837).

unsuspecting travelers for gun possession. These discretionary licensing schemes have become a major issue in Second Amendment litigation, with some federal circuits upholding such laws and others invalidating them.

The right to bear arms has deep roots in America's history and tradition. It was considered a right of Englishmen, and the American Founders extended its scope, as they did with other rights recognized in the state and federal constitutions. In the antebellum period, going armed was no offense unless it was done in a manner and with the intent to terrorize others. State laws prohibiting the carrying of concealed weapons were upheld on the basis that open carry was lawful. Slaves were generally prohibited from having arms altogether, and in the Southern states, free persons of color were prohibited from keeping or carrying arms unless they had a license issued at the discretion of the government. After the Civil War, the Fourteenth Amendment sought to extend the right to bear arms and other fundamental rights to all Americans.

Today, the handful of states that prohibit carrying arms are the distinct minority. Open carry requires no permit in thirty states, requires a permit in fifteen states, and is prohibited in only five states.[4] Forty-one states (arguably forty-four) and the District of Columbia, are "shall issue" states, which means that permits to carry concealed firearms on one's person are available to all law-abiding persons who meet training or other requirements. Vermont does not issue permits, but both concealed and open carry are lawful. Nine states have "constitutional carry," meaning that both concealed and open carry without a permit are lawful. Only eight states (arguably six) are "may issue," i.e., officials may issue a permit if they decide a person "needs" to carry a firearm.[5] It is in those "may issue" states where the question of whether the Second Amendment literally guarantees the right to "bear arms" is in litigation, mostly in the federal courts.

The U.S. Supreme Court has yet to speak directly on whether "may issue" regimes in these outlier states are constitutional, but in *District of Columbia v. Heller* (2008)[6] and *McDonald v. Chicago* (2010)[7] it had a lot to say about the meaning of the right to *bear* arms. The lower courts upholding carry restrictions have misapplied these precedents to state laws that limit the right to bear arms to a privileged elite. Well before those decisions, state courts decided numerous cases on the nature of the right to bear arms, most often under state bills of rights.

This paper is divided into two parts. Part One begins with an analysis of the text of the Second Amendment. What could be confusing about the prohibition on "the infringement" of "the right," not the privilege, of "the people," not a tiny elite, to "bear arms"? Some of the recent lower court decisions seem to suggest that judges in the outlier states find the text either confusing or irrelevant.

Second, the English origins of the right are traced. The Statute of Northampton of 1328, which was construed in a 1686 precedent as prohibiting one from going armed in a manner to terrify one's fellow subjects, is today advanced by courts in these minority jurisdictions as somehow overriding the right to bear arms. But the Declaration of Rights of 1689 recognized the right of Protestants to "have Arms for their Defence" as allowed by the common law. The Americans would expand on this and other rights of Englishmen.

Third, this paper analyzes the right to bear arms at the American Founding and in the early Republic. While the right was constitutionalized in state bills of rights and the Second Amendment, going armed in a manner that terrorized others was considered an offence under certain statutes and the common law. Some states restricted the carrying of concealed weapons, but open carry was recognized as a constitutional right. Yet slaves were subject to near total bans on possession or carrying of arms, while free persons of color were subject to discretionary licensing requirements under which officials would determine their suitability to bear arms.

Part Two of this paper (which will be published separately) begins when slavery was abolished after the Civil War and the Southern states began enacting the black codes that applied discretionary licensing regimes to all African Americans. Congress sought to protect the right to bear arms for all through the Civil Rights and Freedmen's Bureau Acts of 1866. The Fourteenth Amendment was proposed and ratified to protect the right to keep and bear arms from state violation, and the Civil Rights Act of 1871 provided for enforcement of the right. The courts responded with mixed results to carry bans that were enacted during Reconstruction and in the Jim Crow and Anti-Immigrant eras.

Next, this paper addresses state judicial decisions in the modern era that found carry bans to violate the right to bear arms. We then delve into the U.S. Supreme Court's opinions in *Heller*, which held that to "bear arms" means to carry them and rejected the use of interest balancing tests by courts; *McDonald*, which found the right protected under the Second Amendment to be fundamental and not a second-class right; and *Caetano*, which assumed the right to exist outside the home.

Since *Heller* was decided and the issue moved to the federal courts, some circuits have found discretionary issuance laws to violate the right to keep and bear arms as a textual matter. Others have upheld the denial of the right to ordinary citizens under a limbo-like version of intermediate scrutiny—already rejected by the Supreme Court—asking how low the standard can go.

The most extreme example of a restriction and of a judicial decision to uphold it was New York City's rule prohibiting the transport of a handgun from one's licensed premises to other locations and the Second Circuit's upholding of the rule because a police official said such transport would violate public safety. After the Supreme Court granted certiorari in the case, the City revised the law in an effort to moot the case. Oral argument, which focused on standing, took place in December 2019. However that case turns out, petitions are pending in various carry cases.[8]

4 *Open Carry*, OpenCarry.org https://opencarry.org/maps/map-open-carry-of-a-properly-holstered-loaded-handgun/.

5 *Concealed Carry Permit Information By State*, USA Carry, https://www.usacarry.com/concealed_carry_permit_information.html.

6 District of Columbia v. Heller, 554 U.S. 570 (2008).

7 McDonald v. City of Chicago, 561 U.S. 742, 780 (2010).

8 For various approaches to the issue, see Joseph Greenlee, *Concealed Carry and the Right to Bear Arms*, 20 Federalist Soc'y Rev. 32 (2019).

I. What's Confusing About "the right of *the people* to . . . *bear* Arms"?

The Second Amendment unequivocally guarantees the right of "the people" to "bear arms": "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."[9] This guarantees not only the right to "keep" arms, such as in one's house, but also to "bear" arms, i.e., to carry arms without reference to a specific place. If the framers meant to protect nothing more than keeping arms in the home, there would have been no point in including a right to bear arms.

Textually, the right to keep and bear arms is no more restricted to the home than are the First Amendment rights to the free exercise of religion, freedom of speech and the press, and "the right of the people peaceably to assemble, and to petition the government for a redress of grievances." Exercise of those rights might be restricted in some government buildings or on private property, but it may not be limited to one's house.

When a provision of the Bill of Rights is restricted to a house, it says so—the Third Amendment's restrictions on quartering soldiers "in any house" do not apply to buildings that are not houses.[10] Nothing in the Second Amendment's text limits bearing arms to one's house, a place where the right to "keep" arms fits more appropriately. The Fourth Amendment mentions houses, but also refers to other entities or things in protecting "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ."[11]

The unitary phrase "the right of the people" appears in the First, Second, and Fourth Amendments. The right to assemble and petition the government for a redress of grievances, and security from unreasonable searches and seizures, are rights of the people, and may not be limited to a select few determined by government officials to have a special need. So too, "the right of the people to . . . bear arms" extends to the populace at large and is not restricted to a subset of people favored by government to bear arms. "The people" who have "rights" reappear in the Ninth Amendment: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[12] Whatever those rights are, they extend to the people at large and may not be denied or disparaged to all except an elite chosen by government.

When a subset of "the people" is intended, the Bill of Rights is clear. The Second Amendment itself distinguishes "the people" from the subset "well regulated militia." A subset of the militia appears in the Fifth Amendment, which exempts "the militia, when in actual service in time of War or public danger," from the requirement of an indictment to answer for serious crimes.[13] That would occur when the militia is called forth "to execute the laws of the Union, suppress insurrections and repel invasions."[14] The distinction is thus made between "the people" at large (who have the "right" to bear arms), the general "well regulated militia," and that part of the militia "when in actual service."

The amendments related to criminal procedure also refer to specific subsets of the people. The Fifth Amendment refers to persons held to answer for certain crimes, subjected to jeopardy, who have rights against self-incrimination and to due process, and from whom private property is taken. The Sixth Amendment refers to the rights of the accused in criminal prosecutions. The Eighth Amendment only applies to persons subject to bail, fines, and punishments. All of these provisions refer to protections for persons who are identified and targeted by the government to deprive them of life, liberty, or property.

But "the right of the people" to assemble, bear arms, be secure from unreasonable searches, and retain unenumerated rights is not limited to a subset of the people chosen by the government to enjoy special privileges.

Despite that clear text, a number of courts engage in judicial hocus pocus, call it "intermediate scrutiny," and hold that "the people" in fact have no "right" to bear arms. But in the words of Justice Frankfurter, "To view a particular provision of the Bill of Rights with disfavor inevitably results in a constricted application of it. This is to disrespect the Constitution."[15]

II. English Origins

A. The Statute of Northampton and the Common Law Prohibited Only the Carrying of Arms In a Manner to Terrorize Others

The American Revolution began in part because the colonists sought to protect what they perceived to be the rights of Englishmen. Later, the Bill of Rights expanded on those rights and guarded them from legislative violation. The Americans took from the English common law and developed it into their own, and the common law as refined by Americans entailed a right peaceably to go armed, but not to do so in a manner to terrorize others.

Edward III's Statute of Northampton of 1328 provided that no person shall "come before the King's Justices . . . with force and arms, nor bring no force in affray of the peace, nor to go nor ride armed by night nor by day, in Fairs, Markets, nor in the presence of the Justices or other Ministers, nor in no part elsewhere . . . ."[16] Some commentators suggest that this decree of a monarch, written three-quarters of a century before Chaucer's *Canterbury Tales*, supersedes the explicit language of the Second Amendment.[17] Some courts cite it to justify upholding

9 U.S. Const., amend. II.

10 U.S. Const., amend. III ("No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.").

11 U.S. Const., amend. IV.

12 U.S. Const., amend. IX.

13 U.S. Const., amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger . . . .").

14 "The Congress shall have power . . . To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel Invasions." U.S. Const., art. I, § 8, cl. 15.

15 Ullmann v. United States, 350 U.S. 422, 428-29 (1956).

16 2 Edw. III c. 3 (1328).

17 "What does the Statute of Northampton provide us in terms of evaluating the protective scope of the Second Amendment outside the home? The answer is armed individual self-defense outside the home deserves

discretionary licensing regimes.[18] But case law opining on the meaning of the Statute actually supports the right peaceably to bear arms outside the home.

The leading (and only) judicial precedent on the Statute known to the American Founders involved the prosecution of Sir John Knight in 1686. The information alleged that the Statute prohibited persons "from going or riding armed in affray of peace," and that Knight "did walk about the streets armed with guns, and that he went into the church of St. Michael, in Bristol, in the time of divine service, with a gun, to terrify the King's subjects, *contra formam statuti*."[19] The case was tried, and Knight was acquitted. The Chief Justice said that the meaning of the Statute "was to punish people who go armed to terrify the King's subjects."[20] He also stated, "But tho' this statute be almost gone in desuetudinem [disuse], yet where the crime shall appear to be malo animo [with evil intent], it will come within the Act (tho' now there be a general connivance to gentlemen to ride armed for their security) . . . ."[21]

Why was Knight found not guilty? He had walked in the streets and gone into a church service with a gun. But the crime was not simply going or riding armed. The other element of the crime was that one must do so "to terrify the King's subjects," with "malo animo," and "in affray of peace." Nothing in the evidence suggested that he had threatened anyone, brandished a weapon, or started a fight. He had gone armed, but that did not suffice.[22]

William Hawkins, in an exposition of affrays in his *Treatise of the Pleas of the Crown* (first published in 1716), commented that "no wearing of arms is within the meaning of the statute [of Northampton] unless it be accompanied with such circumstances as are apt to terrify the people," adding that "persons of quality are in no danger of offending against this statute by wearing common weapons . . . ."[23] The same general rule would have applied to persons not considered "of quality." The Founders were familiar with Hawkins, but this passage goes unmentioned by proponents of the Northampton-overrides-the-Second-Amendment theory.

No English judicial decision mentions the Statute of Northampton in the eighteenth or nineteenth centuries. Nor did members of Parliament mention it in deliberations. In debate on the 1843 Irish arms act, Lord John Russell noted that "the right to bear arms, which is the universal right in England, and qualified only by individual circumstances, is reversed in Ireland; the right to bear arms here being the rule, the right to bear arms in Ireland being the exception."[24] He added that it was "the general rule in England without any licence that every individual should be entitled to bear arms."[25]

The Statute was briefly referenced in two cases in the early twentieth century. It was found to apply to a person who was "firing a revolver in a public place, with the result that the public were frightened or terrorized."[26] It did not apply to a person peaceably walking down a public road with a loaded revolver, because there were "two essential elements of the offence—(1) That the going armed was without lawful occasion; and (2) that the act was *in terrorem populi*."[27]

The Statute's most recent English mention was in a 2001 case, decided by the House of Lords in its judicial function, holding that a gang of youths who carried petrol bombs but did not terrorize anyone were not guilty of an affray.[28] The court endorsed the view that "mere possession of a weapon, without threatening circumstances . . ., is not enough to constitute a threat of unlawful violence. So, for example, the mere carrying of a concealed weapon could not itself be such a threat."[29] While the defendants might have been charged under a newer statute on carrying weapons, a person should not be charged with an affray "unless he uses or threatens unlawful violence towards another person actually present at the scene and his conduct is such as would cause fear to a notional bystander of reasonable firmness."[30]

It was an offense under the Statute of Northampton to go or ride armed in a manner that creates an affray or terror to the subjects. It was not an offense simply to carry arms in a peaceable manner. These tenets reflected and formed the basis of the common law right to bear arms and the common law crime of going armed in an offensive manner.

B. The Declaration of Rights of 1689 Codified the Individual Right to Possess Arms for Self-Defense as Allowed by the Common Law

The Restoration of the Stuarts in 1660 entailed measures to disarm the monarchy's political enemies. In 1662 Charles II passed a militia bill empowering officials "to search for and seize all arms" possessed by a person judged to be "dangerous to the peace of the kingdom."[31] His Game Act of 1670 provided that any person without lands and tenements valued at 100 pounds or leases of 150 pounds per annum were "not allowed to keep . . . any Guns . . .; but shall be and are hereby prohibited to have,

only minimalist protection or categorical exclusion." Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History versus Ahistorical Standards of Review*, 60 Clev. St. L. Rev. 1, 43 (2012).

18 *E.g.*, Peruta v. County of San Diego, 824 F.3d 919, 929-32 (9th Cir. 2016) (en banc).

19 Sir John Knight's Case, 3 Mod. 117, 87 Eng. Rep. 75, 76 (K.B. 1686).

20 *Id.*

21 Rex v. Knight, Comb. 38, 39, 90 Eng. Rep. 330 (K.B. 1686).

22 More is now known about the Knight case, but not from sources to which the Founders or lawmakers in the early Republic had access. A diary confirmed that the jury acquitted Knight "not thinking he did it [going armed] with any ill design . . . ." 1 Narcissus Luttrell, A Brief Historical Relation of State Affairs from September 1678 to April 1714 380 (1857). No evidence suggests that he was acquitted because he had governmental immunity. *Cf. Peruta*, 824 F.3d at 931.

23 1 Hawkins, A Treatise of the Pleas of the Crown ch. 28, § 9 (8th ed. 1824).

24 70 Hansard's Parliamentary Debates 66 (June 16, 1843).

25 *Id.*

26 Rex v. Meade, 19 L. Times Repts. 540, 541 (1903).

27 Rex v. Smith, 2 Ir. R. 190, 204 (K.B. 1914).

28 I v. Director Of Public Prosecutions, 2 Cr. App. R. 14, 216 (Lords 2001).

29 *Id.* at 226.

30 *Id.* at 232.

31 13 and 14 Car. II c.3 (1662).

keep or use the same."[32] The reason for such laws, Blackstone observed, was "prevention of popular insurrections and resistance to the government, by disarming the bulk of the people . . . ."[33]

James II continued the same repressive policies, which eventually sparked the Glorious Revolution of 1688. Debating his proposed abdication, members of Parliament argued that the militia act "was made to disarm all Englishmen, whom the Lieutenant should suspect" of disloyalty, and gave the "Power to disarm all England."[34] One member was himself disarmed.[35]

The Declaration of Rights of 1689 listed the ways that James II attempted to subvert "the Laws and Liberties of this Kingdom," including: "By causing several good Subjects, being Protestants, to be disarmed, at the same Time when Papists were both armed and employed, contrary to law."[36] The act accordingly declared thirteen "true, ancient and indubitable rights," including "That the Subjects which are Protestants, may have Arms for their Defence suitable to their Condition, and as are allowed by Law."[37] The term "suitable to their Condition" referred to statutes such as the Assize of Arms, which required persons to arm themselves for militia duty based on economic status. "As are allowed by Law" appears to have referred to the common law, not to any statute that might be passed that would negate the right.[38] Exercise of the right was not confined to houses.

Blackstone pointed to the "absolute rights" of "personal security, personal liberty, and private property," which would be a "dead letter" without "certain other auxiliary subordinate rights . . . ."[39] In addition to the right to petition, those auxiliary rights included "that of having arms for their defence," which was "a public allowance under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression."[40] Again, the right was not home-bound.

Quoting the arms right from the Declaration, a judge gave the following jury instruction in an 1820 case: "But are arms suitable to the condition of people in the ordinary class of life, and are they allowed by law? A man has a clear right to protect himself when he is going singly or in a small party upon the road where he is traveling or going for the ordinary purposes of business."[41]

Members of Parliament alluded to the Declaration when pertinent bills came up. In debate on the Irish arms act of 1843, M. J. O'Connell expressed the general view that "by the bill of rights, the right to carry arms for self-defence was not created, but declared as of old existence."[42]

The Declaration of Rights included among the "true, ancient and indubitable rights" that of having arms for defense, which no one suggested was confined to the home. The Americans would hold tightly to this fundamental right of Englishmen when it was threatened and violated by George III.

III. The Founding and Early Republic

A. Constitutionalizing the Fundamental Right to Bear Arms

"The right to keep and bear arms was considered . . . fundamental by those who drafted and ratified the Bill of Rights," the Supreme Court said in *McDonald*.[43] In the Founding period, no laws restricted the peaceable carrying of arms. Militia laws required adult males to provide themselves with firearms and bring them to muster. The great exception was the slave codes, which prohibited the keeping and bearing of firearms by African Americans.[44]

When the colonies declared themselves independent states, they adopted their own constitutions, several of which included declarations of rights. Those of Pennsylvania and Vermont declared, "That the people have a right to bear arms for the defense of themselves, and the state . . . ."[45] North Carolina's declared, "That the People have a right to bear Arms for the Defense of the State . . . ."[46] And Massachusetts's declared, "The people have a right to keep and bear arms for the common defence."[47] All four of these declarations guaranteed the right to "the people" and did not limit it to the militia.

Ratification conventions demanded a bill of rights when the federal Constitution was proposed in 1787 without one. In the Massachusetts ratification convention, Samuel Adams proposed "that the said Constitution be never construed to authorize Congress, . . . to prevent the people of the United States, who are peaceable citizens, from keeping their own arms . . . ."[48] In the

32 22 Car. II c. 25, § 3 (1670).

33 2 William Blackstone, Commentaries *412.

34 2 Miscellaneous State Papers from 1501-1726 407, 416 (1778).

35 *Id*. at 416.

36 *An Act Declaring the Rights and Liberties of the Subject*, 1 W. & M., Sess. 2, c.2, (1689).

37 *Id.*

38 *See* Joyce Lee Malcolm, To Keep and Bear Arms: The Origins of an Anglo-American Right 120-21 (1994). On the Assize of Arms of 1181, see Stephen P. Halbrook, That Every Man Be Armed 36-38 (2013).

39 1 William Blackstone, Commentaries *136.

40 *Id*. at *139.

41 Rex v. Dewhurst, 1 State Trials, New Series 529, 601-02 (1820).

42 69 Hansard's Parliamentary Debates 1151 (May 30, 1843).

43 *McDonald*, 561 U.S. at 768 (citing, inter alia, Stephen P. Halbrook, The Founders' Second Amendment 171-278 (2008) (hereafter "*Founders*")).

44 *See Founders*, *supra* note 43, *passim.*

45 Pa. Const., Dec. of Rights, art. XIII (1776); Vt. Const., art. I, § 15 (1777).

46 N.C. Const., Dec. of Rights, art. XVII (1776).

47 Mass. Const., Dec. of Rights, art. XVII (1780).

48 6 Documentary History of the Ratification of the Constitution 1453 (2000).

Pennsylvania convention, the Dissent of the Minority demanded a written bill of rights, including the proposal:

> That the people have a right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals . . . .[49]

Until that point, the Federalists had argued that, since the federal government would have only limited powers, a bill of rights was unnecessary. However, the New Hampshire convention then proposed one, including a guarantee that "Congress shall never disarm any citizen, unless such as are or have been in actual rebellion."[50]

In *The Federalist* No. 46, James Madison heralded "the advantage of being armed, which the Americans possess over the people of almost every other nation," adding: "Notwithstanding the military establishments in the several kingdoms of Europe, . . . the governments are afraid to trust the people with arms."[51] What became the Second Amendment was demanded as a formal embodiment of this trust of the people with arms.

In the Virginia convention, George Mason recalled that "when the resolution of enslaving America was formed in Great Britain, the British Parliament was advised . . . to disarm the people; that it was the best and most effectual way to enslave them."[52] And Patrick Henry implored: "The great object is, that every man be armed."[53] The ensuing debate concerned defense against tyranny and invasion.

The Virginia convention proposed a bill of rights asserting "the essential and unalienable rights of the people," including "That the people have a right to keep and bear arms . . . . ."[54] In identical language, New York,[55] North Carolina,[56] and Rhode Island[57] joined in the demand for what became the Second Amendment. The right to bear arms had universal support.

Some recent commentators have attempted to justify the treatment of the Second Amendment as a second-class right by arguing that the Amendment was adopted to protect slavery.[58] Not only is there not a shred of evidence for this, but the Northern states—which were less reliant on slavery—led the effort to guarantee the right to bear arms. Pennsylvania, which recognized the right to bear arms in its Declaration of Rights of 1776, passed the first state abolition act in 1780.[59] Vermont's Declaration of Rights of 1777 both abolished slavery and declared the right to bear arms.[60] In Massachusetts, slavery was declared unconstitutional in judicial cases in 1781-83.[61] New Hampshire's 1783 Constitution was read by many to abolish slavery, and its 1790 census counted few slaves.[62] While New York did not enact a law to abolish slavery until 1799, its 1777 constitutional convention resolved to end slavery.[63] Rhode Island abolished slavery in 1784.[64]

The attempt by the British to disarm the Americans and the need to guard against tyranny and invasion were the only concerns voiced during the critical debates in the Virginia convention. The defect in the early American polity was that, because of slavery, the liberties in the Bill of Rights did not extend to all persons.

James Madison introduced his draft of what became the Bill of Rights to the House of Representatives on June 8, 1789. It included the provision: "The right of the people to keep and bear arms shall not be infringed . . . ."[65] While several states had proposed simply "that the people have a right to keep and bear arms," Madison inserted the stronger guard that this right "shall not be infringed." The provision was not controversial. Rep. Roger Sherman expressed the common view in 1791 that it was "the privilege of every citizen, and one of his most essential rights, to bear arms, and to resist every attack upon his liberty or property, by whomsoever made."[66]

St. George Tucker's 1801 edition of Blackstone's *Commentaries* contrasted the Second Amendment with the English Declaration of Rights by saying, "The right of the people to keep and bear arms shall not be infringed . . . and this without any qualification as to their condition or degree, as is the case in the British government . . . ."[67] Tucker called this right "the

49 2 Documentary History of the Ratification of the Constitution 623-24 (1976).

50 18 Documentary History of the Ratification of the Constitution 188 (1995).

51 15 Documentary History of the Ratification of the Constitution 492-93 (1984).

52 3 Jonathon Elliot ed., The Debates in the Several State Conventions on the Adoption of the Federal Constitution 380 (1836).

53 *Id.* at 386.

54 *Id.* at 658-59.

55 18 Documentary History of the Ratification of the Constitution 298 (1995).

56 *Id.* at 316.

57 1 Elliot, *supra* note 52, at 335.

58 Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. Davis L. Rev. 309 (1998).

59 An Act for the Gradual Abolition of Slavery - March 1, 1780, http://www.phmc.state.pa.us/portal/communities/documents/1776-1865/abolition-slavery.html.

60 Vt. Const., Ch. I, §§ 1 & 15 (1777).

61 Massachusetts Constitution and the Abolition of Slavery, https://www.mass.gov/guides/massachusetts-constitution-and-the-abolition-of-slavery#-the-quock-walker-case-.

62 Slavery in New Hampshire, http://slavenorth.com/newhampshire.htm.

63 Emancipation in New York, http://slavenorth.com/nyemancip.htm.

64 An Act authorizing the Manumission of Negroes, Mulattoes and others, & for the gradual Abolition of Slavery, Feb. 26, 1784, https://americasbesthistory.com/abhtimeline1784m.html.

65 4 Documentary History of the First Federal Congress 10 (1986).

66 14 Documentary History of the First Federal Congress 92-93 (1995).

67 1 St. George Tucker, *Blackstone's Commentaries* *143 n.40 (1803).

true palladium of liberty," adding that "[t]he right of self defence is the first law of nature" and that wherever the right to bear arms is prohibited, "liberty, if not already annihilated, is on the brink of destruction."[68] Exercise of the right to bear arms was commonplace: "In many parts of the United States, a man no more thinks, of going out of his house on any occasion, without his rifle or musket in his hand, than an European fine gentleman without his sword by his side."[69]

Kentucky's Constitution of 1792 declared "that the right of the citizens to bear arms in defence of themselves and the state shall not be questioned."[70] An 1822 treatise on the common law in Kentucky noted the crime of "[r]iding or going armed with dangerous or unusual weapons, . . . by terrifying the people of the land," but added that "in this country the constitution guarranties to all persons the right to bear arms; then it can only be a crime to exercise this right in such a manner, as to terrify the people unnecessarily."[71]

The federal and state constitutional declarations of the right to "bear arms" preclude any argument that somehow the common law in America prohibited peaceably going armed. That is further verified by statutes and judicial decisions on going armed aggressively or in doing with concealed weapons.

B. Going Armed: Statutes and the Common Law Prohibited the Carrying of Arms in Public When Done In a Manner to Terrorize Others

Thomas Jefferson drafted, James Madison proposed, and the Virginia legislature enacted an Act Forbidding and Punishing Affrays (1786).[72] Reflecting the Statute of Northampton, it provided in part that no man shall "go nor ride armed by night nor by day, in fairs or markets, or in other places, in terror of the country . . . ."[73] Going armed was not an offense, as had been held in the case of Sir John Knight, unless accompanied by the separate "in terror" element. Had the act been read to ban the mere carrying of firearms, Jefferson would have been one of its most frequent violators, as he regularly went armed and defended the right to do so.[74] He advised his 15-year old nephew, "Let your gun therefore be the constant companion of your walks."[75]

In 1838, the Virginia legislature forbade the habitual carrying about the person of weapons hidden from common observation, so the 1786 law cannot have been interpreted to forbid concealed carry without the additional "in terror" element.[76] The later provision would have been unnecessary if going armed was already an offense, not to mention that this provision only restricted *habitually* going armed and doing so only with concealed weapons. In 1847, Virginia enacted the following: "If any person shall go armed with any offensive or dangerous weapon, without reasonable cause to fear an assault or other injury, or violence to his person, or to his family or property, he may be required to find sureties for keeping the peace."[77] This means that a person doing so, if anyone complained, could continue if the court did not find that keeping the peace required sureties. If sureties were required, he could simply obtain them.

A Massachusetts act of 1795 punished "such as shall ride or go armed offensively, to the fear or terror of the good citizens of this Commonwealth . . . ."[78] Going armed was an offense only if done in this manner. As stated in an 1825 judicial decision, "the right to keep fire arms . . . does not protect him who uses them for annoyance or destruction."[79] Massachusetts passed a more refined act in 1836 which provided:

> If any person shall go armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon, without reasonable cause to fear an assault or other injury, or violence to his person, or to his family or property, he may, on complaint of any person having reasonable cause to fear an injury, or breach of the peace, be required to find sureties for keeping the peace, for a term not exceeding six months, with the right of appealing as before provided.[80]

This did not prohibit going armed per se. It required an aggrieved person to file a complaint and to prove reasonable cause to fear injury or breach of the peace. Even then, the subject person could show reasonable cause to fear injury. If he could not and if the court found that his keeping the peace required sureties, the person could do so and continue going armed.

In addition to statutes like the above, going armed was recognized by the courts as a common law offense, if at all, only if done in a manner to terrify others. In *Simpson v. State* (1833), Tennessee's high court held going armed not to be a crime at common law.[81] It recalled Hawkins' comment that wearing common weapons did not violate the Statute of Northampton,[82] which the court said was not incorporated into American common law.[83] Merely carrying arms could not itself cause "terror to the

68 *Id.*, Appendix, 300.

69 *Id.*, vol. 5, at 19. *See also* Stephen Halbrook, *St. George Tucker's Second Amendment: Deconstructing "The True Palladium of Liberty,"* 3 Tenn. J.L. & Pol'y 120 (2007).

70 Ky. Const., art. XII, § 22 (1792).

71 Charles Humphreys, Compendium of the Common Law in Force in Kentucky 482 (1822).

72 2 Jefferson, Papers 519-20 (Julian P. Boyd ed. 1951).

73 A Collection of All Such Acts of the General Assembly of Virginia, of a Public and Permanent Nature, as Are Now in Force, ch. 21, at 30 (1803).

74 *See Founders, supra* note 43, at 131, 260, 316-18. In 1803, Jefferson wrote an innkeeper that "I left at your house . . . a pistol in a locked case," and asked that a friend pick it up. See original letter at http://memory.loc.gov/cgi-bin/ampage?collId=mtj1&fileName=mtj1page029.db&recNum=210.

75 Jefferson, Writings 816-17 (Merril D. Peterson ed. 1984).

76 Virginia Code, tit. 54, ch. 196, § 7 (1849).

77 1847 Va. Laws 127, 129, § 16.

78 1795 Mass. Acts 436, ch. 2; 2 Perpetual Laws of the Commonwealth of Massachusetts 259 (1801).

79 Commonwealth v. Blanding, 20 Mass. (3 Pick.) 304, 314 (1825).

80 1836 Mass. Laws 748, 750, ch. 134, § 16.

81 Simpson v. State, 13 Tenn. Reports (5 Yerg.) 356, 361 (1833).

82 *Id.* at 358-59.

83 *Id.* at 359.

people" so as to constitute an affray, as under the state constitution, "an express power is given and secured to all the free citizens of the state to keep and bear arms for their defence, without any qualification whatever as to their kind or nature . . . ."[84]

In *State v. Huntley* (1843), the North Carolina Supreme Court upheld an indictment alleging that the defendant went armed with "dangerous and unusual weapons" and threatened to murder various persons, causing them to be "terrified."[85] While the state constitution secured the right to bear arms, a person has no right to "employ those arms . . . to the annoyance and terror and danger of its citizens . . . ."[86] That said, "the carrying of a gun *per se* constitutes no offence. For any lawful purpose—either of business or amusement—the citizen is at perfect liberty to carry his gun."[87]

C. Restrictions on the Manner of Carrying Arms Did Not Prohibit the Peaceable, Open Carry of Firearms in Public

It was not an offense at common law or in the statutes of any state at the Founding peaceably to bear arms openly or concealed. Before 1846, only eight states—seven Southern states and Indiana—of the 29 states in the Union enacted laws prohibiting the carrying of specified arms in a concealed manner.[88] By 1861, when there were 34 states in the Union, Ohio was the only additional state to restrict concealed weapons.[89] None of the other Northern or Southern states had such laws before the Civil War. Other than a law struck down by the Georgia Supreme Court, no state prohibited the open carry of firearms in this period.

The first judicial decision on such a law by a state court declared that Kentucky's 1813 ban on carrying concealed weapons violated the state constitution. In *Bliss v. Commonwealth* (1822), the Kentucky Supreme Court reasoned that the ban "prohibit[ed] the citizens wearing weapons in a manner which was lawful to wear when the constitution was adopted," and "in principle, there is no difference between a law prohibiting the wearing concealed arms, and a law forbidding the wearing such as are exposed; and if the former be unconstitutional, the latter must be so likewise."[90] The state constitution was later revised to authorize the legislature to "pass laws to prevent persons from carrying concealed arms."[91]

The Supreme Court of Indiana, the next court to opine on the issue, held in a one-sentence opinion that a statute "prohibiting all persons, except travelers, from wearing or carrying concealed weapons, is not unconstitutional."[92] Perhaps being unable to refute the logic of the Kentucky court's decision, this judicial ipse dixit offered no reasoning to justify the prohibition.

The Alabama Supreme Court upheld a concealed weapon ban because open carry was allowed, cautioning that "A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional."[93]

That was followed by *Nunn v. State* (1846), in which the Georgia Supreme Court held that the Second Amendment applied to the states and invalidated a ban on open carry of pistols. The court wrote, "The right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear *arms* of every description, and not *such* merely as are used by the *militia*, shall not be *infringed*, curtailed, or broken in upon, in the smallest degree . . . ."[94]

Upholding a concealed weapon ban in 1850, the Louisiana Supreme Court reasoned that the right to carry arms openly "placed men upon an equality. This is the right guaranteed by the Constitution of the United States, and which is calculated to incite men to a manly and noble defense of themselves, if necessary, and of their country . . . ."[95] The open-carry rule was tied into the social norms of the day.

Other than the above Indiana decision, there were no decisions on the right to bear arms from courts in the North because Indiana and Ohio were the only Northern states that restricted the peaceable carrying of arms, concealed or openly. And as noted above, only some of the Southern states had laws restricting concealed, but not openly-carried, weapons.

D. African Americans: Prohibitions and Licensing Requirements

From colonial times until slavery was abolished, slaves were prohibited from keeping and bearing arms in most circumstances or altogether. In the same period, several states prohibited free blacks from carrying arms unless they obtained a license, which was subject to an official's discretion. Such laws reflected that African Americans were not trusted or recognized to be among "the people" with the rights of citizens.

Virginia law provided that "[n]o negro or mulatto slave whatsoever shall keep or carry any gun," except those living at a frontier plantation could be licensed to "keep and use" such weapons by a justice of the peace.[96] Further, "[n]o free negro or mulatto, shall be suffered to keep or carry any fire-lock of any kind, any military weapon, or any powder or lead, without first obtaining a license from the court, . . . which license may, at any time, be withdrawn by an order of such court."[97] As a Virginia court held, among the "numerous restrictions imposed on this class of people [free blacks] in our Statute Book, many of which are inconsistent with the letter and spirit of the Constitution,

84 *Id.*

85 State v. Huntley, 25 N.C. (3 Ired.) 418, 419 (1843).

86 *Id.* at 422.

87 *Id.* at 422-23.

88 *See* Clayton E. Cramer, Concealed Weapon Laws of the Early Republic 143-52 (1999).

89 An Act to Prohibit the Carrying or Wearing of Concealed Weapons, Acts of the State of Ohio 56 (1857).

90 Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90, 92, 13 Am. Dec. 251 (1822).

91 Ky. Const., art. XIII, § 25 (1849).

92 State v. Mitchell, 3 Blackf. 229 (Ind. 1833).

93 State v. Reid, 1 Ala. 612, 616-17 (1840).

94 Nunn v. State, 1 Ga. (1 Kel.) 243, 251 (1846).

95 State v. Chandler, 5 La. Ann 489, 490 (1850). *See also* State v. Jumel, 13 La. Ann. 399 (1858).

96 Va. 1819, c. 111, § 7.

97 *Id.* § 8.

both of this State and of the United States," were "the restriction upon the migration of free blacks into this State, and upon their right to bear arms."[98]

In Georgia, it was unlawful "for any slave, unless in the presence of some white person, to carry and make use of fire arms," unless the slave had a license from his master to hunt.[99] It was also unlawful "for any free person of colour in this state, to own, use, or carry fire arms of any description whatever . . . ."[100] Georgia's high court held that "Free persons of color have never been recognized here as citizens; they are not entitled to bear arms, vote for members of the legislature, or to hold any civil office."[101]

Maryland made it unlawful "for any negro or mulatto . . . to keep any . . . gun, except he be a free negro or mulatto . . . ."[102] It was unlawful "for any free negro or mulatto to go at large with any gun,"[103] but that did not prevent him "from carrying a gun . . . who shall . . . have a certificate from a justice of the peace, that he is an orderly and peaceable person . . . ."[104] The Court of Appeals of Maryland described "free negroes" as being treated as "a vicious or dangerous population," as exemplified by laws "to prevent their migration to this State; to make it unlawful for them to bear arms; to guard even their religious assemblages with peculiar watchfulness."[105]

Delaware forbade "free negroes and free mulattoes to have, own, keep, or possess any gun [or] pistol," except that such persons could apply to a justice of the peace for a permit to possess a gun or fowling piece, which could be granted if "the circumstances of his case justify his keeping and using a gun . . . ."[106] The police power was said to justify restrictions such as "the prohibition of free negroes to own or have in possession fire arms or warlike instruments."[107]

The above is just a sampling of some of the slave code provisions and how they also applied to free blacks. Licensing was discretionary based on the issuing authority's determination of the applicant's circumstances or need to keep or carry a firearm.

North Carolina judicial decisions explained in more detail the basis of discretionary licensing for free persons of color. The state made it unlawful "if any free negro, mulatto, or free person of color, shall wear or carry about his or her person, or keep in his or her house, any shot gun, musket, rifle, pistol, sword, dagger or bowie-knife, unless he or she shall have obtained a licence" from the court.[108] This was upheld in *State v. Newsom* (1844) as constitutional partly on the ground that "the free people of color cannot be considered as citizens . . . ."[109] The court added:

> It does not deprive the free man of color of the right to carry arms about his person, but subjects it to the control of the County Court, giving them the power to say, in the exercise of a sound discretion, who, of this class of persons, shall have a right to the licence, or whether any shall.[110]

This is reminiscent of today's judicial jargon that the right of the people to bear arms is not infringed by laws granting officials discretion to deny them that very right.

Averring that having weapons by "this class of persons" was "dangerous to the peace of the community," a later decision explained the basis of the discretionary issuance policy:

> Degraded as are these individuals, as a class, by their social position, it is certain, that among them are many, worthy of all confidence, and into whose hands these weapons can be safely trusted, either for their own protection, or for the protection of the property of others confided to them. The County Court is, therefore, authorised to grant a licence to any individual they think proper, to possess and use these weapons.[111]

The court could not only deny a license outright, but also could limit a license to carry to certain places. In *State v. Harris* (1859), a free person of color had a license to carry a gun on his own land, but he was hunting with a shotgun outside of his land with white companions.[112] The court held that "the county court might think it a very prudent precaution to limit the carrying of arms to the lands of the free negro" and that the act did not "prevent the restriction from being imposed."[113]

In short, free persons of color were not entitled to the right to keep and bear arms because they were not considered to be citizens. That status was reflected in the requirement that they obtain a license, subject to the issuing authority's subjective decision of whether the applicant was a proper person with a proper reason.

The above was bolstered by the U.S. Supreme Court in *Dred Scott v. Sanford* (1857), which notoriously held that African Americans were not citizens and had no rights that must be respected.[114] Chief Justice Roger Taney wrote that, if African Americans were considered citizens, "it would give them the full liberty of speech . . .; to hold public meetings upon political affairs, and to keep and carry arms wherever they went."[115] This

98 Aldridge v. Commonwealth, 2 Va. 447, 449 (Gen. Ct. 1824).

99 Digest of the Laws of the State of Georgia 424 (1802).

100 § 7, 1833 Ga. Laws 226, 228.

101 Cooper v. Savannah, 4 Ga. 72 (1848).

102 Chap. 86, § I (1806), in 3 Laws of Maryland 297 (1811).

103 *Id.* at § II, 298.

104 *Id.*

105 Waters v. State, 1 Gill 302, 309 (Md. 1843).

106 Ch. 176, § 1, 8 Laws of the State of Delaware 208 (1841).

107 State v. Allmond, 7 Del. 612, 641 (Gen. Sess. 1856).

108 State v. Newsom, 27 N.C. 250, 250 (1844) (quoting Act of 1840, ch. 30).

109 *Id.* at 254.

110 *Id.* at 253.

111 State v. Lane, 30 N.C. 256, 257 (1848).

112 State v. Harris, 51 N.C. 448 (1859).

113 *Id.* at 449.

114 Scott v. Sanford, 60 U.S. (19 How.) 393 (1857).

115 *Id.* at 417.

result was seen as unacceptable. The Fourteenth Amendment, of course, would overrule *Dred Scott*.

* * *

Part Two of this paper will trace the history of the Fourteenth Amendment and its aftermath as applied to the right to bear arms. This will entail analysis of the discretionary licensing schemes of the black codes, protection of the right under the Civil Rights Act of 1871, and carry bans in Reconstruction and in the Jim Crow and anti-immigrant eras.

State courts recognized the right to bear arms in the modern era. In Heller*, the U.S. Supreme Court read "bear" arms to mean "carry" arms and rejected interest balancing. Applying the right to the states,* McDonald *found the right to be fundamental, not second class. Yet the circuits are split, with some applying the clear text and others playing a limbo game to see how low the standard can go. The game played out most recently when the Supreme Court granted certiorari regarding New York City's ban on transporting a handgun outside one's licensed premises, and the City sought to moot the case.*

To Bear Arms for Self-Defense: A "Right of the People" or a Privilege of the Few?

By Stephen P. Halbrook

Civil Rights Practice Group

Part Two of a Two-Part Series

About the Author:

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Other Views:

- Peruta v. County of San Diego, 824 F.3d 919 (9th Cir. 2016) (en banc), *available at* https://cdn.ca9.uscourts.gov/datastore/opinions/2016/06/09/10-56971.pdf.
- Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History versus Ahistorical Standards of Review*, 60 Clev. St. L. Rev. 1, 43 (2012), *available at* https://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=1001&context=clevstlrev.
- Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. Davis L. Rev. 309 (1998), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1465114.

Part One of this paper began with an analysis of the clear text of the Second Amendment declaring that "the right of the people to . . . bear arms, shall not be infringed." It then launched into a history of the English origins of this right. The medieval Statute of Northampton proscribed going armed in a manner to terrorize the subjects, while the common law recognized the peaceable carrying of arms. The Declaration of Rights of 1689 accorded the right to Protestants, and Blackstone found it to be a cornerstone of protection of personal liberty and personal security.

At the American Founding, the right to bear arms was constitutionalized along with other basic rights. The peaceable carrying of firearms by ordinary Americans was allowed in all states during the antebellum period—even in those states where going armed with the intent to terrorize others was a crime. By 1861, 25 of 34 states allowed the carrying of weapons both openly and concealed. In the 9 states that then restricted concealed carry, open carry was lawful; it was this right of open carry that justified the restrictions of concealed carry. However, African Americans were barred from bearing arms at all or were subjected to arbitrary licensing requirements.

IV. The Fourteenth amendment and Its Aftermath

A. The Black Codes and Discretionary Licensing

The Fourteenth Amendment was understood to protect the right to keep and bear arms from state infringement. Under the postbellum black codes, officials had discretion over whether to issue licenses to freedmen to carry arms outside of their homes and even to keep arms at all. Those who ratified the Fourteenth Amendment considered such laws to violate the right to bear arms.

"In the aftermath of the Civil War, there was an outpouring of discussion of the Second Amendment in Congress and in public discourse, as people debated whether and how to secure constitutional rights for newly free slaves," *Heller* relates.[1] The slave codes were reenacted as the black codes, including prohibitions on both the keeping and the carrying of firearms by African Americans. As Frederick Douglass explained in 1865, "the black man has never had the right either to keep or bear arms."[2]

McDonald noted that a state law requiring a license to have a firearm that an official had discretion to limit or deny was typical of what the Fourteenth Amendment would invalidate. For example, *McDonald* pointed out that the Fourteenth Amendment would have invalidated a Mississippi law providing that "no freedman, free negro or mulatto, not in the military service of the United States government, and not licensed so to do by the

1 District of Columbia v. Heller, 554 U.S. 570, 614 (citing Stephen P. Halbrook, Freedmen, the Fourteenth Amendment, and the Right to Bear Arms, 1866-1876 (1998)).

2 4 The Frederick Douglass Papers 84 (1991), quoted in McDonald v. Chicago, 561 U.S. 742, 850 (Thomas, J., concurring).

board of police of his or her county, shall keep or carry fire-arms of any kind . . . ."[3]

Deprivations of freed slaves' Second Amendment rights featured in debates over bills leading to enactment of the Freedmen's Bureau Act and the Civil Rights Act of 1866. Rep. Thomas Eliot, sponsor of the former, explained that the bill would render void laws like that of Opelousas, Louisiana, providing that no freedman "shall be allowed to carry fire-arms" without permission of his employer and approval by the board of police.[4] He noted that in Kentucky "[t]he civil law prohibits the colored man from bearing arms . . . ."[5] Accordingly, the Freedmen's Bureau bill guaranteed the right of freedmen and all other persons "to have full and equal benefit of all laws and proceedings for the security of person and estate, including the constitutional right to bear arms."[6] Senator Garrett Davis said that the Founding Fathers "were for every man bearing his arms about him and keeping them in his house, his castle, for his own defense."[7]

Yet violations persisted. Alexandria, Virginia, for example, continued "to enforce the old law against them [freedmen] in respect to whipping and carrying fire-arms . . . ."[8] To counter such infringements, in South Carolina General D. E. Sickles issued General Order No. 1 to enforce the general right to bear arms with certain exceptions:

> The constitutional rights of all loyal and well disposed inhabitants to bear arms, will not be infringed; nevertheless this shall not be construed to sanction the unlawful practice of carrying concealed weapons; nor to authorize any person to enter with arms on the premises of another without his consent.[9]

This order was repeatedly printed in the *Loyal Georgian*, a black newspaper.[10] One issue of the paper included the following question-and-answer:

> Have colored persons a right to own and carry fire arms?
>
> A Colored Citizen
>
> Almost every day we are asked questions similar to the above. . . .
>
> Article II, of the amendments to the Constitution of the United States, gives the people the right to bear arms, and states that this right shall not be infringed. . . . All men, without distinction of color, have the right to keep and bear arms to defend their homes, families or themselves.[11]

"In debating the Fourteenth Amendment, the 39th Congress referred to the right to keep and bear arms as a fundamental right deserving of protection," observed *McDonald*.[12] Senator Samuel Pomeroy counted among the "safeguards of liberty" "the right to bear arms for the defense of himself and family and his homestead."[13] Introducing the Fourteenth Amendment in the Senate, Jacob Howard referred to "the personal rights guaranteed and secured by the first eight amendments of the Constitution; such as . . . the right to keep and bear arms . . . ."[14] He averred, "The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees."[15] The new amendment was needed, Rep. George W. Julian argued, because Southern courts declared the Civil Rights Act void and some states made it "a misdemeanor for colored men to carry weapons without a license."[16]

A Mississippi court declared the Civil Rights Act unconstitutional in upholding the conviction, under the 1865 Mississippi law quoted above, of a freedman for carrying a musket without a license.[17] However, another Mississippi court found Mississippi's carry ban void, asking, "Should not then, the freedmen have and enjoy the same constitutional right to bear arms in defence of themselves, that is enjoyed by the citizen?" General U.S. Grant noted these decisions in a report stating, "The statute prohibiting the colored people from bearing arms, without a special license, is unjust, oppressive, and unconstitutional."[18]

The Freedmen's Bureau Act was passed by the same two-thirds-plus members of Congress who voted for the Fourteenth Amendment.[19] The Act declared that:

> the right . . . to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens of

3 Certain Offenses of Freedmen, 1865 Miss. Laws p. 165, § 1, quoted in *McDonald*, 561 U.S. at 771. *See Harper's Weekly*, Jan. 13, 1866, at 3 ("the statute laws of Mississippi do not recognize the negro as having any right to carry arms").

4 Cong. Globe, 39th Cong., 1st Sess. 517 (1866).

5 *Id*. at 657. *See Heller,* 554 U.S. at 614-15.

6 Cong. Globe, *supra* note 4, at 654.

7 *Id.* at 371.

8 Report of the Joint Committee on Reconstruction, H.R. Rep. No. 30, 39th Cong., 1st Sess., pt. 2, at 21 (1866).

9 Cong. Globe, *supra* note 4, 908-09. *See McDonald*, 561 U.S. at 773 & n.21 (citing this order and commenting that "Union Army commanders took steps to secure the right of all citizens to keep and bear arms").

10 *Loyal Georgian*, Feb. 3, 1866, at 1.

11 *Id.* at 3. *See also Heller*, 554 U.S. at 615; *McDonald*, 561 U.S. at 848-49 (Thomas, J., concurring).

12 *McDonald*, 561 U.S. at 775.

13 *Id.* (citing Cong. Globe, *supra* note 4, at 1182).

14 Cong. Globe, *supra* note 4, at 2765.

15 *Id.* at 2766.

16 *Id.* at 3210.

17 *New York Times*, Oct. 26, 1866, at 2; *see McDonald*, 561 U.S. at 775 n.24.

18 Cong. Globe, 39th Cong., 2d Sess. 33 (1866).

19 *Freedmen*, *supra* note 1, at 41-43.

such State or district without respect to race or color or previous condition of slavery.[20]

The term "bear arms" was used, and as *McDonald* recognized, "[i]t would have been nonsensical for Congress to guarantee the full and equal benefit of a constitutional right that does not exist."[21] As the Court concluded, "the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty."[22]

B. Protection Under the Civil Rights Act of 1871

"[I]n debating the Civil Rights Act of 1871, Congress routinely referred to the right to keep and bear arms and decried the continued disarmament of blacks in the South," noted *McDonald*.[23] The Act is codified at 42 U.S.C. § 1983, and it provides that any person who, under color of state law, subjects a person "to the deprivation of any rights, privileges, or immunities secured by the Constitution" is civilly liable.[24]

The Supreme Court averred in *Patsy v. Board of Regents* that, in passing the Act, "Congress assigned to the federal courts a paramount role in protecting constitutional rights."[25] Rep. Henry Dawes explained at the time that the federal courts would protect "these rights, privileges, and immunities."[26] As he further noted, under the Act, the citizen "has secured to him the right to keep and bear arms in his defense."[27]

The *Patsy* Court also endorsed the remarks of Rep. John Coburn,[28] who observed that "A State may by positive enactment cut off from some the right . . . to bear arms . . . . How much more oppressive is the passage of a law that they shall not bear arms than the practical seizure of all arms from the hands of the colored men?"[29] "Opponents of the bill also recognized this purpose," *Patsy* continued, citing remarks of Rep. Washington Whitthorne.[30] Whitthorne objected that "if a police officer . . . should find a drunken negro or white man upon the streets with a loaded pistol flourishing it, & c., and by virtue of any ordinance, law, or usage, either of city or State, he takes it away, the officer may be sued, because the right to bear arms is secured by the Constitution . . . ."[31] Of course, no one suggested that arresting someone brandishing a firearm would be actionable under the new law; supporters of the bill were concerned that police would arrest a law-abiding African American peaceably carrying a pistol.

After passage of the Act, President Ulysses S. Grant reported that KKK groups continued "to deprive colored citizens of the right to bear arms and of the right to a free ballot . . . ."[32] The Klan targeted the black person, Sen. Daniel Pratt noted, who would "tell his fellow blacks of their legal rights, as for instance their right to carry arms and defend their persons and homes."[33] While at this point the disarming of blacks was taking place more by the Klan than by state action, a report recalled the state laws of 1865-66 under which "a free person of color was only a little lower than a slave. . . . [and hence] forbidden to carry or have arms."[34]

The Civil Rights Act of 1871 was understood to provide a remedy to persons who were deprived of the right to keep and bear firearms. To bear arms meant to carry them, and the right to do so was never suggested to be limited to one's house.

C. Carry Bans in Reconstruction and the Jim Crow and Anti-Immigrant Eras

The Fourteenth Amendment prohibited the states from infringing on the right to bear arms. Since they could no longer deprive persons of the right based on race or color, some states instead passed bans on the carrying of handguns altogether or instituted discretionary licensing schemes. These approaches allowed for selective enforcement against disfavored classes and the extension of privileges to favored classes. The following analyzes some such laws and judicial reactions to them.

In *Andrews v. State* (1871), the Tennessee Supreme Court held that a prohibition on both open and concealed handgun carry, as applied to the type of revolver used by soldiers, violated the state guarantee of the right of the citizens to "to bear arms for their common defense."[35] It rejected the argument that the legislature could "prohibit absolutely the wearing of all and every kind of arms, under all circumstances," as "[t]he power to regulate, does not fairly mean the power to prohibit . . . ."[36] The legislature could not prohibit wearing arms in "circumstances essential to make out a case of self-defense."[37]

In *English v. State* (1871), the Texas Supreme Court upheld a ban on carrying a pistol (but not a long gun) on one's person unless the carrier had reasonable grounds to fear an attack or was traveling. The restriction was valid because the Texas Constitution only recognized a right to bear arms "under such regulations as

20 An Act to continue in force and to amend "An Act to establish a Bureau for the Relief of Freedmen and Refugees," Ch. 200, §14, 14 Stat. 173, 176-77 (1866).

21 *McDonald*, 561 U.S. at 779.

22 *Id.* at 777.

23 *McDonald*, 561 U.S. at 776 (citing *Freedmen*, *supra* note 1, at 120-31).

24 17 Stat. 13 (1871).

25 Patsy v. Board of Regents, 457 U.S. 496, 503 (1982).

26 *Id.* (quoting Cong. Globe, 42d Cong., 1st Sess., 476 (1871)).

27 Cong. Globe, *supra* note 26, at 475-76. *See McDonald*, 561 U.S. at 835 (Thomas, J., concurring).

28 *Patsy*, 457 U.S. at 504.

29 Cong. Globe, *supra* note 26, at 459.

30 *Patsy*, 457 U.S. at 504 n.6.

31 Cong. Globe, *supra* note 26, at 337.

32 Ex. Doc. No. 268, 42d Cong., 2d Sess. 2 (1872).

33 Cong. Globe, 42d Cong., 2d Sess., 3589 (1872).

34 1 Report of the Joint Select Committee to Inquire into the Condition of Affairs in the Late Insurrectionary States 261-62 (1872).

35 Andrews v. State, 50 Tenn. (3 Heisk.) 165, 177, 186-87, 8 Am. Rep. 8 (1871).

36 *Id.* at 180-81.

37 *Id.* at 191.

the legislature may prescribe."[38] Those tempted to cite this case as precedent today may not like its recognition of "the right to 'keep' such 'arms' as are used for purposes of war," which included not just the musket and pistol, but also "the field piece, siege gun, and mortar."[39]

In *Wilson v. State* (1878), the Arkansas Supreme Court overturned a conviction for carrying a revolver, reasoning that "to prohibit the citizen from wearing or carrying a war arm . . . is an unwarranted restriction upon his constitutional right to keep and bear arms."[40] Militia-type arms received the highest protection.

A Florida law passed in 1893 made it a crime for a person "to carry around with him, or to have in his manual possession" a Winchester or other repeating rifle without a license, which "may" be granted after posting a $100 bond.[41] That would be equivalent to $2,859 today.[42] The average monthly wage for farm labor in Florida in 1890 was $19.35.[43] The law effectively excluded the poor and African Americans. In 1901, the law was amended to add pistols to the list. As noted in *Watson v. Stone* (1941), the law "was passed when there was a great influx of negro laborers in this State," and it was "for the purpose of disarming the negro laborers . . . . The statute was never intended to be applied to the white population . . . ."[44] Moreover, "it has been generally conceded to be in contravention of the Constitution and non-enforceable if contested."[45]

In Virginia, advocates of "a prohibitive tax" on the sale of revolvers and requiring registration thereof appealed to racist rhetoric in support:

> It is a matter of common knowledge that in this state and in several others, the more especially in the Southern states where the negro population is so large, that this cowardly practice of "toting" guns has always been one of the most fruitful sources of crime . . . . Let a negro board a railroad train with a quart of mean whiskey and a pistol in his grip and the chances are that there will be a murder, or at least a row, before he alights.[46]

In 1926, Virginia enacted a registration requirement and an annual tax of $1 (the poll tax for voting was $1.50) for each pistol or revolver, and possession of an unregistered handgun was punishable with a fine of $25-50 and sentencing to the State convict road force for 30-60 days.[47] Not surprisingly, "three-fourths of the convict road force are negroes."[48] The law functioned to prevent African Americans from having arms and to conscript those who exercised their right to bear arms for forced road work.

Meanwhile, New York's restrictive licensing for "premises" and "carry" permits originated with the Sullivan Act of 1911 in an era of mistrust against Italians and other recent immigrants.[49] The first person sentenced under the Sullivan Act was a worker named Marino Rossi, who carried a revolver because he was in fear for his life from the Black Hand criminal gang. Sentencing him to one year in Sing Sing, the judge decried the propensity of "your countrymen to carry guns," adding, "It is unfortunate that this is the custom with you and your kind, and that fact, combined with your irascible nature, furnishes much of the criminal business in this country."[50] The *New York Times* commented: "The Judge's warning to the Italian community was timely and exemplary."[51] Upholding the law because it regulated the right by requiring a permit rather than prohibiting the right, the Appellate Division added, "If the Legislature had prohibited the keeping of arms, it would have been clearly beyond its power."[52] In New York today, the police have discretion to decide whether a person "needs" to carry a handgun, which effectively prohibits the bearing of arms and limits licenses to a privileged few.[53]

* * *

The postbellum black codes required freedmen to obtain a license to bear arms, issuance of which was subject to the discretion of an official. The Freedmen's Bureau Act explicitly protected the right to bear arms, and the Fourteenth Amendment was adopted in part to guarantee this right in the face of state attempts to infringe it. The Civil Rights Act of 1871 aimed to provide a remedy for deprivation of the right. Some states enacted general carry bans during Reconstruction and the Jim Crow and anti-immigrant eras to prevent disfavored classes from exercising the right to bear arms.

V. From The State Courts to the Supreme Court

A. State Cases Recognizing the Right to Bear Arms

This section analyzes selected cases on the right to bear arms decided by state courts in the twentieth and twenty-first centuries. These precedents generally recognize the right to bear arms outside the home for lawful purposes.

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38 English v. State, 35 Tex. 473 (1871). The law did not prevent travelers "from placing arms in their vehicles for self-defense . . . ." Maxwell v. State, 38 Tex. 170, 171 (1873).

39 *English*, 35 Tex. at 476-77.

40 Wilson v. State, 33 Ark. 557, 559-60, 34 Am. Rep. 52 (1878).

41 1893 Fla. Laws 71-72.

42 Inflation Calculator, https://www.in2013dollars.com/us/inflation/1893.

43 George K. Holmes, *Wages of Farm Labor*, USDA at 29 (1912), available at https://babel.hathitrust.org/cgi/pt?id=njp.32101050723756&view=1up&seq=745.

44 Watson v. Stone, 148 Fla. 516, 524, 4 So. 2d 700 (1941) (Buford, J., concurring).

45 *Id.*

46 Editorial, *Carrying Concealed Weapons*, in 15 Virginia Law Register 391-92 (R.T.W. Duke, Jr. ed., 1909).

47 1926 Va. Acts 285, 286.

48 R. Withers, *Road Building by Prisoners*, in *Proceedings of the National Conference of Charities and Correction* 209 (1908).

49 Don B. Kates, Restricting Handguns 17 (1979); L. Kennett & J. Anderson, The Gun in America 177-78 (1975).

50 *New York Times*, Sept. 28, 1911.

51 *Id.*, Sept. 29, 1911.

52 People v. Warden of City Prison, 154 A.D. 413, 421 (1913).

53 Kachalsky v. County of Westchester, 701 F.3d 81 (2d Cir. 2012) (upholding law), *cert. denied*, 133 S. Ct. 1806 (2013).

Outright bans on carrying and possession of firearms and other weapons in public places or outside one's home have been held to violate the right to bear arms in Idaho, Tennessee, New Mexico, Colorado, Kansas, Oregon, and Delaware.[54] The laws at issue in those cases prohibited both open and concealed carry.

In Vermont, a ban on carrying a concealed pistol without a license, where "neither the intent nor purpose of carrying them enters into the essential elements of the offense," was found to violate the right to bear arms.[55] In Ohio, a ban on carrying a concealed weapon, to which "reasonable cause" was an affirmative defense, in the context where open carry would also lead to an arrest, was held to violate the right to bear arms.[56] In West Virginia, a ban on carrying a weapon "for any purpose without a license or other statutory authorization" was found void.[57] In Wisconsin, a ban on carrying concealed firearms, as applied in the defendant's business premises, was held violative of the right to bear arms.[58]

Two precedents are worthy of special note. One from North Carolina upheld the right to open carry without a license. In *State v. Kerner*, the North Carolina Supreme Court upheld the right to openly carry a pistol without a license.[59] While protected arms did not include war planes or cannons, for the citizen "the rifle, the musket, the shotgun, and the pistol are about the only arms which he could be expected to 'bear,' and his right to do this is that which is guaranteed by the Constitution."[60] The right includes "all 'arms' as were in common use, and borne by the people as such when this provision was adopted."[61] In view of places "where great corporations . . . terrorize their employees by armed force," law-abiding citizens must be able to "assemble with their pistols carried openly" to protect themselves "from unlawful violence without going before an official and obtaining license . . . ."[62]

The other noteworthy precedent rejected official discretion over an applicant's "need" in the issuance of a license to carry a concealed handgun. In *Schubert v. DeBard*, the Court of Appeals of Indiana held that the right to bear arms precluded the state police from exercising discretion in deciding whether an applicant had "a proper reason" for a license to carry a handgun.[63] Such discretion "would supplant a right with a mere administrative privilege which might be withheld simply on the basis that such matters as the use of firearms are better left to the organized military and police forces even where defense of the individual is involved."[64]

Currently, open carry requires no permit in thirty states, requires a permit in fifteen states, and is prohibited in five states.[65] Forty-one states (arguably forty-three) and the District of Columbia issue concealed carry permits to all law-abiding persons who meet training or other requirements—these are known as "shall issue" states. Vermont does not issue permits, but both concealed and open carry are lawful. Nine states allow both concealed and open carry without a permit—these are known as "constitutional carry" states. In eight states (arguably six), officials decide if a person "needs" to carry a firearm—these are "may issue" states.[66]

It is in those "may issue" states where the question of whether the Second Amendment literally guarantees the right to "bear arms" is in litigation, mostly in the federal courts.

B. Heller*: To "Bear" Means to "Carry"*

In *District of Columbia v. Heller*, the U.S. Supreme Court held that the right to keep and bear arms extends to individuals and invalidated the District's handgun ban.[67] Its analysis clearly recognized the right to carry firearms subject to limited exceptions.

Textual interpretation has a historical basis; the Constitution "was written to be understood by the voters," and its terminology was thus used in its ordinary meaning.[68] Historical sources considered the right to "keep arms" to be "an individual right unconnected with militia service."[69] Furthermore, "At the time of the founding, as now, to 'bear' meant to 'carry.'"[70] More specifically, to bear arms meant to "'wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person.'"[71] Reflecting such usage, in the years just before and after the adoption of the Bill of Rights,

54 In re Brickey, 70 P. 609 (1902) (carry ban violated Second Amendment and state guarantee); Glasscock v. City of Chattanooga, 11 S.W.2d 678 (1928) (invalidating ban on carrying pistol on the person); City of Las Vegas v. Moberg, 82 N.M. 626, 627 (Ct. App. 1971) (ban on carrying weapons on the person void because "an ordinance may not deny the people the constitutionally guaranteed right to bear arms"); City of Lakewood v. Pillow, 501 P.2d 744 (1972) (ban on possession of firearm except in one's domicile and on carrying firearm held "unconstitutionally overbroad"); Junction City v. Mevis, 601 P.2d 1145 (1979) (ban on possession of firearm outside home or business held "unconstitutionally overbroad"); State v. Blocker, 291 Or. 255, 259 (1981) ("possession of a billy in a public place is constitutionally protected"); Bridgeville Rifle & Pistol Club v. Small, 176 A.3d 632 (Del. 2017) (ban on possession in state parks).

55 State v. Rosenthal, 55 A. 610, 610-11 (1903).

56 Klein v. Leis, 146 Ohio App.3d 526, 531, 535 (2002).

57 State ex rel. City of Princeton v. Buckner, 180 W. Va. 457, 462-63 (1988).

58 State v. Hamdan, 665 N.W.2d 785 (2003).

59 State v. Kerner, 181 N.C. 574, 577-78 (1921).

60 *Id.* at 576.

61 *Id.* at 577.

62 *Id.* at 577-78.

63 Schubert v. DeBard, 398 N.E. 2d 1339, 1341 (Ind. App. 1980).

64 *Id.*

65 *Open Carry*, OpenCarry.org, https://opencarry.org/maps/map-open-carry-of-a-properly-holstered-loaded-handgun/.

66 *Concealed Carry Permit Information by State*, USA Carry, https://www.usacarry.com/concealed_carry_permit_information.html. This source lists Connecticut and Delaware as "may issue," but these states arguably are "shall issue."

67 *Heller*, 554 U.S. 570.

68 *Id.* at 576.

69 *Id.* at 582.

70 *Id.* at 584.

71 *Id.* (quoting Muscarello v. United States, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)).

several states adopted guarantees of the right of citizens to bear arms for defense of self and state.[72]

Although "bear arms" may be used in a military context, there is no "right to be a soldier or to wage war," which would be an absurdity.[73] In historical usage, "bearing arms" meant "simply the carrying of arms," such as "for the purpose of self-defense" or "to make war against the King."[74]

Heller thus found that the Second Amendment guarantees "the individual right to possess and carry weapons in case of confrontation," which the historical background confirmed.[75] The attempts of monarchs to disarm subjects led both to the English Declaration of Rights of 1689 and to the Second Amendment a century later.[76] Although both protected an individual right to have arms, the right was not unlimited.[77] Since "all persons [have] the right to bear arms," "it can only be a crime to exercise this right in such a manner, as to terrify people unnecessarily."[78]

Turning to the prefatory clause, the *Heller* Court found that a "well regulated militia" was seen by the founding generation as necessary to the security of a free polity.[79] "The traditional militia was formed from a pool of men bringing arms 'in common use at the time' for lawful purposes like self-defense."[80] While "the sorts of weapons protected were those 'in common use at the time,'" there was a "historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'"[81] But no such tradition existed of banning the carrying of common arms, and indeed some "statutes required individual arms bearing for public-safety reasons," such as mandated carriage of firearms to church in times of danger.[82]

It is noteworthy that neither the majority nor dissenting opinions in *Heller* so much as mention the Statute of Northampton of 1328, which punished going armed to the terror of the subjects and which is currently being promoted by advocates as somehow overriding the Second Amendment.[83] Going armed peaceably could be a right or a duty, and in neither case was it unlawful. As *Heller* stated: "The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting."[84] Bearing arms for lawful purposes such as these is exactly what the Amendment protects.

Heller also addressed the public understanding of the Second Amendment from just after its ratification through the end of the nineteenth century. That included post-ratification commentary, antebellum judicial opinions, Reconstruction legislation, and post-Civil War commentary.[85] For instance, the Court discussed precedents upholding the right to carry arms openly[86] and protection in the Freedmen's Bureau Act of 1866 for "the constitutional right to bear arms."[87]

Prior decisions of the Court had recognized the individual right to bear arms. *United States v. Cruikshank* (1876) averred that "[t]he right . . . of bearing arms for a lawful purpose . . . is not a right granted by the Constitution," because the right pre-existed the Constitution.[88] *Presser v. Illinois* (1886) held that the right was not violated by a law forbidding (in *Heller*'s words) "private paramilitary organizations."[89] These cases did not consider whether rights under the First and Second Amendment were incorporated against the states by the Fourteenth Amendment.[90]

Heller further recalled the wording in *Robertson v. Baldwin* (1897) that the Bill of Rights codified rights "inherited from our English ancestors."[91] As *Robertson* added, these rights that were incorporated into "the fundamental law" had exceptions; "the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons . . . ."[92] In short, there is a right to carry arms, but regulation of the mode of carry is allowed.

Based on this analysis, *Heller* declared that the District of Columbia's ban on the possession of handguns violated the Second Amendment. Recalling antebellum state court decisions

72 *Id.* at 584-85.

73 *Id.* at 586.

74 *Id.* at 588.

75 *Id.* at 592.

76 *Id.* at 593-94.

77 *Id.* at 595.

78 *Id.* at 588 n.10 (quoting C. Humphreys, A Compendium of the Common Law in force in Kentucky 482 (1822)).

79 *Id.* at 598.

80 *Id.* at 624-25 (citing United States v. Miller, 307 U.S. 174, 178 (1939)).

81 *Id.* at 627.

82 *Id.* at 601.

83 *See* Stephen P. Halbrook, *To Bear Arms for Self-Defense: A "Right of the People" or a Privilege of the Few? Part One*, 21 Federalist Soc'y Rev. 46, 48-49 (2020), *available at* https://fedsoc.org/commentary/publications/to-bear-arms-for-self-defense-a-right-of-the-people-or-a-privilege-of-the-few.

84 *Heller*, 554 U.S. at 598-99.

85 *Id.* at 589.

86 *E.g.*, Nunn v. State, 1 Ga. 243, 251 (1846); State v. Chandler, 5 La. Ann. 489, 490 (1850).

87 *See Heller,* 554 U.S. at 614-15 (citing *Freedmen, supra* note 1).

88 *Id.* at 592, 619-20 (quoting United States v. Cruikshank, 92 U.S. 542, 552-53 (1876)). On *Cruikshank*, see *Freedmen*, *supra* note 1, chapter 7.

89 *Id.* at 621-22 (citing Presser v. Illinois, 116 U.S. 252, 264-65 (1886)) (stating that the law forbade "bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law"). Presser led a parade of four hundred men with rifles through the streets of Chicago without having a license from the governor. *Id. See* S. Halbrook, *The Right of Workers to Assemble and to Bear Arms:* Presser v. Illinois, 76 U. Det. Mercy L. Rev. 943 (1999).

90 *Id.* at 620 n.23 (citing Miller v. Texas, 153 U.S. 535, 538 (1894)). In *Miller*, the defendant challenged a ban on carrying weapons and allowing arrest without a warrant as violative of the Second and Fourth Amendments. The Court rejected the argument that these rights were protected by the Fourteenth Amendment because that had not been claimed in the trial court and was waived. *Id. See* C. Leonardatos, D. Kopel, & S. Halbrook, Miller versus Texas*: Police Violence, Race Relations, Capital Punishment, & Gun-toting*, 9 J.L. & Pol'y, 737 (2001).

91 *Id.* at 599 (quoting Robertson v. Baldwin, 165 U.S. 275, 281 (1897)).

92 *Robertson*, 165 U.S. at 281.

that declared bans on openly carrying handguns unconstitutional, the Court noted that "Few laws in the history of our Nation have come close to the severe restriction of the District's handgun ban."[93]

However, the decision did not "cast doubt on . . . laws forbidding the carrying of firearms in sensitive places such as schools and government buildings," which are among the "presumptively lawful regulatory measures . . . ."[94] This implies that the right to carry arms in non-sensitive places is protected.

C. Heller*: Rejection of Interest-Balancing*

Heller took a categorical approach to adjudicating disputes involving the right to bear arms and, without any consideration of a committee report that sought to justify the handgun ban or of empirical studies, held:

> The handgun ban amounts to a prohibition of an entire class of "arms" that is overwhelmingly chosen by American society for that lawful purpose [self-defense]. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home "the most preferred firearm in the nation to 'keep' and use for protection of one's home and family," . . . would fail constitutional muster.[95]

That the need for defense is "most acute" in the home implies that it is also acute elsewhere, such as on lonely streets or deserted parking lots at night, although perhaps to a lesser degree.

Heller rejected rational basis analysis[96] as well as Justice Stephen Breyer's proposed "judge-empowering 'interest-balancing inquiry' that 'asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests.'"[97] Relying on intermediate-scrutiny cases, Justice Breyer would have applied a standard under which "the Court normally defers to a legislature's empirical judgment in matters where a legislature is likely to have greater expertise and greater institutional factfinding capacity."[98]

Justice Breyer relied on the committee report which proposed the handgun ban and which was filled with data on the misuse of handguns to justify banning them.[99] He also cited empirical studies about the role of handguns in crime, injuries, and death.[100] Contrary empirical studies questioning the effectiveness of the handgun ban and focusing on lawful uses of handguns, in his view, would not suffice to overcome the legislative judgment.[101]

Heller rejected the dissent's use of interest-balancing reliance based on the committee report and empirical studies as follows:

> We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.[102]

Since *Heller* was decided, lower courts have disagreed on what standards of review to apply in Second Amendment cases. Justice Clarence Thomas, in a dissent from denial of certiorari, noted the application of two different tests in a D.C. Circuit case that came to be known as *Heller II*: the majority applied a test based on levels of scrutiny, and then-Judge Brett Kavanaugh, in dissent, argued for a test based on text, history, and tradition.[103] A number of more recent cases have been decided against Second Amendment rights based on intermediate scrutiny analyses akin to Justice Breyer's interest-balancing test, despite the *Heller* majority's rejection of that approach.

D. McDonald*: A Fundamental Right, Not a Second-Class Right*

Next came the Supreme Court's decision in *McDonald v. Chicago*, which repeated the Court's "central holding in *Heller*: that the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home."[104] The right to bear arms for self-defense also exists outside the home, although perhaps somewhat less notably.

McDonald held that "the right to keep and bear arms is fundamental to *our* scheme of ordered liberty" and is "deeply rooted in this Nation's history and tradition," and thus that the Second Amendment is applicable to the states through the Fourteenth Amendment.[105] Tracing the right through periods of American history from the Founding through current times, the Court called the right "fundamental" at least ten times.[106]

McDonald rejected the view "that the Second Amendment should be singled out for special—and specially

93 *Heller,* 554 U.S. at 629 (citing *Nunn*, 1 Ga. at 251); *Andrews*, 50 Tenn. at 187; State v. Reid, 1 Ala. 612, 616-617 (1840)).

94 *Id*. at 626-27 & n.26.

95 *Id.* at 628-29 (citation omitted). While *Heller* invalidated the handgun ban under the categorical test, it implied that strict scrutiny could be applied based on the right being fundamental: "By the time of the founding, the right to have arms had become fundamental for English subjects. . . . Blackstone . . . cited the arms provision of the Bill of Rights as one of the fundamental rights of Englishmen." *Id.* at 593-94.

96 *Id*. at 629 n.27.

97 *Id*. at 634.

98 *Id*. at 690 (Breyer, J., dissenting) (citing Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180, 195-196 (1997)).

99 *Id*. at 693.

100 *Id*. at 696-99.

101 *Id*. at 699-703.

102 *Id*. at 634.

103 Jackson v. City and County of San Francisco, 135 S. Ct. 2799, 2801 (2015) (Thomas, J., dissenting from denial of cert.) (comparing Heller v. District of Columbia, 670 F.3d 1244 (D.C. Cir. 2011) (*Heller II*) (majority opinion) with *id*. at 1271 (Kavanaugh, J., dissenting)).

104 *McDonald*, 561 U.S. at 780.

105 *Id*. at 767.

106 *Id*. at 767-91.

unfavorable—treatment," and that it should be treated as "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees . . . ."[107] It invalidated Chicago's handgun ban without according Chicago's legislative findings any deference or even discussion.[108]

In dissent, Justice Breyer objected that the decision would require courts to answer empirical questions such as: "Does the right to possess weapons for self-defense extend outside the home? To the car? To work? What sort of guns are necessary for self-defense? Handguns? Rifles?"[109] The Court responded that it "is incorrect that incorporation will require judges to assess the costs and benefits of firearms restrictions and thus to make difficult empirical judgments in an area in which they lack expertise."[110] After all, *Heller* had rejected an interest-balancing test and held that "[t]he very enumeration of the right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon."[111]

E. Caetano*: A Stun Gun in a Parking Lot*

A unanimous per curiam decision by the Supreme Court, *Caetano v. Massachusetts*, reversed and remanded a decision of the Massachusetts Supreme Judicial Court that had upheld a ban on stun guns.[112] The Massachusetts court erred in holding stun guns not to be protected on the basis that they were not in common use when the Second Amendment was adopted, contrary to *Heller*'s holding that the Amendment extends to "arms . . . that were not in existence at the time of the founding."[113] It erred in concluding that stun guns were "unusual" because they are a modern invention, for the same reason.[114] And it erred in asserting "that only those weapons useful in warfare are protected," a test that *Heller* explicitly rejected.[115]

Justice Samuel Alito, joined by Justice Thomas, concurred. Jaime Caetano got the stun gun for protection against her abusive former boyfriend. The concurring Justices specifically noted that "By arming herself, Caetano was able to protect against a physical threat that restraining orders had proved useless to prevent."[116]

It is noteworthy that Ms. Caetano carried the stun gun outside of her home, and indeed she was said to be "homeless."[117] She displayed it to defend herself "one night after leaving work" when her ex-boyfriend threatened her. Police later arrested her for possession of the stun gun in the parking lot of a supermarket.[118] If the Court thought that no right exists to bear arms for self-defense outside the home, it might just as well have denied certiorari and let her conviction stand. While the Court has not *held* that the right to bear arms is protected outside the home, its holding in Caetano *assumes* that to be the case.

* * *

Heller concluded that "since this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field," adding that it could "expound upon the historical justifications for the exceptions" to the right should they come before the Court.[119] Many knocks at the Court's door since then have gone unanswered.

VI. The Limbo Game: How Low Can the Standard Go?

*A. The Post-*Heller *Circuit Split*

The circuits are split on whether "may issue" laws violate the right of "the people" to "bear arms." No significant litigation took place in the federal courts on that issue before *Heller* confirmed that the Second Amendment protects individual rights and *McDonald* held the Amendment to apply to the states, but since 2010, the circuits have split such that the First, Second, Third, and Fourth Circuits approve of "may issue" regimes and the D.C. and Seventh Circuits disapprove, while a Ninth Circuit panel disapproved but the case is pending rehearing en banc. This section discusses four of the leading opinions in the circuit split.

Judge Richard Posner's opinion in *Moore v. Madigan* invalidated Illinois' ban on carrying firearms outside the home, which did not even provide for discretionary licensing.[120] Reviewing text, history, and precedent, the court concluded: "To speak of 'bearing' arms within one's home would at all times have been an awkward usage. A right to bear arms thus implies a right to carry a loaded gun outside the home."[121] The right to self-defense is fundamental, and "a Chicagoan is a good deal more likely to be attacked on a sidewalk in a rough neighborhood than in his apartment on the 35th floor of the Park Tower."[122] The existence of the constitutional right overrides policy arguments about whether "the mere possibility that allowing guns to be carried in public would increase the crime or death rates sufficed to justify a ban . . . ."[123]

By contrast, *Drake v. Filko* upheld New Jersey's discretionary carry license law.[124] The majority held that the requirement to demonstrate a "justifiable need" to publicly carry a handgun for self-defense is a "presumptively lawful," "longstanding" regulation, and it thus "does not burden conduct within the scope of the

107 *Id*. at 780.

108 *Id*. at 750-51 (quoting Journal of Proceedings of the City Council).

109 *Id*. at 923 (Breyer, J., dissenting).

110 *Id*. at 790-91.

111 *Id*. at 791 (citation omitted).

112 Caetano v. Massachusetts, 136 S. Ct. 1027, 1028 (2016) (per curiam).

113 *Id*. at 1027.

114 *Id*. at 1028.

115 *Id*.

116 *Id*. at 1029 (Alito, J., concurring).

117 *Id*. at 1028-29.

118 *Id*.

119 *Heller,* 554 U.S. at 635.

120 702 F.3d 933 (7th Cir. 2012).

121 *Id*. at 936.

122 *Id*. at 937.

123 *Id*. at 939.

124 724 F.3d 426 (3rd Cir. 2013), *cert. denied*, 134 S. Ct. 2134 (2014).

Second Amendment's guarantee."[125] Even if it did, it would be upheld under intermediate scrutiny.[126] New Jersey had enacted the "justifiable need" requirement for concealed carry permits in 1924. The court said it was not surprising that no legislative history existed with data to justify the requirement because it could not be anticipated that the Second Amendment would be held in *Heller* and *McDonald* to be an individual right applicable to the states.[127]

In dissent, Judge Thomas Hardiman wrote that to restrict "bearing" arms to the home would conflate it with "keeping" arms.[128] The ban was not "longstanding" in that, while the 1924 law required concealed carry permit applicants to show need, open carry was not banned until 1966.[129] No evidence justified a ban on carrying by the typical citizen, so the law could be upheld only under rational basis review, which *Heller* said should not be applied to the right to bear arms.[130]

The en banc majority in *Peruta v. County of San Diego* held that the Second Amendment does not protect a right to carry concealed firearms, but refrained from opining on whether it protected open carry, although that too was banned in the law being challenged.[131] Carry permits were limited to persons with "good cause," excluding concern for one's safety.[132] To show that the right to bear arms had "long been subject to substantial regulation," the court recalled restrictions on the right imposed by English kings, such as a statute that "limited gun ownership to the wealthy,"[133] and antebellum state cases upholding concealed carry restrictions.[134]

A dissent joined by four judges would have held that, as the law at issue banned both concealed and open carry, the right to bear arms was violated: "States may choose between different manners of bearing arms for self-defense so long as the right to bear arms for self-defense is accommodated."[135] As to the county's unfettered discretion, the dissent pointed out that "[s]uch discretionary schemes might lead to licenses for a privileged class including high-ranking government officials (like judges), business owners, and former military and police officers, and to the denial of licenses to the vast majority of citizens."[136] Another dissenting opinion would have held that the law did not survive either strict or intermediate scrutiny. The county provided no evidence that "preventing law-abiding citizens, trained in the use of firearms, from carrying concealed firearms helps increase public safety and reduces gun violence."[137]

Justice Thomas, joined by Justice Neil Gorsuch, dissented from the denial of certiorari in *Peruta*.[138] Based on *Heller*'s interpretation of the right to "bear arms," Justice Thomas wrote that the Court "has already suggested that the Second Amendment protects the right to carry firearms in public in some fashion."[139] He found it "extremely improbable that the Framers understood the Second Amendment to protect little more than carrying a gun from the bedroom to the kitchen."[140] Given the historical evidence and precedents, the denial of certiorari "reflects a distressing trend: the treatment of the Second Amendment as a disfavored right."[141] Justice Thomas concluded:

> For those of us who work in marbled halls, guarded constantly by a vigilant and dedicated police force, the guarantees of the Second Amendment might seem antiquated and superfluous. But the Framers made a clear choice: They reserved to all Americans the right to bear arms for self-defense. I do not think we should stand by idly while a State denies its citizens that right, particularly when their very lives may depend on it.[142]

Finally, *Wrenn v. District of Columbia* invalidated the District of Columbia's law restricting issuance of concealed handgun licenses to those the police deem as having "good reason to fear injury."[143] The analysis was based on the textual reference to "bear arms," the common law and historical tradition, and *Heller*. The court rejected the continuing relevance of the Statute of Northampton and instead emphasized the understanding of the framers and ratifiers of the Bill of Rights:

> we can sidestep the historical debate on how the first Northampton law might have hindered Londoners in the Middle Ages. Common-law rights developed over time, and American commentaries spell out what early cases imply: the mature right captured by the Amendment was not hemmed in by longstanding bans on carrying in densely populated areas. Its protections today don't give out inside the Beltway.[144]

Since the law was a total ban on exercise of a right by the people at large, it was inappropriate to apply any level of scrutiny, strict or intermediate: "Bans on the ability of most citizens to exercise

125 *Id*. at 429.

126 *Id*. at 430.

127 *Id*. at 437-38.

128 *Id*. at 444 (Hardiman, J., dissenting).

129 *Id*. at 448-49.

130 *Id*. at 453, 455.

131 Peruta v. County of San Diego, 824 F.3d 919, 924, 927 (9th Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 1995 (2017).

132 *Id*. at 926.

133 *Id*. at 929-30.

134 *Id*. at 933-37.

135 *Id*. at 946 (Callahan, J., dissenting).

136 *Id*. at 955.

137 *Id.* at 957 (Silverman, J., dissenting).

138 Peruta v. County of San Diego, 137 S. Ct. 1995 (2017) (Thomas, J., dissenting from denial of cert.).

139 *Id*. at 1998.

140 *Id.*

141 *Id*. at 1999.

142 *Id.* at 1999-2000.

143 Wrenn v. District of Columbia, 864 F.3d 650 (D.C. Cir. 2017), *reh'g en banc denied* (Sept. 28, 2017).

144 *Id*. at 661. For more on the Statute of Northampton, see Halbrook, *To Bear Arms for Self-Defense, supra note 83*.

an enumerated right would have to flunk any judicial test that was appropriately written and applied, so we strike down the District's law here apart from any particular balancing test."[145] In sum, "[a]t the Second Amendment's core lies the right of responsible citizens to carry firearms for personal self-defense beyond the home, subject to longstanding restrictions" like licensing, but not bans on carrying without a special need.[146]

Discretionary licensing regimes have also been upheld by the First, Second, and Fourth Circuits.[147] At the time of this writing, petitions for a writ of certiorari regarding the laws of New Jersey, Massachusetts, and Maryland are pending before the Court.[148]

B. New York City's Ban on Transport Outside the Home

The Supreme Court granted a petition for a writ of certiorari in *New York State Rifle & Pistol Association v. City of New York* to review New York City's rule providing that a person with a license to keep a handgun at his or her dwelling may not take it out of the premises other than to a licensed shooting range within the City.[149] One of the petition's questions presented is: "Whether the City's ban on transporting a licensed, locked, and unloaded handgun to a home or shooting range outside city limits is consistent with the Second Amendment . . . ."[150]

The Second Circuit had upheld New York City's rule because it deferred to a declaration by a retired police official that allowing licensees to transport handguns to second homes or to competitions or ranges outside the City is "a potential threat to public safety."[151] The court speculated that City residents could simply keep another handgun at a second home, or rent or borrow a handgun at ranges or matches.[152] Concluding that its review required "difficult balancing" of the constitutional right with the governmental interests, the court applied intermediate scrutiny and upheld the rule.[153]

After the Supreme Court granted certiorari, the City amended its rule to allow transport directly to specified places and then argued to the Court that the case is moot. Yet even under the amended rule, to transport a handgun to a second home, one would be required to obtain yet another premises permit from the issuing authority at that location.[154] Transport to hotels or other temporary abodes would not be possible. As the Court has stated elsewhere, "Such postcertiorari maneuvers designed to insulate a decision from review by this Court must be viewed with a critical eye."[155] At oral argument on December 2, 2019, petitioners and the amicus United States argued against mootness because injunctive relief and damages were still live issues, while the City contended that its representations sufficed to shield the petitioners from any adverse consequences. Oral argument included much discussion about whether the new rule on direct transport would allow a person to stop for coffee, use the bathroom, or make a quick visit with one's mother who lives near a range.[156]

On the merits, the real question is whether a Second Amendment right exists to take a firearm out of one's home. The New York City law should be an easy case because an unloaded, inaccessible, and locked away firearm is being restricted. But recognition of the right should not stop there, but should lead to a full right to bear arms, i.e., carrying a firearm on the person outside the home for self-defense.

VII. Conclusion

Over two centuries passed between 1791 when the Bill of Rights was ratified and the Supreme Court's 2008 *Heller* decision which resurrected the Second Amendment from oblivion. Despite the textual reference to "the right of the people to . . . bear arms" and *Heller*'s reading in ordinary language that "bear" means "carry," some lower courts brush that away and hold that banning this constitutional right is justified by judicial balancing tests that they devised.

Rewriting history and tradition play a major role in this game. Its most grotesque manifestation is the misreading of the 1328 Statute of Northampton that supposedly overrides the explicit right to bear arms guaranteed by the Second Amendment. The right of Englishmen to have arms for self-defense was recognized by the Declaration of Rights of 1689 and exposited by Blackstone.

At the Founding and in the early Republic, the right to bear arms was constitutionalized, and going armed was lawful unless done in a manner to terrorize others, or in some states, if arms were openly carried. African Americans were prohibited from exercise of the right because they were slaves or, if free, were not considered citizens. The discretionary licensing policies foisted upon the freedmen by the black codes represent the clearest historical precedent for today's "may issue" laws. The Fourteenth Amendment sought to obliterate such laws, but they crept back in during the Jim Crow and anti-immigrant eras. Today they live on in a handful of states—albeit some of the most populated states in the nation.

Whether "the people" have a right to bear arms, or whether the right is reserved for a government-approved elite, should be

145 *Wrenn*, 864 F.3d at 666.

146 *Id*.

147 Gould v. Morgan, 907 F.3d 659 (1st Cir. 2018); *Kachalsky*, 701 F.3d 81, *cert. denied*, 133 S. Ct. 1806 (2013); Woollard v. Sheridan, 712 F.3d 865 (4th Cir. 2013), *cert. denied*, 571 U.S. 952 (2013).

148 Rogers v. Grewal, 2018 WL 2298359 (D. N.J. 2018), *summarily affirmed* (3d Cir., Sept. 21, 2018), *cert. petition filed*, No. 18-824 (Dec. 20, 2018); *Gould*, 907 F.3d 659, *cert. petition filed*, No. 18-1272 (Apr. 1, 2019); Malpasso v. Pallozzi, 767 F. App'x 525 (4th Cir. 2019) (*mem.*), *cert. petition filed*, No. 19-423 (Sept. 26, 2019).

149 New York State Rifle & Pistol Association, Inc. v. City of New York, 883 F.3d 45 (2d Cir. 2018) ("*NYSRPA*"), *cert. granted*, 139 S. Ct. 939 (2019).

150 Petition for a Writ of Certiorari, New York State Rifle & Pistol Association, Inc. v. City of New York, No. 18-280 (2019).

151 *NYSRPA*, 883 F.3d at 63.

152 *Id*. at 57-58, 61.

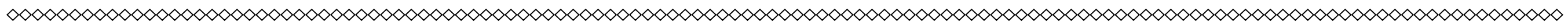
153 *Id*. at 64.

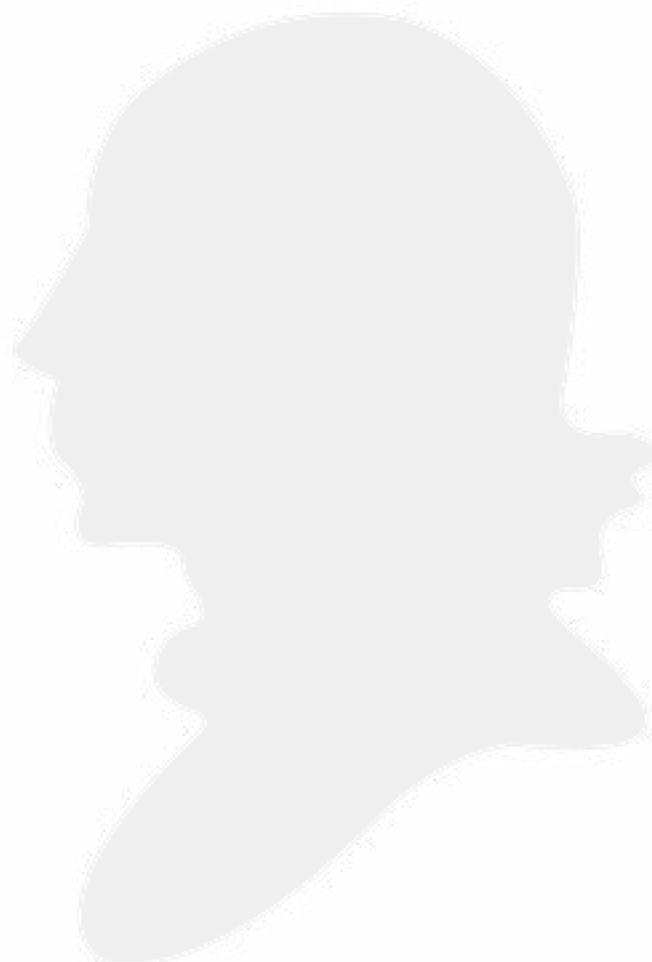
154 *See* Brief of Respondents, New York State Rifle & Pistol Association, Inc. v. City of New York, No. 18-280, at 5-6, 14-15 (2019).

155 Knox v. Service Employees Internat'l Union, 567 U.S. 298, 307 (2012).

156 Transcript of Argument, Dec. 2, 2019, *available at* https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-280_m64o.pdf.

resolved by the Supreme Court. The Court took a step in that direction by granting certiorari regarding the home-bound rule in New York City. Petitioners from "may issue" states wait in line at the Court's door, knocking. It seems to be only a matter of time before the door is opened.





Is Our Modern Administrative State Unmoored from the Morality of Law?

By Ted Hirt

Administrative Law & Regulation Practice Group

A Review of:

The Dubious Morality of Modern Administrative Law, by Richard A. Epstein (Manhattan Institute 2019), https://www.amazon.com/Dubious-Morality-Modern-Administrative-Law/dp/1538141493

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Other Views:

• Cass R. Sunstein & Adrian Vermeule, *The Morality of Administrative Law*, 131 Harv. L. Rev. 1924 (2018), *available at* https://harvardlawreview.org/2018/05/the-morality-of-administrative-law/.

• Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 Harv. L. Rev. 141 (2017), *available at* https://harvardlawreview.org/2017/11/1930s-redux-the-administrative-state-under-siege/.

• Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 Yale L.J. 908 (2017), *available at* https://www.yalelawjournal.org/article/the-origins-of-judicial-deference-to-executive-interpretation.

As we approach the seventy-fifth anniversary of the 1946 enactment of the Administrative Procedure Act (APA),[1] judges, practitioners, and academics continue a vigorous debate on the current state of administrative law.[2] How should Congress and the federal courts respond to criticisms of administrative agency overreach? In *The Dubious Morality of Modern Administrative Law*, Professor Richard A. Epstein joins this debate, addressing fundamental questions on the legitimacy of modern administrative law.[3]

Epstein brings to this task impressive credentials. He is the Laurence A. Tisch Professor of Law at the New York University School Law, the Peter and Kirsten Bedford Senior Fellow at the Hoover Institution, and the James Parker Hall Distinguished Service Professor of Law Emeritus at the University of Chicago Law School, where he is a Senior Lecturer. He has written over 20 books and numerous articles on law and other subjects. Epstein applies decades of expertise in both law and economics to his careful dissection of administrative law issues.

In his classic work, *The Morality of Law,* the late Professor Lon L. Fuller argued that "the moral framework for evaluating the rule of law should be independent of any assessment of the substance of the rules in question."[4] Fuller explained that adherence to such a moral framework creates reciprocity between the citizen and the government as to the observance of such rules.[5] In their 2018 article, *The Morality of Administrative Law*, Professors Cass Sunstein and Adrian Vermeule recognize that many critics of the modern administrative state have relied on Fuller's principles in expressing concern about abuses of agency power.[6] The authors explain that various judge-made doctrines enable the courts to monitor and correct agency deviations from Fuller's principles.[7] They argue that in the "real world" of modern American administrative law, the problem is not the failure of the rule of law, but an insufficiency in agency application of the

1 Pub. L. No. 79-404, 80 Stat. 237-44 (1946) (codified in various sections of title 5, United States Code).

2 *See, e.g.*, John Marini, Unmasking the Administrative State: The Crisis of American Politics in the Twenty-First Century (2019); Peter J. Wallison, Judicial Fortitude: The Last Chance To Rein in the Administrative State (2018); Joseph Postell, Bureaucracy in America: The Administrative State's Challenge to Constitutional Government (2017); Philip Hamburger, Is Administrative Law Unlawful? (2014).

3 Richard A. Epstein, The Dubious Morality of Modern Administrative Law (2019).

4 *Id.* at 19 (citing Lon L. Fuller, The Morality of Law 153 (1964)).

5 *See* Fuller, *supra* note 4, at 39-41.

6 Cass R. Sunstein & Adrian Vermeule, *The Morality of Administrative Law*, 131 Harv. L. Rev. 1924, 1927-28 (2018).

7 *Id.* at 1940-51, 1957-60, 1973-76.

principles.[8] They also caution that Fuller's principles must be balanced against an agency's "institutional role and capacities, resource limitations, and programmatic objectives," which means that agencies may need to use "open-ended standards," proceed on an ad hoc basis, or apply managerial judgment and make difficult economic allocations in resolving issues.[9]

Epstein's book is framed in part as a response to Sunstein and Vermeule's article. Epstein squarely rejects their conclusion, arguing that Fuller's "steely insistence on legal coherence, clarity, and consistency, coupled with his strong condemnation of retroactive laws, does not mesh with modern administrative law."[10] In assessing the morality of administrative law, Epstein addresses "basic rule-of-law considerations" from both a theoretical and historical perspective.[11] He describes how the APA differs from ordinary rules of civil procedure, and he analyzes how administrative law has been applied to various substantive fields of law, including environmental, public power, and civil rights laws.[12] Epstein also tackles some of most pressing issues in the debate over administrative law reform, including the nondelegation doctrine and various forms of judicial deference to agency interpretations of federal law. He does not address the constitutionality of administrative law, although he notes that some judges and commentators have voiced "grave constitutional doubts" about it.[13] Epstein opines that administrative agencies "do many things well," and that the "overall picture is not uniformly bad," but he says "there is much space for improvement" in the operation of administrative law.[14]

I. Administrative Law in a Moral Framework

Epstein evaluates the morality of administrative law according to the rubric set forth in Fuller's *The Morality of Law*, which outlines the "minimum requisites" of the rule of law.[15] Fuller enumerates eight ways a regime can violate the rule of law:

1. failing to enact rules at all, which results in ad hoc decision-making
2. failing to publicize the law or inform the affected party about the rules that it was expected to observe
3. enacting retroactive laws (unless "curative"—a narrow exception)
4. failing to make rules understandable
5. enacting contradictory rules
6. enacting rules that require conduct beyond the power of the affected party
7. creating such frequent rule changes that the affected party cannot adjust its activities to them
8. failing to maintain congruence between a rule as announced and its actual administration[16]

Epstein notes that Fuller placed special emphasis on the evil of retroactive laws, which he called a "monstrosity."[17] Epstein also supplements Fuller's principles with several maxims derived from Roman law, such as the principles that decision-makers must act impartially and that a tribunal must hear from both sides of a controversy.[18]

Fuller's principles, Epstein explains, are "nonsubstantive rules" that should have "universal appeal across the political spectrum."[19] Rule of law principles also can support substantive rights, such as property and contract rights, by maintaining law that is "constant over time" and not changeable based on social or economic pressures in the society.[20] For example, strong rules of freedom of contract help preserve stability and certainty in the legal framework because parties agree to binding norms, reducing disputes in the legal system.[21] In contrast, government intervention "opens the door" to interference with freedom of contract, diminishing private rights.[22] And when the state regulates private property or contracts without providing just compensation for government takings of property, the state has eroded substantive rights even more, because it is not paid any price for the cost of its interference.[23]

II. The Evolution of Administrative Law

Epstein provides a very brief outline of the evolution of administrative law in the United States.[24] At the time of the Founding, it was understood that delegations of authority by the three branches would occur.[25] The enumeration of congressional powers in Article I, section 8 of the Constitution did not preclude delegations of authority, but the Founders did not think Congress should delegate its power lightly. For example, the issue of the establishment post roads and post offices occupied Congress's attention in 1791.[26] Ultimately, a proposal

8 *Id.* at 1973-74.

9 *Id.* at 1968-70, 1976-78.

10 Epstein, *supra* note 3, at 1.

11 *Id.* at 7.

12 *Id.* at 7, 99-107, 111-17, 137-48, 192-205.

13 *Id.* at 10, 88, 214 (citing Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J. concurring) (questioning scope of agency powers conferred through *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) and other cases).

14 *Id.* at 1, 7.

15 *Id.* at 12.

16 *Id.* at 19-20 (citing Fuller, *supra* note 4, at 38-39).

17 *Id.* at 20 (citing Fuller, *supra* note 4, at 53).

18 *Id.* at 21.

19 *Id.* at 22.

20 *Id.* at 22-24.

21 *Id.*

22 *Id.* at 25.

23 *Id.* at 26-28

24 *Id.* at 33-58.

25 *Id.* at 33-34.

26 *Id.* at 40-41.

to delegate that decision to the president failed.[27] Epstein views this as an important indicator of Congress's desire to maintain its legislative prerogative and not delegate its authority, even where the Constitution might allow it.[28]

During the nineteenth century, the federal government had few "core functions"—e.g., handling government contracts, disposing of public land, administering patents and copyrights, and imposing taxes and tariffs—and there were few controversies that implicated administrative law principles.[29] Epstein states that when Congress delegated authority to levy a tariff, it used a "clear directive to which the overall system had to conform."[30] Courts applied rule of law principles when they adjudicated rate-making decisions and cases involving the contractual liabilities of railroads.[31]

In 1935, the Supreme Court rejected a broad delegation of power Congress had made in the National Industrial Recovery Act of 1933.[32] The NIRA provided for over 500 codes of conduct to be issued upon presidential approval and the reports of several administrative agencies, with the goal of restoring the nation's economy in the wake of the Great Depression.[33] Chief Justice Charles Evan Hughes explained that the codes were to prescribe conditions of "fair competition," a term that was not defined, but which extended beyond the more limited common law concept of "unfair competition."[34] Chief Justice Hughes contrasted the new, open-ended grant of authority with that made in the earlier Federal Trade Commission Act, in which Congress prohibited "unfair methods of competition" and relied on the Federal Trade Commission (FTC) to determine what methods were unfair in individual adjudications, with its decisions subject to judicial review.[35] Epstein observes, however, that although *Schechter* struck down a broad delegation of congressional authority, it implicitly approved a broad exercise of FTC power that was "ripe for abuse" and "unmoored from both the law of misrepresentation and the law of antitrust."[36]

Epstein expounds on the *Schechter* decision to drive home several points. First, he disagrees with scholars like Sunstein who have argued that *Schechter* was a break from decades of broad congressional delegations that were not overturned by courts.[37] Epstein responds that previous delegations of authority had been clear and constrained in scope and had been upheld in "relatively narrow circumscribed opinions."[38] Before the New Deal period, the doctrine "exerted such a powerful effect on legislatures" that they followed it without "judicial compulsion."[39]

Second, *Schechter* illustrates the difference between the pre-New Deal legal regime that relied on common law definitions and the "progressive conception" that enacts ambitious schemes that seek to regulate things like "market failure in the inequality of bargaining power that it claims exists even in competitive markets."[40] The New Deal was a "watershed moment" that vastly increased the federal government's reach at the expense of constitutional protections for contract and property rights.[41] Congress asked agencies to regulate a vast swath of economic activity.[42]

Epstein also explains that although nineteenth and early twentieth century courts gave some deference to agency interpretations of statutes—such as an agency's interpretation of a statute delineating retirement benefits for government employees—the agencies at the time limited themselves by applying the "custom" and the "accumulated weight" of past agency practice.[43] That early deference was not as broad as the deference given to agency decisions after the 1984 decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, under which courts defer to an agency's interpretation of an ambiguous statute as long as the interpretation is reasonable.[44]

Epstein argues that several contemporary scholars have overstated the nature and extent of the deference that courts gave to agencies in the pre-*Chevron* era.[45] In the areas of public land grants and taxation, Epstein discerns modest deference to agency decision-making.[46] In reviewing the application of tariff laws, for example, courts understood that the president and his agents could only act within limits prescribed by Congress and that, within those limits, they could make judgments as to the application of the tariff laws to specific factual circumstances.[47]

27 *Id.* at 40-42.

28 *Id.* at 41.

29 *Id.* at 42-44.

30 *Id.* at 48.

31 *Id.* at 49-50 (citing Bd. of Public Utility Comm'rs v. New York Telephone Co., 271 U.S. 23 (1926); Railroad Retirement Bd. v. Alton R.R. Co., 295 U.S. 330 (1935)).

32 A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

33 Epstein, *supra* note 3, at 51-54.

34 *Id.* at 53 (citing *Schechter*, 295 U.S. at 531-32).

35 *Schechter*, 295 U.S. at 532-33.

36 Epstein, *supra* note 3, at 55.

37 *Id.* at 51 (citing Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 322 (2000)).

38 *Id.*

39 *Id.*

40 *Id.* at 52, 54.

41 *Id.* at 58-59.

42 *Id.* at 51, 59.

43 *Id.* at 44-45.

44 *Chevron*, 467 U.S. at 842-43.

45 Epstein, *supra* note 3, at 44 (citing Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 Harv. L. Rev. 141 (2017); Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation,* 126 Yale L.J. 908 (2017)).

46 *Id.* at 44-46.

47 *Id.* at 46-48 (citing Field v. Clark, 143 U.S. 649 (1892)).

III. Flaws in Modern Administrative Law

Epstein contends that several features of modern administrative law violate Fuller's principles or Epstein's own criteria for a moral legal regime.[48]

A. Delegations of Congressional Power

Epstein criticizes the futility of the modern nondelegation doctrine, under which Congress lawfully can delegate authority to agencies if the reviewing court can discern an "intelligible principle" for the agency's exercise of that authority.[49] When Congress delegates authority to agencies to implement a legislative objective through open-ended statutory terms like the "public interest, convenience, and necessity," courts have very limited ability to invalidate such standards or to substitute a narrower set of terms.[50] Ultimately, it becomes too difficult for Congress to restrict administrative agencies that have been given broad powers over the economy.[51] As a result, agencies can weaken the operation of competitive markets and undermine property rights.[52]

Epstein also is skeptical of broad delegations to agencies of authority to distribute benefits to private individuals or entities.[53] Epstein says that Fuller was "uneasy" about how his rule of law principles could apply to situations in which the government grants benefits to private firms or to individuals, such as air traffic routes or portions of the radio spectrum.[54] The allocation of public resources to private entities makes the government subject to charges of favoritism; the solution is to conduct an auction or use another market-based mechanism to allocate those resources.[55] This method of allocation is superior to vague statutory directives such as that contained in the Federal Communications Act—to advance the "public interest, convenience, and necessity."[56]

Epstein acknowledges that broad delegations may be appropriate in some circumstances.[57] Congress, particularly in times of emergency, may delegate broad powers to agencies, particularly when such powers will be temporary.[58] And Congress also may delegate authority when decision-making will involve case-by-case resolution of the substantive law standards.[59] But Congress must make policies, not evade its responsibility to do so.[60] Epstein rejects the notion that the expansion of federal power over the past 75 years has made it impossible for Congress to legislate.[61] Congress can still make specific and definitive legal determinations.[62]

B. Agency Bias—Unity of Functions and Adjudications

Epstein argues that the ancient principle of requiring a neutral, unbiased decision-maker is employed by our judicial system, but not in administrative agencies.[63] He explains that the "first constraint" of the rule of law is the citizen's right to have a case adjudicated by a neutral judge under rules that guarantee the right to be heard.[64] Our judicial system implements this principle in various different ways.[65] The judicial system is typically one of general jurisdiction over a broad class of case types and subjects, which reduces the risk that an individual judge will form strong views on an individual case's outcome.[66] In more technical areas, such as patents, taxation, and bankruptcy, there are specialized courts, but constraints like panel rotation mitigate possible institutional bias.[67]

In contrast, some agencies unite the rulemaking, prosecution, and adjudication functions "under the same roof," and other agencies go so far as to concentrate all decision-making in one agency head or a small number of commissioners.[68] Concentrating authority in a single individual unduly enhances agency power and the potential for abuse and favoritism, particularly if the administrative process (e.g., adjudication of regulatory violations) is "truncated" and lacks basic protections such as burdens of proof and cross-examination.[69] For example, when high-level officials are appointed based on political affiliation, the result is decision-making that is driven by policy choices rather than expertise, and by efficiency rather than concern for protecting the interests of regulated entities.[70]

For agencies like the Securities and Exchange Commission, statutory violations are adjudicated by administrative law judges ("ALJs"), with review by the SEC's own commissioners, and

48 *Id.* at 58-76, 21-22.

49 *Id.* at 67-73.

50 *Id.* at 213.

51 *Id.*

52 *Id.* at 212-13.

53 *Id.* at 73-76.

54 *Id.* at 73-74.

55 *Id.* at 74-75.

56 *Id.* at 75 (citing 47 U.S.C. § 303). Epstein acknowledges that notwithstanding this vague directive, broadband spectrum is "routinely auctioned off" to the highest bidder. *Id.* at 76.

57 *Id.* at 68-71, 73.

58 *Id.* at 68-69 (citing Yakus v. United States, 321 U.S. 414, 420-21 (1945) (upholding Congress's delegation of authority to the Office of Price Administration to set emergency price regulations)).

59 *Id.* at 69-71 (citing Mistretta v. United States, 488 U.S. 361, 374-79 (1989) (upholding Congress's delegation of authority to the United States Sentencing Commission to set federal sentencing guidelines)).

60 *Id.* at 73 (citing Gundy v. United States, 139 S. Ct. 2116 (2019) (upholding Congress's delegation of authority to the Attorney General to determine the applicability of a statute to a specific class of individuals)).

61 *Id.* at 73.

62 *Id.*

63 *Id.* at 59.

64 *Id.*

65 *Id.*

66 *Id.*

67 *Id.*

68 *Id.* at 59-61.

69 *Id.* at 60.

70 *Id.* at 59-60.

serious violations can result in heavy fines and exclusion from the industry.[71] In *Lucia v. Securities and Exchange Commission*, the Supreme Court considered a constitutional challenge to the ALJ appointment process, under which SEC staff, rather than the Commission itself, appointed ALJs.[72] The ALJ in the case, who had an "unbroken record of imposing heavy fines" and life-time bars on industry participation, had imposed $300,000 in civil penalties and a life-time bar on the owner of the investment company, who challenged the appointment process in his administrative proceedings, contending that the ALJ was an "Officer of the United States" who could not be appointed by SEC staff.[73] The Court held that the ALJ's appointment violated the Appointments Clause because the ALJ exercised significant authority and discretion in conducting adjudications.[74] Such functions only could be performed by ALJs appointed by the agency head.[75] Epstein notes that although the Commission resolved the appointments problem in response to the *Lucia* decision, the "gaping bias" in the ALJ adjudication system was not addressed.[76] The proper alternative to such arrangements, Epstein contends, would be the adjudication of such cases by an independent court.[77] Epstein points to the Court of Appeals for the Armed Forces as an example of how administrative adjudication can be done justly; that court decides cases in accordance with the rule of law and maintains procedural protections for accused individuals.[78]

C. Agency Guidance

Agencies also flout rule of law principles by issuing guidance to regulated entities, intending to shape their behavior without enacting regulations through the notice-and-comment rulemaking process prescribed by the APA.[79] Epstein does not quarrel with the use of guidance on "routine housekeeping" matters, such as compliance with agency procedures, but he criticizes agencies' use of guidance to "stake out aggressive substantive positions" that are not appropriate to documents that are not formally binding.[80] When agencies seek to make policy via informal guidance, the regulated party, while not bound by an actual rule, must evaluate the risk of not following the guidance and exposing itself to agency enforcement.[81]

Guidance documents also enable agencies to expand their jurisdiction if their authorizing statutes are sufficiently "open-ended."[82] Epstein criticizes an egregious example of this phenomenon: guidance to colleges and universities that was issued by the Department of Education under the Obama administration (since rescinded) that set out procedures for the resolution of campus-related sexual harassment claims. This guidance was issued pursuant to Title IX of the Education Amendments of 1972, which proscribes discrimination based on sex at educational institutions that receive federal funds.[83] Although the statute did not describe any procedures for the resolution of sexual harassment complaints, the Education Department imposed an elaborate set of procedures on the universities, but without sufficient procedural protections for accused persons.[84]

IV. The *Chevron* and *Auer* Doctrines and Retroactivity

How much deference should be given to an agency when it interprets statutes and adjudicates facts?[85] In its 1984 *Chevron* decision, the Supreme Court held that 1) if "Congress has directly spoken to the precise question at issue," then the reviewing court must apply that "unambiguously expressed intent," but that 2) if the statute is silent or ambiguous on the question, then the court should defer to the agency's interpretation of the ambiguous statute, as long as the agency's interpretation is reasonable.[86] Epstein points out that *Chevron* represents a break from nineteenth century practice, a fact that is sometimes ignored by *Chevron*'s defenders.[87] Epstein considers the various justifications for the *Chevron* doctrine to be "unsound, as a matter of public policy and constitutional law, because they fly in the face" of the rule of law constraints championed by Fuller.[88] Fuller's principle of consistency is compromised when courts defer to an agency's "radical changes in position and direction," particularly on questions of law, as *Chevron* permits.[89] Giving agencies so much discretion "imposes heavy costs of uncertainty on private parties" who are trying to develop investment and business strategies.[90]

Epstein points out that *Chevron*'s supporters do not recognize that the doctrine "represents a marked deviation from the strictures of the APA itself," which lacks any reference to the word "deference."[91] APA section 706(a) identifies "a list of

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71 *Id.* at 62.

72 138 S. Ct. 2044, 2052-55 (2018) (holding that SEC ALJs are "Officers of the United States" within the meaning of the Constitution's Appointments Clause).

73 *Id.* at 2050. *See* U.S. Const. art. II, sec. 2, cl. 2. ("[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States[.]").

74 *Lucia*, 138 S. Ct. at 2053-54.

75 *Id.*

76 Epstein, *supra* note 3, at 62.

77 *Id.*

78 *Id.* at 62-63.

79 *Id.* at 63-67.

80 *Id.* at 64.

81 *Id.* at 64-65.

82 *Id.* at 65.

83 *Id.* at 65-67.

84 *Id.* at 66.

85 *Id.* at 85.

86 *Chevron*, 467 U.S. at 842-43.

87 Epstein, *supra* note 3, at 85-86.

88 *Id.* at 86.

89 *Id.*

90 *Id.*

91 *Id.* at 86-87.

explicit controls that reviewing courts should routinely exercise over administrative actions."[92] *Chevron* itself lacks any reference to section 706, despite the fact that it is an administrative law case.[93] Sunstein argues that Congress has broad authority to require courts to defer to agency interpretations of statutes.[94] Epstein disagrees because the APA's statutory command to a reviewing court that it "shall decide all relevant questions of law" implies de novo review.[95] Epstein contrasts that standard of review with arbitrary and capricious review, a more deferential standard that courts often apply when evaluating agency decisions on their merits.[96] Epstein contends that *Chevron* deference violates Article III's mandate of independent judicial review, which is integral to the Constitution's separation of powers structure.[97]

Epstein also questions *Chevron* in practice. It is very difficult to identify what constitutes congressional silence or ambiguity in a statute, so it is not always clear when judges will need to apply step 2 of the *Chevron* analysis.[98] This renders judicial review uncertain and malleable.[99] For judges who favor a large administrative state, *Chevron* "offers a painless and effective way to allow agencies to expand the scope of their activities."[100] Recognizing that statutory gaps and ambiguities may exist, Epstein urges courts to give "the most plausible interpretation that they can glean from all available sources," rather than simply defer to the agency's interpretation.[101] After all, courts typically engage in de novo review of questions of law outside the administrative law context, and statutory interpretation is what judges are trained to do.[102] Courts should apply an "ordinary meaning" rule to all administrative law questions, reading statutes the same way they do in private law contexts.[103]

The current controversy over *Chevron* deference is far from abstract.[104] Epstein describes recent litigation on the meaning of the term "navigable waters" in the Clean Water Act.[105] Federal regulators have interpreted that term to encompass areas that form no part of any system of navigable waters, and some courts have deferred.[106] They also have contended that their jurisdiction extends to dry land that is separated from navigable waters by several lots that include permanent structures, and to wetlands that supposedly had a "significant nexus" to a river located 120 miles away.[107] Epstein argues that a "single authoritative judicial interpretation" of the term "navigable waters" could have resolved this issue, which would have led to a "more reliable outcome at a lower cost."[108]

The Supreme Court has backed away from applying *Chevron* in several cases that have involved large scale agency interventions in important segments of the national economy.[109] Under the "major questions" doctrine, congressional intent to delegate authority over important segments of the economy to an agency must be clearly expressed, not presumed, and courts should therefore decline to defer to agency interpretations of statutes dealing with major questions of political or economic policy.[110] Epstein welcomes this limit to *Chevron* deference, but he says that there would be no need for it if *Chevron* itself were not a deviation from the "standard interpretive canon," embraced by Fuller, that statutory terms should be given their ordinary meaning whenever possible.[111]

Chief Justice John Roberts' majority opinion in *King v. Burwell*—the principal challenge to the Affordable Care Act—exasperates Epstein's rigorous approach to statutory interpretation.[112] Chief Justice Roberts invoked the major questions doctrine and declined to defer to the Internal Revenue Service's interpretation of the terms "state exchange" and "Federal exchange" in the Affordable Care Act.[113] Yet in spite of this refusal to accord *Chevron* deference, he ultimately upheld the law in order to avoid the dislocations that might occur if the subsidies authorized under the Act could not go forward.[114] Epstein laments that the Court rejected the statutory text in

92 *Id.* at 87 (citing 5 U.S.C. § 706(a)(2)(A)–(F)).

93 *Id.* at 87-88.

94 *Id.* at 88 (citing Cass R. Sunstein, Chevron *as Law*, 107 Geo. L.J. 1613 (2019)).

95 *Id.*

96 *Id.*

97 *Id.*

98 *Id.* at 89-90.

99 *Id.*

100 *Id.* at 90.

101 *Id.*

102 *Id.*

103 *Id.* at 91-97.

104 *Id.* at 99.

105 *Id.* Epstein also develops this thesis of overly expansive agency interpretation of authority through his analysis of cases arising under the Endangered Species Act. *Id.* at 104-07.

106 *Id.* at 99-102. *Compare* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 131-35 (1985) (deferring to agency interpretation) *with* Solid Waste Agency of North Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159, 171-73 (2001) (declining to defer to agency interpretation).

107 Epstein, *supra* note 3, at 102 (citing Sackett v. EPA, 566 U.S. 120, 124 (2012) (agency has jurisdiction over dry land); Army Corps of Eng'rs v. Hawkes, 136 S. Ct. 1807, 1815 (2016) (agency has jurisdiction over specific type of wetlands)).

108 *Id.* at 103.

109 *Id.* at 107-21. Epstein discusses several Supreme Court decisions in which the major questions doctrine was, or could have been, invoked. *Id.* at 108-21 (citing MCI Telecommunications Corp v. AT&T, 512 U.S. 218 (1994); FDA v. Brown & Williamson Tobacco Corp, 529 U.S. 120 (2000); Whitman v. American Trucking Ass'n, 531 U.S. 457 (2001); Massachusetts v. EPA, 549 U.S. 497 (2007); King v. Burwell, 135 S. Ct. 2480 (2015)).

110 *Id.* at 107. *See* Utility Air Group v. Environmental Protection Agency, 573 U.S. 302, 314 (2014) (citing *Brown & Williamson*, 529 U.S. at 160).

111 Epstein, *supra* note 3, at 107.

112 *Id.* at 120-21 (citing *King,* 135 S. Ct. at 2488-91).

113 *King,* 135 S. Ct. at 2489.

114 Epstein, *supra* note 3, at 120.

order to lead to "better substantive results."[115] Essentially, the Court was "far less concerned with the supposed ambiguity in the words 'state exchange' and much more worried" about the real-world consequences of removing the subsidies at issue from the program.[116] Epstein also argues that judges can easily manipulate the major questions doctrine because "judicial ingenuity allows this concept to mean different things to different people and to be followed by some judges in some cases but ignored by other judges in other cases."[117] Epstein warns that any hope that the major questions doctrine can "rehabilitate the dubious morality of modern administrative law" is illusory.[118]

Epstein also criticizes *Auer* deference, where courts defer to an agency's interpretation of its own ambiguous regulation.[119] *Auer* deference lets agencies, rather than the courts, decide how to interpret regulations, and that results in the abandonment of judicial review of questions of law.[120] The result is "too much running room for political appointees with partisan agendas," an "open invitation to repeated 'flip-flops'" on rules that govern regulated parties.[121] There is no required consistency in agency rules.[122] Epstein illustrates his argument by describing the litigation that ensued when the Obama administration interpreted Title IX to apply to students in public schools seeking accommodations based on gender identity, rather than biological sex.[123] The lower court reflexively adopted the agency's position without serious analysis of the statute or its purpose.[124] Epstein points out that this level of agency deference enabled the agency to undertake a major transformation of law without regard to the interests of the schools and affected parents and students.[125]

Auer is sometimes equated with the Supreme Court's 1945 decision in *Bowles v. Seminole Rock & Sand Co.*, but Epstein contends that there is a "huge gulf" between the two decisions.[126] The *Seminole Rock* Court stated that, if the meaning of the words of a regulation was in doubt, a reviewing court "must necessarily look to the administrative construction of the regulation" and give "controlling weight" to that interpretation unless it was "plainly erroneous or inconsistent with the regulation."[127] In that case, the Court independently determined that the agency's interpretation of the price regulation was consistent with the statute and the underlying price regulatory system.[128] Epstein does not object to the *Seminole Rock* formulation per se, but he warns that the opinion should not be over-interpreted to mean that courts should defer to agencies "in cases of evident conflict between the ordinary language interpretation of the statute and that given it by the relevant administration."[129]

Epstein also believes that the modern administrative state operates at variance with Fuller's principle of non-retroactivity.[130] Significant changes in the law should be accomplished by the legislature, "or perhaps even judicial decisions on key points of law."[131] When, instead, an agency applies new rules to actions done in reliance on prior rules, or the agency enacts a prospective rule that requires significant changes in private parties' behavior, these actions undermine the reliance interests of private parties in knowing and calculating the expected costs of compliance.[132] Courts presume that, given the frequency of reversals of agency positions, regulated entities are "on notice" that retroactive impositions will occur.[133] Defenders of the modern administrative state argue that agencies must have the ability to adapt to changed circumstances, even to the extent of reversing prior rules, but this mindset shifts the risk of change from the public sector to the private sector.[134] Epstein contends that allocating risk this way is unfair in view of an agency's "greater knowledge of the regulatory, administrative, and policymaking process."[135]

Epstein acknowledges that agencies should have some discretion in policy making, noting that APA section 706(2)(A) only allows courts to review agency decisions to ensure they are not arbitrary and capricious.[136] The APA allows agencies to exercise their judgment in drawing lines or doing routine administration.[137] The principle can also apply when the executive branch needs to set policy on such vital matters as immigration and the construction of the census, which are assigned to the executive by the Constitution.[138]

115 *Id.* at 121.

116 *Id.* at 120.

117 *Id.* at 107-08.

118 *Id.* at 121.

119 *Id.* at 131 (citing Auer v. Robbins, 519 U.S. 452, 458 (1997)). Epstein notes that several members of the Supreme Court are uncomfortable with *Auer* deference. *Id.* at 152 (citing Kisor v. Wilkie, 139 S. Ct. 2400, 2425-30 (2019) (Gorsuch, Thomas, and Kavanaugh, JJ., concurring in judgment)).

120 *Id.* at 130, 137.

121 *Id.* at 136.

122 *Id.*

123 *Id.* at 137-39, 141 (citing G.G. ex rel. Grimm v. Gloucester County School Bd., 822 F.3d 709, 721 (4th Cir. 2016), *vacated in part*. 853 F.3d 729 (4th Cir. 2017)).

124 *Id.* at 141-44.

125 *Id.* at 139.

126 *Id.* at 131 (citing Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 413-14 (1945)).

127 *Id.* at 133 (citing *Seminole Rock*, 325 U.S. at 414).

128 *Id.* at 131-33.

129 *Id.* at 133.

130 *Id.* at 155.

131 *Id.*

132 *Id.* at 153-54.

133 *Id.* at 155-56.

134 *Id.* at 154.

135 *Id.*

136 *Id.* at 183, 185 (citing 5 U.S.C. § 706(a)).

137 *Id.* at 183.

138 *Id.* at 185.

Epstein does not uniformly favor more judicial authority and less agency discretion.[139] Some reviewing courts have added extra-statutory requirements to the arbitrary and capricious standard, such as by holding that an agency rule may be invalidated if the agency relied on a factor that Congress had not intended.[140] Judicial review then becomes one of "exacting scrutiny," which exceeds the judicial role assigned by the APA.[141] Epstein disagrees with this gloss on the statute, saying that a "sensible reading" of the arbitrary and capricious standard would allow the agency to prevail unless it had engaged in a "wholesale and knowing disregard of large masses of relevant information" or missed "some important aspect of a problem or offers an explanation that is counter to the evidence."[142] Where courts have taken a "hard look" at agency decisions, the result has often been the demise of publicly-valuable infrastructure projects such as nuclear power plants and interstate pipelines.[143]

V. Can Administrative Law Become Moral?

Epstein laments that no area of modern administrative law meets the "standard requirements of the rule of law."[144] This failure is closely connected the modern regulatory climate insofar as federal statutes impose "comprehensive systems of government control on the environment, drug development, telecommunications, and labor relations, among other fields," giving agencies broad powers to intervene.[145] Weak protections for property rights and broad grants of rulemaking authority enable agencies to regulate broad swaths of the economy without sufficient regard for the interests of the regulated entities.[146] The failures of administrative law are a "necessary consequence of the progressive mind-set that has ushered in its modern interpretation."[147]

What steps might resolve these problems? Epstein concludes that inconsistent application of the APA's standards for judicial review can be rectified by having all courts reviewing agency actions apply the standards used by an appellate court reviewing a trial court's decision: questions of law are reviewed de novo, while questions of fact are decided under a clearly erroneous standard.[148] If courts just apply the APA, which imposes these two discrete standards, the "constitutional questions will then largely take care of themselves."[149]

Epstein's concerns about the overreach of administrative law, however, will not necessarily be resolved by eliminating *Chevron* deference. His objection to the breadth of powers delegated by Congress to agencies requires separate attention.[150] Epstein recognizes that Congress's ability to "fine-tune" a system of regulation is constrained by its "hazy information about the complications likely to arise down the road" and the difficulty of long-term agency oversight.[151]

Epstein has addressed fundamental questions that should inform our understanding of modern administrative law. He makes a strong case that modern administrative law is not sufficiently moral under Fuller's definition, but that it can become more moral if specific reforms are pursued. A reader who wants to probe deeper into the morality of modern administrative law will benefit from reading this book.

139 *Id*. at 185-205.

140 *Id.* at 186 (citing Motor Vehicle Mfrs. Ass'n v. State Farm Ins., 463 U.S. 29, 43 (1983)).

141 *Id.*

142 *Id.*

143 *Id.* at 191, 205, 213.

144 *Id.* at 211.

145 *Id.* at 212.

146 *Id.* at 212-13.

147 *Id.* at 214.

148 *Id.* at 213.

149 *Id.*

150 *Id.* at 34-35, 37, 214.

151 *Id.* at 34.

An Imagined Bloc and Other Figments

By Donald A. Daugherty, Jr.

Litigation Practice Group

A Review of:

American Justice 2019: The Roberts Court Arrives, by Mark Joseph Stern (University of Pennsylvania Press 2019), https://www.upenn.edu/pennpress/book/16045.html

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Note from the Editor:

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With Brett Kavanaugh replacing Anthony Kennedy, the Supreme Court's composition for the 2018-19 Term broke down into five "conservative" Justices, who generally follow an originalist/textualist approach, and four "liberal" Justices, who are more inclined to look for meaning beyond the constitutional or statutory language. Slate's Mark Joseph Stern reviews the Term in the latest installment of the University of Pennsylvania Press's "American Justice" series, "The Roberts Court Arrives."

Stern concurs with most court watchers that the Term was less momentous than anticipated and "by no means a conservative revolution—thanks in large part to the chief justice." Thus, he writes, "[t]he central topic of this book . . . is how Roberts wielded his newfound power" by, for example, writing more than a third of the Term's majority opinions in 5-4 or 5-3 decisions. In Stern's view, Chief Justice John Roberts' institutional interest in the judiciary is the thin black line keeping the Supreme Court from becoming an arm of the Republican Party. Nonetheless, Stern remains anxious: "even as Roberts played the role of centrist, he laid the groundwork for a coming turn to the right." As a result, the book is sometimes concerned less about the Term than about future terms.

Stern views judges as essentially politicians in robes, and there is no doubt where his own politics lie. He makes little effort to come across as evenhanded or nonideological. Outcomes he favors are lauded as "progressive," while conservatives are consistently described as "ardent," "rock ribbed," "staunch," and the like.

Stern also grinds on the tiresome falsehood that conservatives vote as one "bloc." In fact, most conservative observers wish there were a more coherent, functioning majority, and throughout the book, Stern himself points out abundant cracks in the bloc, including between President Donald Trump's two appointees.

Unexamined, however, is the possibility that a liberal bloc exists, which is a much more solid proposition. In the 67 cases decided after argument, the four Justices appointed by Democratic presidents voted the same way 51 times, while the five Republican appointees stuck together 37 times. Of the 20 cases that split 5-4, only seven followed the conservative-liberal divide that conventional wisdom would expect, with a conservative joining the four liberals more often than the five conservatives voting together. By the end of the Term, each conservative Justice had joined the liberals as the deciding vote at least once. As seen in Stern's book, votes by the conservative Justices (other than perhaps Samuel Alito) often surprise, while the four liberals vote reliably for "progressive" outcomes.

Also unexamined is the disconnect during the current administration between controlling Supreme Court precedent and some lower court decisions. From the outset, Trump's opponents have maintained that his presidency is fundamentally different from every other in American history, and they have sounded the rallying cry that it must not be "normalized." Although journalists

violate no oath by supporting this effort, judges cannot base legal analysis on personal feelings about a president. The most notable example of this disconnect is the Ninth Circuit, which had 12 of 14 of its cases reversed in the Term. At the same time, the Circuit's dismal record predates Trump. (And in light of the late Judge Stephen Reinhardt's boast that the Supreme Court "can't catch 'em all," the Circuit may not be concerned about its consistently miserable showing.)

The Term cannot be properly assessed without considering the brutal confirmation proceedings that occurred at its outset, and which may have caused the Court to try to keep a low profile. Stern opens the Introduction with a description of red-robed handmaidens standing outside the Court building protesting the newest Justice. Stern recounts the wrenching drama of the Kavanaugh hearings, duly noting the chaos and the differing recollections of Kavanaugh and his accuser, Christine Ford.

To give the Term historical context, Stern mentions a few landmark decisions since the Warren Court, and observes that the Court "has reached into nearly every aspect of American life." Asking rhetorically, "Is it healthy in a democracy for so many important issues to be settled by nine lawyers in Washington, D.C.?," Stern appears unaware that for decades, conservative legal and political scholars have answered emphatically, "*Of course not!*" In fact, a major theme of the Roberts Court is that Americans should look to the federal political branches and the states for resolution of "so many important issues" that have been directed at the federal judiciary for the past sixty years. This may explain why only 72 cases were decided on the merits in the Term, which although quite low by historical standards, is not under this Chief Justice.

The most dramatic divisions among the Justices appeared in the Term's death penalty cases, which are considered in the first chapter, "Death Matters." The cases are highly fact-dependent and much of the activity occurred on the Court's "shadow docket," making it difficult to draw themes broader than that some Justices believe the Constitution allows for capital punishment and some (if not all) are unsettled personally by it. Unfortunately, Stern relies for his conclusions on caricatures of conservative Justices as death penalty enthusiasts, religious partisans, and/or beholden to public opinion. For example, explaining their votes to stay executions in two cases, Stern asserts that "Kavanaugh and Roberts do not want to be reviled as callous, bigoted, or bloodthirsty;" apparently, he thinks the other three conservatives don't mind.

In the factually similar cases of *Dunn v. Ray*[1] and *Murphy v. Collier*,[2] the Court reached different conclusions. Taken together, the results puzzled observers, but Stern's analysis doesn't help clarify matters. Both inmates sought to have their executions stayed while the Court considered whether they had the right to have clergy from their respective faiths with them in the death chamber. In February 2019, the Supreme Court denied as untimely the request for an imam by Ray, a Muslim, but a month later, it stayed Murphy's execution to consider his last minute claim of a right to have a Buddhist priest present.

At the time Ray's request was denied, Justice Elena Kagan wrote an impassioned dissent for the liberal Justices. Alito later issued a dissent in *Murphy* which, unusually, also tried to explain his vote in *Ray* two months earlier. Then, Kavanaugh and Roberts issued a statement pointing out a strong equal treatment claim raised by Murphy but not by Ray.

Because conservatives support religious liberty, Stern believes the result in *Ray* can only be explained by religious bias. He recounts non-death penalty cases from the past several terms that involved Christian or Muslim parties, but is unable to draw any meaningful conclusion. Similarly, he cannot explain the "pro-Buddhist" result in *Murphy*, but he still rejects Kavanaugh's reliance on the equal treatment claim and insists that he was responding to "the crush of bipartisan criticism that greeted the court's decision in *Ray.*"

The next chapter, "The Establishment Reversal," demonstrates how even when the Justices in the purported "bloc" reach the same conclusion, they often cannot agree on a path for getting there. In *American Legion v. American Humanist Association*, the Court considered the constitutionality of a forty-foot tall cross, which had stood on public land in Maryland for nearly a century as a memorial to soldiers who perished in World War I.[3] The Court held that allowing the cross to continue to stand did not constitute an unconstitutional establishment of religion by Maryland. As Stern notes, this result was expected: "[t]he real fight . . . wasn't really about whether the . . . cross would stay or go. It was whether the majority would go for broke by overturning decades of precedent—and specifically the *Lemon* test itself." In the event, the majority failed to cohere, seven different opinions were needed to reach a 7-2 result, and the widely-maligned *Lemon* test lives on.

For a plurality of four, Alito wrote that any religious monument permitted under the Establishment Clause as originally understood is constitutional, and that removing the long-standing cross now would in fact show hostility towards religion. Kavanaugh concurred, but focused less on the history of specific monuments and more on the history of certain governmental practices permitted under the clause. Justice Neil Gorsuch stated that the offense allegedly suffered by the challengers as a result of the monument was inadequate to give them standing, and Justice Clarence Thomas wrote, like he has in other cases, that under the language of the First Amendment ("*Congress* shall make no law . . . "), the clause should not constrain states in the first place.

Stern believes that notwithstanding its muddled holding, *American Legion* is an initial step by the new conservative majority "to compel government subsidization of religion," which requires that they "hobble the establishment clause to succeed." This seems farfetched. A more pertinent takeaway is that because the conservative Justices could not agree on a single opinion overruling *Lemon*, an opportunity to clarify one of the more confused areas of constitutional law was missed and an opening left for judges inclined to follow Reinhardt's lead.

The third chapter, "Abortion Access Denied," seems to have been titled by someone who didn't read it. Stern writes that the

1 139 S. Ct. 661 (Mem.) (2019).

2 139 S. Ct. 1475 (Mem.) (2019).

3 139 S. Ct. 2067 (2019).

Court ducked and dodged abortion cases, and it is unclear how access was curtailed, let alone denied. The Term's only decision on the merits, *Box v. Planned Parenthood of Indiana and Kentucky*, was decided without oral argument, and the majority opinion was unsigned.[4] There, a 7-2 majority upheld on rational basis review a provision of Indiana law regulating the disposal of what remains *after* the fetus is aborted. (In the same opinion, the Court also denied certiorari review of the Seventh Circuit's decision striking down as unconstitutional a related provision prohibiting abortions based on the fetus's race, sex, or disability.)

In the only other notable abortion case, *June Medical Services v. Gee*, a five-Justice majority stayed without explanation a Fifth Circuit decision upholding a Louisiana law that required abortion doctors to have admitting privileges at local hospitals.[5] Stern contends that the Fifth Circuit's decision was an outlandish disregard of the Supreme Court's 2016 decision, *Whole Woman's Health v. Hellerstedt*, which struck down a similar Texas statute on the grounds that it unduly burdened women seeking abortions.[6] Rather than showing how the lower court's decision was so obviously wrong, however, Stern speculates about the authoring judge's hopes for the Kavanaugh nomination.

Looking ahead, Stern writes, "[T]he conventional wisdom is that the chief justice will erode *Roe* and its progeny by methodically granting states more and more leeway to regulate abortion." In fact, consistent with this thinking, New York recently passed liberal abortion legislation in anticipation of *Roe's* demise. Given his rhetorical question in the Introduction, Stern should welcome such state legislation.

Chapter 4, "The Libertarian Court?," is the book's longest and most interesting. Stern observes that in criminal law cases, the Court "often splinters along unusual lines that do not track partisan ideology," and this prevents him from simply categorizing decisions as conservative or liberal.

For example, the Chief Justice and Kavanaugh joined Justice Sonia Sotomayor's majority opinion in *Garza v. Idaho*.[7] There, a 6-3 majority held that the refusal by counsel to file an appeal on behalf of his client, who previously had pled guilty and signed an appeal waiver, constituted ineffective assistance under the Sixth Amendment, regardless of the merits of the appeal.

Gorsuch's originalist/textualist approach may be stricter than that of his conservative colleagues and, in several criminal cases, it led him to "progressive" conclusions. For example, Gorsuch and Justice Ruth Bader Ginsberg dissented in *Gamble v. United States*, where a 7-2 majority upheld the "dual sovereigns" rule, which permits federal and state governments to try a defendant separately for the same offense without violating the Double Jeopardy Clause.[8]

Also, Gorsuch joined the liberals to form a 5-4 majority in *United States v. Davis*,[9] the third in a series of cases since 2015 in which the Court has struck down a federal criminal statute under the "void for vagueness" doctrine. Under the doctrine, a criminal law violates due process where it is so vague that it fails either to give notice of the conduct it proscribes or to provide any real standard such that arbitrary enforcement may occur. The statute at issue in *Davis* lengthened prison sentences for certain offenders who used a gun in a "crime of violence," the definition of which the Court found to be unconstitutionally vague.

Gorsuch's opinion expressed structural concerns:

> Only the people's elected representatives in Congress have the power to write new federal criminal laws. And when Congress exercises that power, it has to write statutes that give ordinary people fair warning about what the law demands of them. Vague laws transgress both of those constitutional requirements. They hand off the legislature's responsibility for defining criminal behavior to unelected prosecutors and judges, and they leave people with no sure way to know what consequences will attach to their conduct. When Congress passes a vague law, the role of courts under our Constitution is not to fashion a new, clearer law to take its place, but to treat the law as a nullity and invite Congress to try again.

In his dissent, Kavanaugh showed a greater willingness to interpret the statute so it was less vague, in order to avoid "a serious mistake" that would allow "many dangerous offenders [to] walk out of prison early." Stern writes that this reflects a "philosophical dispute about the role of courts in American democracy" between Gorsuch and the other four conservatives.

Although the Trump Administration's immigration policy remains a significant political issue, it has had less significance in the courts since *Trump v. Hawaii*, a decision from the previous term addressing related legal issues.[10] Nonetheless, in the fifth chapter, "Huddled Masses," Stern discusses two immigration cases.

Stern's penchant for speculation is noticeable in his discussion of *East Bay Sanctuary Covenant v. Trump*, where the Court cursorily declined the government's request to stay a nationwide preliminary injunction of an executive order denying asylum to any individual crossing the U.S.-Mexican border illegally between "ports of entry."[11] The executive order had been directed at a long caravan of migrants heading toward the border and threatening to further overwhelm the immigration system. The lower courts had found that the executive order conflicted with the Immigration and Nationality Act, which states that "any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival)" may apply for asylum.

The Court's unsigned order indicated that Alito, Gorsuch, Kavanaugh, and Thomas would have stayed the injunction,

4 139 S. Ct. 1780 (2019).

5 139 S. Ct. 663 (Mem.) (2019). *See* Rachel N. Morrison, *The Supreme Court Takes Up Abortion: What You Need to Know About* June Medical Services v. Gee, 20 Federalist Soc'y Rev. 144 (2019).

6 136 S. Ct. 2292 (2016).

7 139 S. Ct. 738 (2019).

8 139 S. Ct. 1960 (2019).

9 139 S. Ct. 2319 (2019).

10 138 S. Ct. 2392 (2018).

11 139 S. Ct. 782 (2018).

causing speculation about the reasoning behind Roberts' vote. At the time of the injunction, President Trump had called the judge who issued it "an Obama judge," and the Chief Justice responded that it was improper to categorize judges based on which president appointed them. Like many observers, Stern reads a lot into this high profile exchange, writing that Roberts' subsequent vote in *East Bay* to continue the stay "marked a turning point in the chief justice's relationship with the administration," and "indicated that his deference to the president had a limit." And going beyond *East Bay,* Stern believes that Roberts' vote reflected his "disillusionment" with the Trump administration, and "would prove incredibly consequential for the term's biggest blockbuster—a fight over the president's ability to add a citizenship question to the 2020 census," which is the subject of the last chapter.

In the only merits decision on immigration, *Nielsen v. Preap*, the Court was forced to construe the kind of inartfully-drafted statute that tests the limits of the textualist approach.[12] By a 5-4 vote, the Court upheld a policy allowing immigration officials to detain without bail illegal immigrants who had committed certain criminal offenses, even if detention did not begin promptly after their release from prison. The governing statute provided that such immigrants could be taken into custody "when the alien is released," and the defendant argued that the government could not hold him without bond unless it intercepted him immediately when he got out of prison.

Looking beyond the statutory language, Justice Stephen Breyer's dissent read a six-month deadline into the term "when," stating that "the Court should interpret the words of this statute to reflect Congress' likely intent, an intent that is consistent with our basic values."

Perhaps because the policy originated in the Obama administration, Stern concludes that *Nielsen* was not a political decision. Nonetheless, although he calls Alito's majority opinion "plausible if debatable—as it tried to make sense of the law and implement it as Congress intended"—Stern accuses the four conservatives of employing textualism cynically: in *Nielsen,* it led to their preferred outcome (he presumes), but the statutory language would have led to a "pro-immigrant" result in *East Bay*, so they ignored it there.

As with "pro-criminal defendant" decisions by conservative Justices, Stern expresses surprise in Chapter 6, "Big Business Before the Bar," at three cases whose results favored consumers and employees.

New Prime v. Oliveira[13] diverged from a trend over the past decade in which, relying on the broadly-worded Federal Arbitration Act, the Supreme Court has enforced arbitration provisions against consumers and employees seeking to bring contract claims in court. In *New Prime*, a unanimous Court held that an independent contractor for a trucking company could pursue a class action on behalf of himself and other drivers for improper paycheck deductions, notwithstanding a provision in his contract that all disputes be resolved through individual arbitration. The FAA excluded from its scope "contracts of employment of . . . workers engaged in . . . interstate commerce." In a textbook example of an originalist/textualist approach, Gorsuch looked at usage of the word "employment" when the FAA was passed in 1925 and, citing contemporaneous dictionaries and statutes, concluded that it was broad enough to encompass "work agreements involving independent contractors."

Like *South Dakota v. Wayfair*,[14] the eCommerce sales tax case from the previous term, *Apple v. Pepper* reviewed established legal concepts in light of new business models.[15] To list an app in Apple's App Store, a third-party developer must pay Apple an annual fee plus a commission for each sale of the app. The developer—not Apple—sets the retail price. Plaintiffs were iPhone users claiming that this arrangement inflated prices for apps.

Since its *Illinois Brick* decision in 1977,[16] the Court had prohibited antitrust lawsuits by "indirect purchasers"—that is, those who do not buy directly from an alleged antitrust violator. Over the dissent of the other four conservatives, however, Kavanaugh concluded that under the text of antitrust laws and precedent, the plaintiffs were "direct purchasers" harmed by Apple's alleged monopoly, and thus they could assert an antitrust claim: "There is no intermediary in the distribution chain between Apple and the consumer. . . . . The iPhone owners purchase apps directly from the retailer Apple, who is the alleged antitrust violator. The iPhone owners pay the alleged overcharge directly to Apple," and *Illinois Brick* was not "a get-out-of-court free card."

Similarly, Thomas joined the four liberal Justices in *Home Depot v. Jackson*, which held that a third-party defendant could not remove a class-action from state to federal court.[17] A bank brought a collection action in state court against a credit card holder, who in turn filed a class action counterclaim against both the bank and Home Depot, a retailer not previously involved in the case. The credit card holder alleged that he and others were victims of a consumer scam orchestrated by the bank and Home Depot. Analyzing the general removal statute, the majority concluded that removability is based on whether the *action*, not the *claim*, could have been filed in federal court, and that a removal provision in the Class Action Fairness Act did not change this result.

Stern writes that Thomas' "methodology led to a surprisingly progressive outcome" in *Home Depot.* This shows his misunderstanding of textualism: a *statute* can embody a policy that is (or is not) progressive, and a textualist legal interpretation will be consistent with the language expressing that policy. Similarly, Stern states, "Using the U.S. Chamber of Commerce's position as a proxy for conservativism, business should have won all three cases;" although the Chamber might be a useful proxy for conservative public policy, it is irrelevant to which legal conclusions are reached through a originalist/textualist approach.

Eventually, Stern does acknowledge that "[t]extualism is the link" between the three decisions: "[t]extualism is sometimes derided as inherently conservative, but in each case here the

12 139 S. Ct. 954 (2019).

13 139 S. Ct. 532 (2019).

14 138 S. Ct. 2080 (2018).

15 139 S. Ct. 1514 (2019).

16 Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

17 139 S. Ct. 1743 (2019).

winning party snatched a liberal victory by zeroing in on a few key words." This shows the catholic nature of the method, as lawyers of every political stripe would agree that focusing on critical statutory language is important for winning a lawsuit.

Chapter 7, "Gunning for the Administrative State," describes two failed efforts by conservatives in the Term to restore a constitutional separation of powers. In both *Gundy v. United States*,[18] and *Kisor v. Wilkie*,[19] Kagan "finagled a solution" that preserved the administrative status quo. Stern warns, however, that the Court still "laid the groundwork for a judicial attack on the 'administrative state' that may well carry the day in the near future."

Gundy centered on the "nondelegation doctrine," which holds that Congress cannot delegate its Article I legislative authority to the executive branch without also providing an "intelligible principle" to guide exercise of that authority. Critics claim that the intelligible principle standard makes it too easy for Congress to slough its responsibility for making tough policy decisions off onto administrative agencies, pointing to the fact that the doctrine has not been invoked to strike down a statute since two early New Deal cases from 1935.

The petitioner in *Gundy* challenged the Sex Offender Registration and Notification Act, which established a national sex offender registry and required that offenders convicted after its enactment register with state officials. At issue was a provision delegating to the Attorney General "authority to specify" SORNA's retroactive application and to "prescribe rules" for those like the petitioner, who had been convicted before the legislation went into effect in 2006.

The Court voted 5-3 to uphold SORNA's retroactivity provision. (Kavanaugh was not on the Court when it was argued.) Writing for the four liberal Justices, Kagan sidestepped the doctrine by finding that Congress had given up little authority in the first place: "Reasonably read, the Attorney General's role . . . was important but limited: It was to apply SORNA to pre-Act offenders as soon as he thought it was feasible to do so," which was a "delegation [that easily] passes constitutional muster." Alito begrudgingly cast the fifth vote, stating that he was willing to reconsider the intelligible principle standard, but that "because a majority is not willing to do that, it would be freakish to single out the provision at issue here for special treatment."

Echoing his structural concerns in *Davis*, Gorsuch wrote for the dissenters that the Constitution demanded that Congress give the executive branch greater direction in enforcing statutes, and he argued for a more rigorous standard that would restrict agencies to making "factual findings" using "criteria" and "policy judgments" determined by Congress.

Kagan identified an enormous practical problem that could result from robust enforcement of the nondelegation doctrine: "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." However, if the Court were to better align its jurisprudence with the constitutional separation of powers, options exist for addressing the problem she warns about. For example, the (unelected) administrative bureaucracy, whose technical expertise is required for the specialized rules promulgated by agencies, could be relocated to Congress, so that it can inform the legislation drafted by (elected) senators and representatives.

In *Kisor,* the Veterans Administration had awarded a Vietnam War veteran disability benefits prospectively after finding in 2006 that he suffered from PTSD, even though it had denied him those benefits in 1982. The VA rejected his request for back payments, finding that his new application failed to include "relevant" records that had not been considered at the time of the initial application, which its regulations require for retroactive benefits.

The Court took *Kisor* expressly to decide one issue: whether to overrule *Auer v. Robbins*, a 1997 decision which held that courts must defer to an agency's "reasonable interpretation" of its own ambiguous regulations.[20] Based on previous writings by the conservative Justices and their questions at oral argument, it was widely-expected that *Auer* would be overruled. However, the Chief Justice joined Kagan's opinion declining to do so on a 5-4 vote.

Kagan listed examples of arcane issues arising under federal regulations (e.g., does a jar of truffle pate or olive tapenade qualify as a "liquid" or "gel" under TSA rules?) that are best left to agencies, which are better able to "get[]into the weeds of the rule's policy." Addressing concerns that administrative power went beyond such esoterica, Kagan stressed the limits of judicial deference: for example, a court must exhaust "all the 'traditional tools' of construction" before concluding that a regulation is genuinely ambiguous, and must also conclude that the agency's interpretation is truly "reasonable."

Roberts and Kavanaugh each wrote separately to point out that if lower courts are faithful to Kagan's opinion, *Auer* deference will be exercised less frequently. Similarly, Gorsuch's dissent asserted that the majority had "zombified" *Auer,* such that it retained little force going forward. By leaving *Auer* in place, however, the Court left room for lower courts to resist, as it did in *American Legion.*

To support the result in *Kisor,* Stern cites the "unitary executive" theory as a democratic limitation on the administrative state: although "[a]gencies are not directly accountable to the people, . . . most are accountable to the president—and when the people do not like the executive branch's actions, they can vote the president out." Of course, this is disingenuous, as commentators like Stern are generally dismissive of the theory, particularly since November 2016. (Also, Stern does not explain how agencies that are not "accountable to the president" pass constitutional muster.)

Looking ahead, Roberts and Kavanaugh both noted that the result in *Kisor* did not guarantee that the related "*Chevron* doctrine," which requires that courts defer to agencies' reasonable interpretations of ambiguous statutes, would survive their future scrutiny. *Chevron* has much greater significance than *Auer,* and Stern closes the chapter warning that if it is overturned and the size of the federal government decreased as a result, Americans "may come to miss the administrative state when it is gone"

18 139 S. Ct. 2116 (2019).

19 139 S. Ct. 2400 (2019).

20 519 U.S. 452 (1997).

because "a smaller government is not always a more competent one." Of course, those who are concerned that the administrative state has become an unaccountable, D.C.-centric fourth branch, greatly outstripping the three constitutional branches in size and scope, would counter that government should simply focus on those core functions that it can perform more competently than the private sector.

In Chapter 8, Stern recounts the history of "[d]rawing districts to boost the power of the ruling party and dilute votes for the opposition," which "is as old as the American republic." He acknowledges that despite many efforts over the years, the Supreme Court has "never struck down a partisan gerrymander, or even agreed on a standard to gauge their legality." Given that the franchise has been greatly expanded in the United States over that history, the chapter's title—"Democracy Imperiled"—seems overwrought.

Rucho v. Common Cause involved a challenge to a map of North Carolina's congressional districts drawn by state lawmakers, the majority of whom were Republican.[21] The Court ruled 5-4 that political gerrymandering claims present a nonjusticiable "political question." In his majority opinion, Roberts wrote, "There are no legal standards discernible in the Constitution for making . . . judgments" as to whether political power is apportioned fairly, "let alone limited and precise standards that are clear, manageable, and politically neutral."

Stern spends much of the chapter on the dissent of the four liberal Justices, with Kagan "act[ing] as the conscience of the court. In her dissent," Kagan charged that "[f]or the first time ever, this Court refuses to remedy a constitutional violation because it thinks the task beyond judicial capabilities." She expressed concern that advances in information technology "have enabled mapmakers to put [voter data] to use with unprecedented efficiency and precision," thereby threatening "free and fair elections."

As Stern recounts, many tests have been proffered for determining when inherently political redistricting decisions become too political, but none have been accepted by the Court. The outcome in *Rucho* was a foregone conclusion after the previous term's *Gill v. Whitford*,[22] where the Court rejected the latest such test and, contrary to Stern, it is not "a hugely consequential decision." In addition, changes in legislative control (e.g., Democrats capturing the House in 2018) have undercut warnings about permanently-entrenched partisan majorities, which are often cited as justification for involving federal judges. Democracy in America remains intact, and future claims of improper political gerrymandering will be addressed at the state level.

The last chapter is "Drawing the Line on Lies" and by framing the question in *Department of Commerce v. New York*,[23] as "whether Donald Trump's administration can add a citizenship question to the 2020 census," Stern gives us his answer. Although the issues of constitutional and administrative law at the heart of the case were fairly well-settled, its political ramifications gave it a high profile.

As even New York conceded in *DOC*, it was legitimate to ask census respondents whether they were citizens because the government has a clear interest in knowing the number of noncitizens in the country. DOC had included the question in past censuses, and there was little doubt it had discretion to do so. However, mainstream analysis focused on DOC's ham-handed efforts to justify adding it back into the census.

The Secretary of Commerce claimed he relied on a letter from the Department of Justice stating that the question would assist its enforcement of the Voting Rights Act by preventing dilution of minority votes. Private communications told a different story. Although judicial review under the Administrative Procedure Act is usually confined to the administrative record, the district court had taken the unusual step of ordering extra-record discovery, which led to emails between DOC and DOJ that conflicted with the Secretary's public explanation. Not only had DOC aggressively solicited the letter, but it had recommended the VRA rationale to DOJ. Further, besides legitimate reasons for including the question, the Secretary had a political motive: DOC data showed that it could cause an undercounting of undocumented immigrants, which could in turn lead to an underallotment of Democratic seats in the House of Representatives and state legislatures.

Stern contends that Kavanaugh and Gorsuch "shocked many observers" when they noted at oral argument that many other countries asked the same question on their national censuses and that the United Nations recommended the practice, because the two Justices generally hold that foreign law is not a valid basis for deciding United States law. However, Stern's contention confuses issues of fact (what is the actual practice in other countries?) with issues of law (what is legally permissible under the APA?).

After oral argument, but before the decision issued, a dramatic development occurred that supported a finding that DOC had political motivations. After a Republican political consultant died in 2018, his estranged daughter found computer drives among his personal belongings, and the drives contained communications with DOC citing the VRA to justify adding the citizenship question. His daughter gave the drives to Common Cause, which had filed *Rucho* and whose law firm represented some of the *DOC* plaintiffs. The law firm then provided some of the deceased consultant's communications to the *DOC* district court, in part hoping that publicity about them would get the attention of the Supreme Court. However, as Stern notes, the communications were never in the record before the Court, nor were they mentioned by any of the Justices in their opinions.

Most of the Chief Justice's majority opinion was devoted to the conclusion by the four other conservatives and him that including the citizenship question was not unconstitutional, nor was it arbitrary or capricious under the APA. DOC has "broad authority over the census" and may collect "demographic information" as it sees fit. Further, the Secretary was permitted "to make policy choices within the range of reasonable options," and judges should not be "second-guessing [his] weighing of risks and benefits."

21 139 S. Ct. 2484 (2019).

22 138 S. Ct. 1916 (2018).

23 139 S. Ct. 2551 (2019).

In the latter portion of the opinion, however, Roberts was joined by the four liberal Justices. He wrote that the APA required DOC to "disclose the basis" for its action, and that its "sole stated reason" for including the citizenship question "seems to have been contrived." Although it was generally not appropriate for a court to look beyond the administrative record when reviewing an agency's decision, here the extra-record discovery "shows that the Secretary began taking steps to reinstate a citizenship question about a week into his tenure, but it contains no hint that he was considering VRA enforcement in connection with that project;" rather, the VRA rationale came much later, after DOC had gone "to great lengths to elicit [support] from DOJ (or any other willing agency)." "If judicial review is to be more than an empty ritual, it must demand something better than the explanation offered for the action taken in this case," the Court stated, remanding the case for DOC to try again to justify inclusion. Eventually, time overtook events, and the Administration announced in July 2019 that it would proceed to prepare 2020 census forms without the citizenship question.

Administrative law rarely permits judicial examination of the motives behind otherwise permissible policy decisions, as occurred in *DOC*, and political appointees acting with political motives should not be shocking. Moreover, it is unclear whether the limited exception that allows for such review applied in *DOC* as a legal matter or merely because the administrative agency was part of the Trump administration.

Stern cites veteran courtwatcher Linda Greenhouse, who imagines that in some "dark night of the soul" shortly before *DOC* was released, the Chief Justice changed his vote "to reject the administration's position" because of the consultant's communications that were made public after oral argument. Greenhouse "readily admit[s] that I have no sources for the claim I just made." However, as Stern notes, it has been similarly suggested that Roberts switched his vote at the last minute vote in the 2012 Affordable Care Act case, *NFIB v. Sebelius*.[24]

The book's Epilogue begins by reviewing the roles played in the Term by each Justice. Comparing the swing votes of Kennedy and Roberts, Stern portrays the latter as a more "fundamentally conservative justice, whose jurisprudence consistently aligns with the Republican Party." At the same time, Stern offers the faint praise that due to the institutional concerns he showed in *June Medical, East Bay,* and *DOC*, Roberts is "not a hack or a reactionary."

Stern writes, "When it comes to the most contentious debates sundering the country today, the law of the land will be what John Roberts says it is." This overstatement does contain a kernel of truth: again, the Chief Justice (and others) have been saying for some time that many of our "most contentious debates" should be resolved in the federal political branches or the states, and this may become increasingly likely due to the Roberts Court.

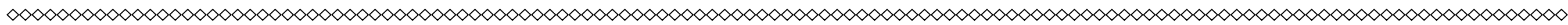
Although most observers see Roberts as the likely successor to Kennedy as a swing vote, Stern suggests it could be Gorsuch: he "is willing to swing left on criminal justice when he believes that the original meaning of the U.S. Constitution requires it." Given that Gorsuch looks to the text as understood when it became law, certainly he will "swing" where it takes him, including in noncriminal cases.

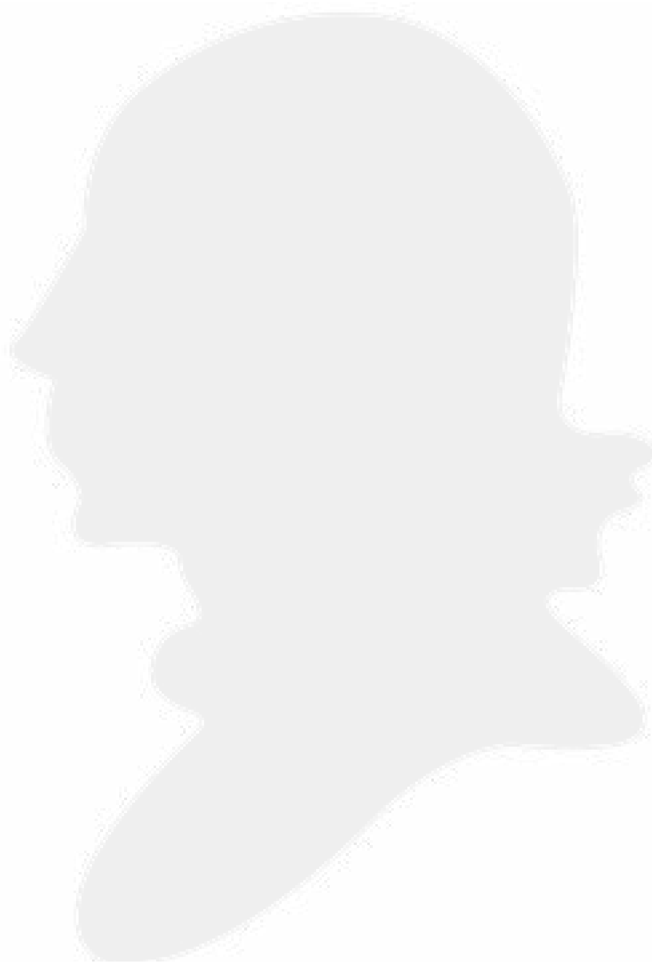
Stern agrees with others that Ginsberg has passed the liberal mantle to Kagan, who he casts as standing Buckley-esque "athwart [conservative efforts] yelling 'Stop.'" Seemingly despondent, Stern tries to find solace by imagining "an alternative world in which Kagan served as the chief justice," achieving progressive results with Roberts-like deftness.

Pining for the late Justice John Paul Stevens, Stern concludes his book with the lament that Kavanaugh and Gorsuch are not among "the ranks of stealth liberals" appointed by Republican presidents. And, predictably, Leonard Leo makes an appearance so that Stern can blame him for successful conservative nominations.

Throughout the book, Stern tries to hoist conservative Justices on their originalist/textualist petard and, occasionally, he succeeds. However, he is unable to offer a principled alternative, and can only bemoan the composition of the Court and outcomes he doesn't like. Presumably, the lack of a viable path forward for achieving progressive results explains his hopelessness. In any event, as the book shows, the originalist/textualist approach has gained wide traction; Kagan famously observed during her confirmation that "we're all originalists," and in her short concurrence in *New Prime,* Ginsberg made clear that she is a statutory originalist. This could offer hope even to progressives. To the extent the Justices agree on fundamental methodology, it should be heartening that they're playing on the same field, and that they are certainly less divided than the rest of the federal government.

24 567 U.S. 519 (2012).





As Far As Reasonably Practicable: Reimagining the Role of Congress in Agency Rulemaking

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I would like to thank Nate Kaczmarek and the Federalist Society's Article I Initiative for offering this writing contest, Katie McClendon for her helpful edits in improving this article for publication, and my former colleagues at the Mercatus Center who taught me much about regulation when I worked there. The views expressed in this article, as well as any errors or oversights, are mine alone and should not be attributed to the Federalist Society or my past or current employers.

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. We invite responses from our readers. To join the debate, please email us at info@fedsoc.org.

Mr. Jayne's article won First Place in the Article I Initiative Writing Contest, conducted by the Federalist Society's Article I Initiative on the topic *The Nondelegation Doctrine: Intelligible Principle or Unworkable Standard?* Prof. Lillian BeVier, Hon. C. Boyden Gray, and Hon. Chris DeMuth were the esteemed judges for the Writing Contest. They completed a blind review of the submitted essays addressing the contest topic, and they selected this paper as the winner.

Abstract:

This paper argues that the nondelegation doctrine is in need of resuscitation. It argues for adoption of a new "as far as reasonably practicable" standard, first articulated in the lesser-known case of *Buttfield v. Stranahan*, and for effectuating that standard with the application of statutory construction principles like the major questions doctrine to issues of nondelegation. The practical effects of this approach would be a judiciary more faithfully policing the constitutional separation of powers and spurring Congress to govern more responsibly. With the assistance of a revamped CBO, and informed by the examples of British Columbia and Idaho, Congress should take a greater role in generating regulations by establishing legislative impact accounting of proposed bills, institutionalizing the Congressional Review Act, and implementing the twin reforms of regulatory budgeting and retrospective review.

I. The Nondelegation Doctrine Needs to Be Resuscitated

The American experiment is predicated on the idea of a social contract, the notion that citizens are governed by consent that they can revoke and by representatives that they can hold accountable. Failure to faithfully enforce the nondelegation doctrine—the doctrine that the Constitution places limits on Congress' authority to transfer its lawmaking powers to administrative agencies—deprives the citizen of both means of participating in government, because the regulator neither needs consent nor must give an account. Perhaps more importantly, threats to liberty abound when the power to define, enforce, and interpret the law accrue in one branch or department. That is why the most salient arguments against the current iteration of the nondelegation doctrine are constitutional, and why the separation of powers, far from being an anachronism, remains integral to "the system of government ordained by the Constitution."[1]

Hence, the vesting clauses of the first three articles point to a tripartite framework with an exclusive role for each branch.[2] "*All* legislative Powers herein granted shall be vested in a Congress of the United States."[3] The Necessary and Proper Clause implies a limit on the content of the laws that Congress can pass.[4] It is not enough for laws to be "convenient, or useful, or essential to another."[5] The conjunction "and" implies that in addition to being necessary, they must be appropriate in allocating authority with respect to separation of powers principles (as well as consistent with federalism and individual liberty).[6] The Take Care Clause implies a reciprocal duty for the executive: that it must carry out the will of the legislature and not exercise its own prerogative.[7]

Aside from the constitutional perils, there are prudential reasons for revisiting the nondelegation doctrine as currently applied. Since 1935, general nonenforcement of the nondelegation doctrine under the intelligible principle standard has coincided with a shift in the locus of policymaking from Congress to government agencies. During the 2018 calendar year alone, Congress enacted 313 laws, but agencies issued 3,368 rules—a 1 to 11 ratio.[8] This shift seems in keeping with the ideal regime championed by modern administrative state architect James

1 Field v. Clark, 143 U.S. 649, 692 (1829).

2 U.S. Const. art. I, § 1; art. II, § 1; art. III, § 1.

3 U.S. Const. art. I, § 1 (emphasis added).

4 U.S. Const. art. I, § 8, cl. 18.

5 McCulloch v. Maryland, 17 U.S. 316, 413 (1819).

6 Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev 327, 347 (2002).

7 U.S. Const. art. II, § 3.

8 Clyde Wayne Crews, Jr., *Ten Thousand Commandments 2019*, Competitive Enterprise Institute, May 7, 2019 at 5.

Landis, who saw the growth of the so-called Fourth Branch as both inevitable and desirable.[9] "The administrative process springs from the inadequacy of a simple tripartite form of government to deal with modern problems," he wrote.[10]

But while agency officials often possess greater technical expertise than elected representatives, Article I establishes a finely wrought process to refine policy while maintaining its legitimacy as the product of representative government. This process brings together more than 500 senators and representatives, chosen from different constituencies, to shape the final outcome of what binds the public.[11] While this "sausage-making" often results in tradeoffs and compromises, it frequently ensures that multiple perspectives are considered and the worst proposals jettisoned from the resulting legislation. Agencies lack such a honing process. The resulting rules are often ill-conceived and ill-considered, popularly coined "red tape." Regulators are rewarded for issuing new rules, rather than for effectively managing the interrelationship of an agency's entire portfolio of existing rules.[12] Hence, they are rarely held responsible when their good intentions do not translate into good outcomes. Also troubling, agencies reach for outdated congressional delegations of power as a source of authority to pass rules that Congress never considered or would never support today.[13]

Regulations tend to accumulate, as they are added to, but seldom removed from, a growing stockpile of often duplicative, burdensome, or outdated rules. It would take someone three years, 108 days, four hours, and five minutes to read through the Code of Federal Regulations (CFR) at a rate of 250 words per minute for 40 hours a week.[14] Of course the task would be a Sisyphean one, as the Code is constantly in flux with the regular churn of the administrative state. Not only is it hard for Congress to police this ballooning code, it is difficult for the average citizen or small business to avoid running afoul of some arcane rule. When so many citizens become unwitting lawbreakers, institutional faith, trust, and respect suffer. The rule of law is compromised, threatening the legitimacy of the American experiment. As Madison cautioned, "It will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood."[15]

Such a state of affairs weakens faith in political efficacy. Voters, rather than seeing their ballot-box choices reflected in policy, increasingly feel subject to the whims of faceless, unaccountable bureaucrats. "[T]he citizen confronting thousands of pages of regulations—promulgated by an agency directed by Congress to regulate, say, 'in the public interest'—can perhaps be excused for thinking that it is the agency really doing the legislating."[16]

This phenomenon of regulatory accumulation has important implications for the economy as well. Economists Michael Mandel and Diana Carew liken it to dropping pebbles in a stream.[17] One pebble or regulation is insignificant, but too many pebbles can dam a stream, and too many regulations can slow down an economy.[18] One study found that if regulations had been held constant at their 1980 levels, the economy would have been 25 percent larger in 2012 than it actually turned out to be, or $4 trillion larger, an average of $13,000 more in the pocket of every American.[19]

Congress will not fix the problem on its own. Its incentives are to pass general pronouncements of laudable goals but leave the tough tradeoffs to the executive branch, which it can then blame when implementation falls short of its ideal. In a study of four regulatory reform statutes that became law, Stuart Shapiro and Diana Moran found that all failed to reduce regulatory burdens.[20] In order to secure passage, they had to be watered down to the point of being mostly ineffectual, but they allowed policymakers to campaign on their adoption.[21] Even if the Regulatory Accountability Act[22] and the Regulations in Need of Scrutiny (REINS) Act[23] had received a floor vote in today's

9 Thomas K. McCraw, Prophets of Regulation 215 (1984). Landis is widely considered to have been among the most influential proponents of congressional delegation to agency experts. He served on three federal commissions, including as chairman of the SEC, an agency he is credited with designing; as adviser to Presidents Roosevelt, Truman, and Kennedy; and as Harvard Law School dean.

10 James M. Landis, The Administrative Process 1 (1938).

11 U.S. Const. art. I, §§ 2, 3.

12 Laura Jones, *Cutting Red Tape in Canada: A Regulatory Reform Model for the United States?* at 19 (Nov. 2015) (unpublished working paper) (on file with Mercatus Center).

13 *See* Jonathan H. Adler & Christopher J. Walker, *Delegation and Time* at 5 (The C. Boyden Gray Center for the Study of the Administrative State, Working Paper 19-14, 2019).

14 The QuantGov Regulatory Clock, https://quantgov.org/charts/the-quantgov-regulatory-clock/ (last visited Jan. 4, 2020).

15 The Federalist No. 62 (James Madison).

16 City of Arlington v. FCC, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting) (quoted in Dept. of Trans. v. Ass'n of Am. R.R., 575 U.S. 43, 62 (2015) (Alito, J., concurring)).

17 Michael Mandel & Diana G. Carew, *Regulatory Improvement Commission: A Politically-Viable Approach to U.S. Regulatory Reform*, Progressive Policy Institute 4 (2013), https://www.progressivepolicy.org/wp-content/uploads/2013/05/05.2013-Mandel-Carew_Regulatory-Improvement-Commission_A-Politically-Viable-Approach-to-US-Regulatory-Reform.pdf.

18 *Id.*

19 Bentley Coffey et al., *The Cumulative Cost of Regulations* at 8 (April 2016) (unpublished working paper) (on file with Mercatus Center).

20 *See* Stuart Shapiro & Deanna Moran, *The Checkered History of Regulatory Reform since the APA*, 19 N.Y.U. J. Legis. & Pub. Pol'y 141 (2016) (evaluating the effectiveness of the Regulatory Flexibility Act, the Paperwork Reduction Act, the Unfunded Mandates Reform Act, and the Small Business Regulatory Enforcement Fairness Act).

21 *Id.*

22 S. 951, 115th Cong. (2017); Regulatory Accountability Act of 2017, H.R. 5, 115th Cong. (2017).

23 S. 21, 115th Cong. (2017); Regulations from the Executive in Need of Scrutiny Act of 2017, H.R. 26, 115th Cong. (2017).

politically fractious climate, they would likely have been gutted of any meaningful reform.

Courts have been reluctant to second-guess agencies. The Supreme Court has largely accepted the view of Landis: "Our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."[24] Even Justice Antonin Scalia, exponent extraordinaire of the separation of powers, put it thus: "In short, we have 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'"[25] The idea that it would be impracticable and nonsensical to expect Congress to make all of the implementation decisions on its own informs a central rationale of the so-called "intelligible principle" standard as established in *J.W. Hampton v. United States*.[26] The intelligible principle standard has become the Court's test for whether a given delegation is lawful. Congress can delegate quasi-legislative power to agencies or officials, so long as it gives them an intelligible principle to guide their discretion.[27] The practical effect of the standard is that courts have avoided placing any real limits on what Congress can assign to agencies.

But Alexander Hamilton rightly admonished that judges must do their duty as "faithful guardians of the Constitution."[28] This means that courts must step into the breach. The Court recognizes that duty, and it has hence repeatedly reaffirmed the existence of a limit on congressional delegation and discoursed on the importance of such a limit.

Indeed, our nation's foremost jurists have expressed concern about delegation. Chief Justice John Marshall is credited with first giving judicial expression—in *Wayman v. Southard*—to the doctrine that Congress cannot delegate "exclusively legislative" functions and must decide the "important subjects" if it assigns others to "fill up the details."[29] Four years later, in *Field v. Clark*, the Court provided additional guidance when it defined a category of cases in which the nondelegation doctrine is not implicated: when Congress directs the executive to take certain actions upon a contingent event or the latter's ascertainment of particular facts.[30] In *Field*, the Court upheld a grant of authority to the president to suspend congressionally prescribed tariff rates with countries he determined had imposed unequal and unreasonable duties on American shipping.[31] Still, the Court maintained, "That congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution."[32]

In 1980, then-Justice William Rehnquist quoted this latter statement from *Field* in calling for resuscitation of the nondelegation doctrine.[33] In a concurrence in a case concerning a delegation of authority to the Labor Secretary to set the allowable level of benzene exposure in the workplace, he outlined the contours of a new standard consistent with Justice Marshall's exposition in *Wayman*: "The most that may be asked under the separation-of-powers doctrine is that Congress lay down the general policy and standards that animate the law, leaving the agency to refine those standards, 'fill in the blanks,' or apply the standards to particular cases."[34] He added, "It is the hard choices, and not the filling in of the blanks, which must be made by the elected representatives of the people."[35]

Justice Clarence Thomas has carried the banner in the years since.[36] In a concurrence tracing the nondelegation doctrine's rationale from Greek and Roman times, through English history, to *J.W. Hampton*,[37] he questioned the soundness of the intelligible principle standard before counseling a test more consistent with Justice Marshall's criteria in *Wayman*, namely that Congress could not delegate "exclusively legislative" functions.[38] Justice Thomas quoted Professor David Schoenbrod at length for the proposition that what implicates the doctrine is not the degree or quantity of authority that is conferred, but its nature or quality.[39] Schoenbrod distinguishes between "rules statutes," which define the parameters of allowable conduct, and "goals statutes," which state only objectives; when Congress passes goals statutes and asks agencies to determine how to achieve those objectives, it impermissibly delegates legislative power to agencies.[40] In other words, the difference between Justice Marshall's descriptions of "important subjects" and "fill[ing] up the details" is not about big picture versus nitty-gritty. It is about making law versus determining how

24 Mistretta v. United States, 488 U.S. 361, 372 (1989).

25 Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474-75 (2001) (quoting *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting)).

26 J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406 (1928) ("In determining what it may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination.").

27 *Id*. at 409 ("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.").

28 The Federalist No. 78 (Alexander Hamilton).

29 Wayman v. Southard, 23 U.S. 1, 42 (1825).

30 *Field*, 143 U.S. 649.

31 *Id.*

32 *Id.* at 692.

33 *See* Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 673 (1980) (Rehnquist, J., concurring).

34 *Id.* at 675 (Rehnquist, J.).

35 *Id.* at 687 (Rehnquist, J.).

36 A.J. Kritikos, *Resuscitating the Non-Delegation Doctrine: A Compromise and an Experiment*, 82 Mo. L. Rev. 441, 457 (2017) (describing Justice Thomas as the Court's lone voice in questioning its application of the intelligible principle standard from 1980 to the present day.

37 *J.W. Hampton*, 276 U.S. 394.

38 *See Dept. of Trans.*, 575 U.S. at 66-87 (Thomas, J., concurring).

39 *Id.* at 79-80 (Thomas, J., concurring) (quoting David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 Mich. L. Rev. 1223, 1255-64 (1984)); *see also* Kritikos, *supra* note 36, at 457 (discussing Justice Thomas' incorporation of Professor Schoenbrod's ideas in his concurrence).

40 Schoenbrod, *supra* note 39, at 1253.

to implement it. When it makes law, the government regulates private conduct; when it determines how to implement that law, it regulates itself.[41] Schoenbrod describes his "rules statute/goal statute distinction" as "fundamentally different" from the intelligible principle standard because it is rigidly formalistic in prohibiting all delegations of legislative power.[42] Justice Thomas seemed to endorse Schoenbrod's test when he wrote that "[g]overnment may create generally applicable rules of private conduct only through the proper exercise of legislative power."[43]

In 2019, Justice Thomas and Chief Justice John Roberts joined Justice Neil Gorsuch in a sharp dissent on nondelegation grounds.[44] In a case considering the scope of the U.S. Attorney General's authority to determine the applicability of a statute to offenders convicted before its enactment, Justice Gorsuch wrote a dissent offering what might be considered an alternative test to the one Justice Thomas has endorsed.[45] First, he said, Congress may delegate gap-filling duties (a reiteration of *Wayman*'s statement of the doctrine), but it must make the policy governing private conduct (a clarification of *Wayman*'s "exclusively legislative" duties and "important subjects").[46] "Second, once Congress prescribes the rule governing private conduct, it may make the application of that rule depend on executive fact-finding" (a summation of the *Field* category of cases exempted under the nondelegation doctrine).[47] "Third, Congress may assign the executive and judicial branches certain non-legislative responsibilities."[48] He further argued that the intelligible principle test has been misunderstood. An intelligible principle must "assign to the executive only the responsibility to make factual findings," it must "set forth the facts that the executive must consider and the criteria against which to measure them," "[a]nd most importantly," Congress must make the policy judgments.[49]

A revival of the nondelegation doctrine now appears imminent. Recently, Justice Brett Kavanaugh cited the opinions of then-Justice Rehnquist and Justice Gorsuch discussed above.[50] He issued a statement respecting the denial of certiorari in a case because he said it raised an identical statutory interpretation issue that had already been decided in *Gundy*.[51] But he wrote separately to signal, like Justice Samuel Alito did in his *Gundy* concurrence,[52] that he would be open to revisiting the doctrine.[53] In summarizing then-Justice Rehnquist, he wrote that Congress must make the "major policy decisions with the president through the legislative process, and not through delegation to agencies"[54] Justice Kavanaugh referred to a "nondelegation doctrine for major questions" that could provide additional guidance for a new standard or test.[55]

This paper attempts to synthesize a new standard from the criteria offered by Justices Rehnquist, Thomas, Gorsuch, and Kavanaugh—one that could get five votes. It briefly considers what effect this new standard would have on lower courts and Congress. It then recommends that Congress implement significant institutional reforms to make a revived nondelegation doctrine workable.

II. A Revived Doctrine Needs a New Standard

The nondelegation doctrine needs resuscitation, but the intelligible principle standard is a dead letter. It should be discarded and replaced with a test that is more limiting and more readily administrable. An intelligible principle is a low bar, but Congress still manages to limbo right under it by passing vague generalities. The Court has upheld broad delegations with weak intelligible principles such as the FCC's authority to grant broadcast licenses "if public convenience, interest, or necessity will be served thereby";[56] the SEC's authority to determine whether a holding company's organization "does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders";[57] and the wartime Office of Price Administration's authority to fix "fair and equitable" commodity prices."[58] The Court "consistently finds intelligible principles where less discerning readers find gibberish."[59]

Since 1935, the Court has never struck down a statute for failing to articulate an intelligible principle. The test is difficult to enforce and administer. It offers meager guidance for courts, as it makes no distinction among the nature or degree of delegated authority.[60] Justice Thomas opined, "I believe that there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than 'legislative.'"[61]

41 Kritikos, *supra* note 36, at 447.

42 Schoenbrod, *supra* note 39, at 1251, 1255.

43 *Dept. of Trans.*, 575 U.S. at 86 (Thomas, J., concurring).

44 *See* Gundy v. United States, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting).

45 *Id.* at 2136-37.

46 *Id.* at 2136.

47 *Id.*

48 *Id.* at 2137.

49 *Id.* at 2141.

50 Paul v. United States, 589 U.S. __ (2019) (Kavanaugh, J., concurring in denial of certiorari) (citing *Gundy*, 139 S. Ct. 2116 (Gorsuch, J., dissenting) and *Indus. Union Dep't, AFL-CIO*, 448 U.S. 607 (Rehnquist, J., concurring)).

51 *Id.*

52 *See Gundy*, 139 S. Ct. at 2130 (Alito, J., concurring).

53 *Paul*, 589 U.S. __ (Kavanaugh, J., concurring in denial of certiorari).

54 *Id.* (citing *Indus. Union Dep't, AFL-CIO*, 448 U.S. 607 (Rehnquist, J., concurring)).

55 *Id. See also infra* at notes 100-109 and accompanying text for a discussion of the major questions doctrine.

56 47 U.S.C. § 307 (2012) (upheld in Nat'l Broad. Co. v. United States, 319 U.S. 190 (1943)).

57 15 U.S.C. § 79k (2012) (upheld in Am. Power & Light Co. v. SEC, 329 U.S. 90 (1946)).

58 Exec. Order No. 8875, 6 Fed. Reg. 4483 (Aug. 30, 1941) (upheld in Yakus v. United States, 321 U.S. 414 (1944)).

59 Lawson, *supra* note 6, at 329.

60 Schoenbrod, *supra* note 39, at 1249-52.

61 *Whitman*, 531 U.S. at 486 (Thomas, J., concurring).

Commentators have argued that the intelligible principle test was never intended to be interpreted so broadly. Justice Thomas noted in another case that the intelligible principle test was formulated in a time when most of the delegations challenged before courts concerned conditional or contingent legislation.[62] These were laws in which Congress made the rules and the conditions under which the rules would be triggered or suspended, and then left to the executive only the duty of determining whether those conditions had taken effect.[63] Examples include delegations to the president to adjust tariff rates,[64] lift embargos,[65] and ban importation of inferior tea.[66] Many of these delegations concerned inherent Article II functions, warranting greater deference given the president's role as the "sole organ" in foreign affairs.[67]

Justice Gorsuch has also questioned the status of *J.W. Hampton* as a seminal case:

> No one at the time thought the phrase meant to effect some revolution in this Court's understanding of the Constitution. . . . And when Chief Justice Taft wrote of an "intelligible principle," it seems plain enough that he sought only to explain the operation of these traditional tests; he gave no hint of a wish to overrule or revise them.[68]

He went on to surmise that "the Court's reference to an 'intelligible principle' was just another way to describe the traditional rule that Congress may leave the executive the responsibility to find facts and fill up details."[69] Whatever its place in administrative law jurisprudence, the intelligible principle standard has failed to demarcate any limits on delegation or declare what the law is.

Yet the Court has already articulated a suitable alternative standard in its line of nondelegation decisions, tucked away in the overlooked 1904 case of *Buttfield v. Stranahan*.[70] In *Buttfield*, the Court upheld a delegation of authority to the Secretary of the Treasury to ban importation of "impure" and "unwholesome" tea.[71] It held this case fell within the *Field v. Clark* fact-finding, contingent exception to the nondelegation doctrine because the statute at issue "fix[ed] a primary standard" for the Secretary to follow and gave that official the "mere executive duty to effectuate the legislative policy declared in the statute."[72] In concluding a discussion of the petitioner's nondelegation challenge, then-Justice Edward Douglass White added, "Congress legislated on the subject as far as was reasonably practicable."[73] This could be read either as controlling precedent or as dicta. Either Congress is required to legislate as far as reasonably practical before it delegates any authority to the executive branch,[74] or, in this particular case, the Court made an additional observation that Congress had gone as far as it realistically could in designing the statutory scheme.

Regardless, this language suggests what could become a new standard or test by which to apply the nondelegation doctrine. A court faced with a challenge to a congressional delegation would determine whether Congress had legislated as far as reasonably practicable, leaving to agencies some gap-filling discretion that Congress would be unable to effectively exercise on its own. Administration of this standard could be assisted by several existing interpretive canons that are already frequently applied in nondelegation contexts, particularly the major questions doctrine.

An "as far as reasonably practicable" test would have several advantages over the existing intelligible principle standard. It would be more limiting and more administrable. As discussed below, when informed by a series of nondelegation canons, it would give reviewing courts better guidance than what the intelligible principle standard provides. Drawn from *Buttfield,* a progeny of *Field*, it avoids undoing a century of precedent. It is an incremental step in the right direction, staking a moderate position that is likely to garner at least five votes. For critics of a runaway administrative state, it would require Congress to stop passing the buck and pass legislation with greater specificity. On the other hand, for those worried that Congress is unable to discharge its duties in an increasingly complex society—a concern raised in *Mistretta*[75]—it acknowledges a gap-filling role for agencies in a modern technocracy. What is not "practicable" for Congress, whether because it is too detailed or too technical, can be assigned to subject matter experts in the branch tasked with enforcing the laws.

Two cases illustrate how the "as far as reasonably practicable" test could work. First, reviewing courts should be skeptical that Congress has legislated on a subject "as far as reasonably practicable" when an agency relies on a very old statute for a new grant of power or a novel interpretation of authority. For example, when Congress passed the Communications Act of 1934,[76] it established the FCC to regulate public use of the broadcast frequencies within the electromagnetic spectrum.[77] Congress could not have foreseen the development of satellite

62 *See Dept. of Trans.*, 575 U.S. at 78 (Thomas, J., concurring).

63 *Id.* at 78-79.

64 *See Field*, 143 U.S. at 692.

65 *See* Brig. Aurora v. United States, 18 U.S. (7 Cranch) 382 (1813).

66 *See* Buttfield v. Stranahan 192 U.S. 470 (1904)

67 *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936).

68 *See Gundy*, 139 S. Ct. at 2139 (Gorsuch, J., concurring).

69 *Id.*

70 192 U.S. 470. Justice White wrote a unanimous opinion for himself and six other justices; Justices Brown and Brewer abstained after taking no part in oral arguments.

71 *Id.*

72 *Buttfield*, 192 U.S. at 496.

73 *Id.*

74 Craig L. Taylor, *The Fourth Branch: Reviving the Nondelegation Doctrine*, 1984 BYU L. Rev. 619, 622 (1984) (interpreting the Court's "as far as reasonably practicable" statement as a condition precedent to lawful congressional delegation).

75 *Mistretta*, 488 U.S. at 372.

76 47 U.S.C. § 151 (2012).

77 *See* Weiss v. United States, 308 U.S. 321, 328 ("The Government correctly asserts that the main purpose of the Communications Act of 1934 was to extend the jurisdiction of the existing Radio Commission to embrace telegraph and telephone communications as well as those by radio.").

technology and dish receivers,[78] let alone cable television or the internet. Yet the FCC relied on the 1934 law to justify applying common-carrier regulations to internet service providers.[79] Under an "as far as reasonably practicable" standard, the FCC would be purporting to exercise an unlawful delegation of authority in doing so. Congress did not legislate far enough into this field—as far as reasonably practicable—for the FCC to promulgate its net neutrality rule.[80]

By contrast, *Touby v. United States* may be a case in which an as far as reasonably practicable standard would permit Congress to delegate gap-filling authority that is consistent with the nondelegation doctrine.[81] In *Touby*, the Court considered a provision of the Controlled Substances Act that allowed the Attorney General to temporarily add a controlled substance to a list of prohibited drugs if he determined it necessary to avoid threats to public safety.[82] To do so, he had to follow specified procedures and engage in fact-finding by evaluating a substance with reference to its history and current pattern of abuse; the scope, duration, and significance of its abuse; and what, if any, risk it posed to public health.[83] Here, Congress established the general policy and standards for the authority it was delegating and outlined the facts that needed to be ascertained before the Attorney General could add a drug to the list of prohibited substances. It would have been impracticable for Congress to withhold this authority, because new designer drugs were regularly hitting the streets before the normal drug scheduling process could make them illegal. While stopping short of endorsing the unanimous decision in *Touby*, Justice Gorsuch cited it in his *Gundy* dissent as a case pointing "in the direction of the right questions."[84]

The phrase "as far as reasonably practicable" has been invoked in several areas of the law, such as the advisability of executing a search warrant in the daytime,[85] desegregation considerations in planning the construction of new schools,[86] and the standard of care in monitoring freight train wheels while in transit.[87] If not a universal term, it is a generally understood one. The concept is also adaptable enough to allow courts to apply it in different factual circumstances. The question is how to apply it to nondelegation, to make a standard or test flexible enough to apply to different facts and cases, but firm enough to limit judges' discretion to principled decision-making. There is some tension in Chief Justice Marshall's pronouncement of the doctrine, as his descriptions of "important subjects" and "fill up the details" could be read as delineating a matter of degree, while his term "exclusively legislative" appears to be a black-and-white, categorical definition.[88] Then-Justice Rehnquist channels Chief Justice Marshall when he emphasizes that Congress must "lay down the general policy" and make the "hard choices," "leaving the agenc[ies]" only to "fill in the blanks."[89] In summarizing then-Justice Rehnquist, Justice Kavanaugh wrote that Congress must make the "major policy decisions."[90] An "as far as reasonably practicable" standard could determine the lawfulness of any delegation based on *how much* authority Congress hands over—whether it makes the "major policy decisions" or "general policy" when it designs the statutory scheme—so it expects more of Congress than under the Court's current test and is therefore a step in the right direction.

But the standard could also determine whether a delegation is lawful based on the *kind* of authority that is handed over, as the term "exclusively legislative" implies. In quoting Professor Schoenbrod and seemingly endorsing his "rules statute/goals statute distinction," Justice Thomas seems to favor a strict categorical approach whereby any legislative power—including the ability to make authoritative interpretations of laws—left to agencies is an unlawful delegation. Though as Adam White notes, by joining Justice Gorsuch's *Gundy* dissent, Justice Thomas may be signaling that he is amenable to a more modest approach.[91] Justice Gorsuch parallels Chief Justice Marshall and then-Justice Rehnquist when he writes that Congress "may always authorize executive branch officials to fill in even a large number of details,"[92] but he appears to gesture at a categorical approach too. He does not speak of "general policy" or "major policy" but only of "policy."[93] He writes that Congress must make the policy judgments and leave to the executive "only the responsibility to make factual findings."[94] Such a rule predates *J.W. Hampton* and its introduction of the intelligible principle standard. Adopting it could signal a return to the *Field* approach, a general policy of nondelegation with a categorical exception for executive fact-finding. If viewed in this light, the "as far as reasonably practicable" standard is merely a faithful application of *Field*'s fact-finding

78 McCraw, *supra* note 9, at 306-07.

79 *See* U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 740 (D.C. Cir. 2016) (interpreting scope of 47 U.S.C. § 151 (2012)).

80 Protecting and Promoting the Open Internet, 30 FCC Rcd. at 5603.

81 500 U.S. 160 (1991).

82 21 U.S.C. § 811(h).

83 *Id.* § 811(h)(3)

84 *Gundy*, 139 S. Ct. at 2141 (Gorsuch, J., dissenting).

85 *See* United States v. Borkowski, 268 F. 408, 411 (S.D. Ohio May 24, 1920).

86 *See* Green v. Sch. Bd. of City of Roanoke, 316 F. Supp. 6, 12–13 (W.D. Va. 1970), *vacated sub nom.* Adams v. Sch. Dist. No. 5, Orangeburg Cty., S.C., 444 F.2d 99 (4th Cir. 1971).

87 *See* S. Pac. Co. v. R.R. Comm'n of Cal., 10 F. Supp. 918, 923 (N.D. Cal. 1935).

88 *Wayman*, 23 U.S. at 42.

89 *See Indus. Union Dep't, AFL-CIO*, 448 U.S. at 675 (Rehnquist, J., concurring).

90 *Paul*, 589 U.S. __ (Kavanaugh, J., concurring in denial of certiorari) (citing *Indus. Union Dep't, AFL-CIO*, 448 U.S. at 687 (Rehnquist, J., concurring)).

91 Adam White, *Nondelegation's Gerrymander Problem*, Yale J. on Reg., Notice and Comment blog, (Dec. 16, 2019), https://www.yalejreg.com/nc/nondelegations-gerrymander-problem/.

92 *See Gundy*, 139 S. Ct. at 2145 (Gorsuch, J., dissenting).

93 *Id.* at 2136, 2141.

94 *See id.* at 2136.

nondelegation exception. Recall that the *Buttfield* Court explicitly applied *Field's* fact-finding principle in its decision.[95] With *Field* in view, "as far as reasonably practicable" could be applied as prohibiting the delegation of any legislative power. An "as far as reasonably practicable" standard would press Congress to settle the primary policy questions and define clear standards to cabin agencies' discretion—certainly more than the extant intelligible principle standard does.

Whether it turns on the amount of delegated authority or on a categorical classification, this standard would likely rely on other established doctrines to make it work. It can be informed by what essentially is the current nondelegation standard or test: a series of statutory construction canons. Practically, the existing nondelegation doctrine does not so much limit the laws that Congress can pass as it limits the way agencies can construe statutes.[96] An "as far as reasonably practicable" test would be an umbrella standard encompassing a series of nondelegation canons, the most important of which would be the major questions doctrine. Justice Kavanaugh invoked this doctrine in his recent statement inviting the Court to revisit the nondelegation doctrine, and he appears inclined to see it incorporated within any new standard.[97]

The term "Major Questions Doctrine" comes from an article by Justice Stephen Breyer in which he discusses the degree of deference that courts should give to how agencies interpret their governing statutes and make their rules.[98] Justice Breyer wrote that courts should assume Congress has considered and decided the major questions in a statute and should therefore accord agencies less deference on major questions than on "interstitial matters."[99] The Court cited Justice Breyer's article when it held the FDA lacked the authority to regulate tobacco products.[100] It has invoked the major questions doctrine or its rationale on several occasions since.[101]

Justice Gorsuch described the major questions doctrine in *Gundy* as a sort of workaround to the nondelegation doctrine and its intelligible principle standard: "Although it is nominally a canon of statutory construction, we apply the major questions doctrine in service of the constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency."[102] As Adam Gustafson has proposed, "Although the major questions doctrine began as an exception to *Chevron* deference, it can operate more broadly as a nondelegation canon of statutory construction."[103] Echoing other administrative law experts, Gustafson suggests using the Executive Order 12866[104] definition of a "significant regulatory action"—agency actions that would have an annual impact on the economy of $100 million or more—as an administrable standard for determining when a major question is presented.[105] This $100 million threshold is used elsewhere, such as in the Regulatory Flexibility Act.[106] In other words, if an agency proposes a regulation that is "major" enough that the Office of Information and Regulatory Affairs (OIRA) is tasked with reviewing it, then it should be able to show statutory language evincing congressional authorization for such a rule. Applying an "as far as reasonably practicable" standard suggests that a policy judgment with a $100 million price tag requires Congress to exercise a requisite degree of decision-making. Charging an agency with a mere intelligible principle should not suffice.

Other nondelegation canons could include the doctrine of avoidance, whereby a court would construe an ambiguous statute narrowly to avoid raising separation of powers problems; lesser deference for agencies' novel uses of older, more established terms in statutes; greater deference for interpretations of broader, more general terms; and more leeway for delegations of highly technical decision-making.[107] Though imperfect, an "as far as reasonably practicable" standard, buttressed by continued application of the major questions doctrine, is an incremental step in the right direction.

The practical effect of a revived nondelegation doctrine, guided by an "as far as reasonably practicable" standard and applied through a series of nondelegation canons, would be a more hands-on judiciary, a more responsible Congress, and a more fettered administrative state. These changes would not happen overnight but would gradually take effect as institutional incentives were realigned. Applying the new approach, courts would put Congress and agencies on notice that the days of broad delegations are over. Agencies would see many of their lawmaking efforts frustrated and turn to Congress for clear direction. A Congress forced to take more responsibility for the everyday requirements and restrictions that bind its citizens would be more accountable to the public. And as the public became aware of this growing accountability, it might spur Congress to become even more involved in agency rulemaking.

95 *Buttfield*, 192 U.S. at 496.

96 Cass R. Sunstein, *The American Nondelegation Doctrine*, 86 Geo. Wash. L. Rev. 1181, 1182 (2018).

97 *Paul*, 589 U.S. at __ (Kavanaugh, J., concurring in denial of certiorari).

98 Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 364 (1986).

99 *Id.* at 370.

100 FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 127 (2000).

101 *See*, *e.g.*, King v. Burwell, 135 S. Ct. 2480 (2015) (holding that eligibility for tax credits is something Congress should have decided); *Whitman*, 531 U.S. 457 (holding that the EPA did not have authority to consider implementation costs in an ambiguous provision at issue when other provisions in the statute explicitly answered the same question); Util. Air Regulatory Grp. v. EPA, 573 U.S. 302 (2014) (rejecting EPA's claim that "any air pollutant" unambiguously included greenhouse gas emissions); *see also* Adam R. F. Gustafson, The Major Questions Doctrine Outside *Chevron*'s Domain (The C. Boyden Gray Center for the Study of the Administrative State, Working Paper 19-07, 2019) (surveying Supreme Court decisions referencing the major questions doctrine).

102 *Gundy*, 139 S. Ct. at 2142 (Gorsuch, J., dissenting).

103 Gustafson, *supra* note 101.

104 Exec. Order No. 12,866, 58 Fed. Reg. 51735 (Oct. 4, 1993).

105 Gustafson, *supra* note 101, at 24.

106 5 U.S.C. §§ 601-612.

107 Sunstein, *supra* note 96, at 1184-91.

III. Congress Should Prepare for a More Active Role

Congress should prepare to take a more active role in generating regulations at all stages of the rulemaking process. As the Senate does for treaties and appointments, the whole Congress should do for significant regulations: advise and consent. It should vote—at a minimum—on all significant regulations.

In order to do so effectively, Congress must hire considerably more staff. It should begin anticipating, tracking, and analyzing regulations at the bill-drafting stage and conduct independent, ongoing analyses of agency regulatory actions. Congress should limit agency rulemaking by implementing a regulatory budget, and it should establish a process for periodically reviewing the CFR for rules that reflect excessive delegation, do not justify their costs, or are otherwise unlawful or imprudent.

A. Additional Congressional Staff

First, Congress would need to authorize and appropriate funding for more staff. In order to legislate on subjects "as far as reasonably practicable," it needs expanded resources to further develop policies at the drafting stage, to conduct more effective oversight of the executive by more closely scrutinizing its proposed and finalized rules, and to conduct retrospective review of existing regulations. Naturally, this might entail larger committee staffs with additional subject-matter experts. But perhaps more importantly, Congress would need an institutional counterweight to the administration that it oversees, a rival to the Office of Management and Budget (OMB) and OIRA.[108] The natural place to house such an entity would be the Congressional Budget Office (CBO). CBO's principal role is to forecast the effects of budget, tax, and spending policy.[109] It estimates the revenue and costs of proposed bills.[110] A revamped CBO could help Congress reassert its constitutional prerogative by providing reports on, estimates of, and recommendations about regulations. It is possible that either the General Accountability Office (GAO) or Congressional Research Service could perform a similar function, as all three operate under strict rules of nonpartisanship and objectivity.[111] This paper proposes CBO, but regardless of which entity is used, it is clear Congress needs more personnel. From 1975 to 2015, CBO, GAO, and the Congressional Research Service have seen their combined staffs shrink by 45 percent.[112]

B. Legislative Impact Accounting

Congress should be involved in generating regulations even before passing the enabling statutes that empower agencies to promulgate new rules. Scholars Jason Fichtner, Patrick McLaughlin, and Adam Michel propose that CBO be tasked with estimating a bill's regulatory impact along with its effect on the federal budget.[113] Their system of "Legislative Impact Accounting" calls for scoring and tracking of regulations beginning with new bills.[114] An independent office like CBO would forecast the impact of proposed legislation, not just on the budget, but on the economy as a whole, estimating the likely regulatory effects on things like direct compliance costs, employment rates, technological disruptions, and future innovation.[115] They note, "The European Commission provides impact assessments on all legislation by the European Parliament."[116]

In addition to economic forecasting, CBO could be charged with reviewing legislation to spot potential legal and constitutional delegation issues, providing a more holistic assessment of a bill's legal consequences that goes beyond the focus of the individual members and committee staff who are its chief authors. A legal office within CBO or a similar entity could provide additional expertise, paying particular attention to circumstances in which Congress has not legislated as far as reasonably practicable or would need to decide major questions. Fichtner, McLaughlin, and Michel characterize their legislative impact accounting proposal as a continual feedback loop that conveys to Congress information about regulations and, by extension, their authorizing legislation.[117] It would begin with an assessment of proposed legislation prior to voting and continue with analysis of agencies' regulatory actions.[118] Congress could then make better informed decisions about how to respond to agency behavior, particularly at budget time.[119] Such a feedback loop makes sense given the two additional recommendations discussed below.

C. Greater Oversight and Regular Use of the Congressional Review Act

Secondly, CBO should review the significant regulatory actions that OIRA includes in its semiannual Unified Agenda of Regulatory and Deregulatory Actions and prepare detailed analyses of them for members of Congress. Rather than relinquishing the responsibility for regulatory analysis to OIRA, CBO could be double-checking the executive branch's work and providing regular advice to lawmakers as agencies carry out their legislative mandates. The good news is that Congress has an important tool at its disposal: the Congressional Review Act

108 *See* Adam Levenson, *OMB: The Most Powerful Office in Washington That You've Never Heard Of*, University of North Carolina, School of Government, MPA @ UNC Jan. 6, 2020 6:17 PM), https://onlinempa.unc.edu/office-of-management-and-budget/; Congressional Budget Office, Organization and Staffing, https://www.cbo.gov/about/organization-and-staffing (last visited Jan. 6, 2020). OMB has twice as many employees as CBO.

109 Roger H. Davidson & Walter J. Oleszek, Congress & Its Members 407 (2004).

110 *Id.*

111 *Id.* at 220. GAO's agency head, the Comptroller General, is charged under the Congressional Review Act with reviewing new rules. 5 U.S.C. § 801(a)(1)(A) (2012).

112 Curtlyn Kramer, *Vital Stats: Congress has a staffing problem, too*, Brookings Inst., May 24, 2017, https://www.brookings.edu/blog/fixgov/2017/05/24/vital-stats-congress-has-a-staffing-problem-too/.

113 Jason J. Fichntner, Patrick A. McLaughlin, & Adam N. Michel, *Legislative Impact Accounting: Incorporating Prospective and Retrospective Review into a Regulatory Budget*, Public Budgeting & Finance, Summer 2018, at 41.

114 *Id.* at 40-43, 48-49.

115 *Id.* at 46.

116 *Id.* at 56.

117 *Id.* at 52-54.

118 *Id.*

119 *Id.*

(CRA).[120] Passed in 1996, the CRA laid dormant for many years; it was used only once in 2001 to strike an unpopular ergonomics rule.[121] Yet in the wake of the 2016 election, President Trump signed 15 joint resolutions of disapproval passed by Congress under the CRA to nullify regulations issued by agencies in the final year of the Obama Administration.[122] Congress should institutionalize it as part of regular order.

The CRA requires a rule-issuing agency to submit a report and copy of the rule to GAO and both houses of Congress, which is then forwarded to the chairman and ranking member of the committees that have jurisdiction over the rule.[123] The report's submission starts a 60-day clock during which Congress may initiate filibuster-proof, fast-track procedures to schedule a vote on whether to strike the rule.[124] If both chambers vote to strike it, they can submit a joint resolution to the president; if he signs it, or if Congress overrides his veto, the rule is quashed. In addition, if the resolution succeeds, the agency is forbidden from issuing a rule that is "substantially the same" unless Congress later takes action to empower it to do so.[125] This latter point is critical, because it can serve to deter agencies from passing so-called "midnight rules" in the final year of an outgoing administration. Such a tactic can backfire, as an incoming Congress can not only void the rule, but also prevent the agency from passing it or a substantially similar one in the future.

Paul Larkin argues that the CRA could apply to far more than regulations passed through notice-and-comment rulemaking.[126] A recent GAO opinion[127] suggests the CRA's reach could extend to guidance documents, policy statements, and other sub-regulatory items.[128] If so, Congress would be able to vote on a wide swath of agency activity beyond notice-and-comment regulation. Additionally, because the 60-day clock on a rule does not start until Congress receives its report from the agency,[129] Larkin suggests that potentially thousands of rules that were never properly submitted to Congress could be reviewed under the CRA today.[130] This would allow Congress to begin retrospective review of regulations that have been in effect for some time. A reconstituted CBO could assist members in deciding what to prioritize.

While the CRA's reach is limited because it must comport with Article I requirements of bicameralism and presentment, and most presidents would veto challenges to their own agencies' regulations, the CRA holds promise for at least some improvement. Its regular use might even discipline agencies to pass better regulations.

D. Retrospective Review

Finally, Congress needs to periodically audit the federal corpus of regulation through a process of retrospective review. At first blush, this might not sound reasonably practicable. Given that there were 63,645 pages in the Federal Register and 185,434 pages in the CFR at the end of 2018,[131] such a review would require additional resources beyond what Congress currently commits to its oversight of government agencies. But Congress can draw encouragement from what the Trump administration, British Columbia, and Idaho have done to reexamine old rules that are on the books.

The Trump administration's approach to executive branch rulemaking demonstrates how regulatory budgets and retrospective review work together. Pursuant to Executive Orders 13771[132] and 13777,[133] agencies are currently scrutinizing regulations as part of a regulatory budget and retrospective review. There is no reason Congress cannot bring these functions in house. Briefly, a regulatory budget is a cap on agency rulemaking.[134] It is an attempt to limit the total amount of regulation by placing the cost of regulation on the regulator.[135] Rather than merely making new rules, agencies must be "rule managers," regulating within fixed limits such that each regulation entails a tradeoff. In order to issue a new regulation, an agency must make room for it within the amount of allowable regulation, often by rescinding an existing regulation.[136] The amount of regulation allowed within a given budget can be measured in different ways, and Executive Order 13771 uses two metrics within each executive branch agency: a cap on the total cost of an agency's regulatory burden to the economy, and a 2-for-1 requirement that each proposed rule be offset by identification of two existing rules for elimination.[137] Aside from limiting the amount of new regulation, a regulatory budget provides the incentive for agencies to conduct

120 Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 871 (1996) (codified at 5 U.S.C. §§ 801–08 (2012)).

121 *See* Shapiro & Moran, *supra* note 20, at 175-76.

122 Paul J. Larkin, Jr., *Reawakening the Congressional Review Act*, 41 Harv. J.L. & Pub. Pol'y 187, 190 (2018).

123 5 U.S.C. § 801(a)(1)(A) (2012).

124 *Id.* § 801(a)(2)(A).

125 *Id.* § 802(b)(1) (2012).

126 Larkin, *supra* note 122, at 204.

127 Letter from Susan A. Poling, GAO General Counsel, to Senator Pat Toomey, Pub. B-329272, Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation—Applicability of the Congressional Review Act to Interagency Guidance on Lever-aged Lending 2 (Oct. 19, 2017), https://www.gao.gov/assets/690/687879.pdf.

128 Larkin, *supra* note 122, at 204.

129 *See* 5 U.S.C. § 802(a) (2012).

130 Larkin, *supra* note 122, at 238.

131 Crews, *supra* note 8, at 18.

132 Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Jan. 30, 2017).

133 Exec. Order No. 13,777, 82 Fed. Reg. 12,285 (Feb. 24, 2017).

134 Patrick A. McLaughlin & Tyler Richards, *Regulatory Review Commission + Regulatory Budget = A Diet for Better, More Effective Regulations*, Policy Brief (Mercatus Center at George Mason University, Arlington, VA, Nov. 2019), at 8.

135 *Id.*

136 *Id.*

137 Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Jan. 30, 2017).

retrospective review of their existing regulations: In order to make new rules, they must find offsets by digging through their stockpile to select rules they are willing to part with. Executive Order 13777 establishes the contours of this retrospective review by requiring the designation of "regulatory reform officers" to lead "regulatory reform task forces" in their implementation of the Executive Order 13771 regulatory budget. Under this charge, agency lawyers and economists are auditing the rules on their books, and according to several observers, they have helped slow the growth of regulation.[138]

Though an improvement, these executive orders will be effective only so long as a president chooses to keep them in place. Congress should make them permanent by institutionalizing regulatory budgeting and retrospective review, and by putting CBO in charge of monitoring compliance. There are at least three ways it could do this. First, Congress could simply pass the substance of Executive Orders 13771 and 13777 into law. It could then, perhaps through the appropriations process, annually set caps for the regulatory costs that agencies may impose on the economy and establish limits on the number of new rules or regulatory actions by conditioning issuance of new regulations on the rescission of old ones. Under this approach, OMB and OIRA would still be in the driver's seat of setting and ensuring compliance with the regulatory budget for individual agencies. CBO would oversee OMB and OIRA and advise members of Congress on remedial actions.

A variation of this framework would put CBO in charge of recommending individual rules to Congress for removal, rather than deferring to OMB and OIRA. CBO could refer rules to committees with jurisdiction over their subject matter, the committees could make recommendations, and Congress could vote on whether to keep them. Given the size of the code and time pressure of scheduling votes on thousands of regulations, CBO could review sections on a staggered, multi-year schedule, reviewing the entire code perhaps once every decade. Here, Congress need not adopt the CRA provision that prevents an agency from reissuing rules that have been voted down by Congress.[139] Such a provision might raise the stakes of any retrospective review beyond what is helpful to encourage removal of old rules and secure the president's signature.

A third option would be to use an independent, impartial commission to review regulations. It could be modeled on the Base Realignment and Closure (BRAC) Commission established by Congress to determine, in an apolitical manner, which bases to close.[140] The BRAC Commission was initially established as part of a post-Cold War drawdown to shrink the defense budget.[141] Congress squabbled over the issue, as members sought to keep open the bases in their districts that were sources of jobs and boons to their local economies.[142] Rather than incur their constituents' wrath for voting on closures, they agreed to let the Commission decide. The Commission's experts recommended closures that made sense from a cost-savings standpoint. The only way Congress could stop a closure was to pass a joint resolution of disapproval. These procedures allowed members in districts with pending base closures to save face by publicly opposing the closure and voting for a joint resolution of disapproval, because it was unlikely enough similarly situated members would muster enough votes to thwart the Commission's recommendations.[143] That is exactly what happened, and the Commission was a success.[144] Like the second option presented above, a regulatory review commission would take the authority to decide on individual rules out of the hands of the agencies. But unlike the second option, it would place them not in the hands of Members of Congress, but in an independent body, insulated from special interests, political incentives, and institutional pressures.[145] It is important to note, however, that unlike the first two options, this third method would not address the underlying constitutional issue of requiring Congress to make the major legislative or policy decisions. It is merely a practical means for removing regulations that are already on the books, many of which were issued pursuant to excessive delegations in the first place.

Congress could improve on the Trump administration's model in important ways. Currently, the Executive Order 13771 budget may only apply to about 8 percent of federal regulations.[146] James Broughel and Laura Jones advise broadening the scope of the budget—beyond the small number of "significant regulations" that currently count in the cost-caps and 2-for-1 offsets—to include counts of regulatory restrictions or requirements in the CFR.[147] One way to measure these restrictions or requirements is to comb through the CFR for terms like "shall," "must," "may not," "prohibited," and "required."[148] In some instances, these terms signify agency behavior, but in others, they define applicable rules of private conduct. Using a measure like regulatory restrictions or requirements captures more regulatory activity within the budget and allows regulations to be considered for adoption or rescission that have not undergone the prudent, but often complicated and time-consuming, process of cost-benefit analysis.

Lawmakers would also do well to consider the case study of British Columbia, as it demonstrates how regulatory budgets can be effective with simple measurements. This westernmost Canadian province, with a well-diversified economy and a population comparable to that of Louisiana, undertook a

138 *See, e.g.*, James Broughel & Laura Jones, *Effective Regulatory Reform: What the United States Can Learn from British Columbia* 14-15 (Sept. 2018) (unpublished working paper) (on file with Mercatus Center).

139 *Id.* § 802(b)(1) (2012).

140 *See* McLaughlin & Richards, *supra* note 134, at 5-8.

141 *Id.*

142 *Id.*

143 *Id.*

144 *Id.*

145 *Id.*

146 Broughel & Jones, *supra* note 138, at 5-8.

147 *Id.*

148 *Id. See also,* Patrick A. McLaughlin and Oliver Sherouse, RegData 3.1 (dataset), QuantGov, Mercatus Center at George Mason University, Arlington, VA, 2017, http://quantgov.org/regdata/.

remarkable turnaround at the turn of the century.[149] In the 1990s, it was in last place in Canada for growth and employment.[150] A survey of mining companies in British Columbia scored the province last out of 31 jurisdictions.[151] In 2001, under new leadership, the province set a goal of reducing its "regulatory requirements" by a third in three years.[152] Broughel and Jones note that the measurement and definition used—"regulatory requirement"—was key to its success: "British Columbia's two-for-one policy applied broadly to most requirements found in the province's regulations, legislation, forms, and interpretive policies. The [U.S.] policy, by contrast, requires only that a relatively small number of legally 'significant' rules be offset."[153] By 2004, the province had exceeded its retrospective review target, reducing regulatory requirements by 37 percent.[154] It institutionalized those reforms, and by 2015, it had cut 43 percent of its regulatory requirements.[155] The Canadian federal government took note and adopted a 1-for-1 regulatory budget.[156] However structured, retrospective review and regulatory budgeting can help lawmakers rein in the excesses of the administrative state.

Finally, Congress should start adding sunset provisions, or expiration dates, to the majority of its future statutes. Requiring reauthorization of statutes can "induce Congress to revisit, reassess, and recalibrate existing programs" to ensure they reflect up-to-date information and considered evaluation of agency behavior.[157] These statutes should also include sunsets on all regulations issued in pursuance of their expired authorizing legislation, as it should be unlawful for agencies to continue issuing rules without a current grant of authority in effect.

This reform would shift the burden of proof, so to speak, from Congress to the agencies. In conducting a retrospective review, Congress or CBO bears responsibility for identifying the regulations and defending its decision to vote disapproval or order their rescission. Sunset provisions shift the burden to agencies, especially when they must undertake the rulemaking process anew and are "subjected to public scrutiny, cost-benefit analysis and perhaps even court challenges."[158] Far from a new idea, sunset provisions predate the republic and have been proposed by Thomas Jefferson, Alexander Hamilton, and William O. Douglas.[159]

While the prospect of an expiring regulatory code before a gridlocked Congress may give some pause, Idaho has demonstrated how sunset provisions can work without causing dire consequences. In January 2019, Governor Brad Little signed an executive order requiring regulators to identify two rules for repeal for every new one proposed.[160] Little was establishing a regulatory budget for the Gem State that mirrored Executive Order 13771. Yet another impetus for reform came from an odd quirk of the state's government: the Idaho Legislature must reauthorize the entire regulatory code each year.[161] After a rancorous legislative session ended in April, lawmakers left town without reauthorizing the code.[162] The impending expiration provided the Little Administration with a rare opportunity to create a regulatory code from scratch that could be presented to lawmakers at the start of the next session in 2020.[163] By the end of the year, Little claimed to have cut 30,936 restrictions from the 72,000 that were on the books prior to expiration, which would make Idaho the least regulated state in the nation.[164]

Legislative impact accounting, regulatory budgets, retrospective review, and sunset provisions have traditionally been the recommendations of economists to improve the quality of regulations and minimize their tradeoffs. Moving forward, Congress can deploy them to reassert its authority and to prevent and correct lawless delegations to agencies.

IV. Conclusion

It has been said that the nondelegation doctrine had one good year back in 1935.[165] But the doctrine is far from dead. It just needs to be resuscitated. Time will tell whether the doctrine will get another good year, but recent developments leave room for optimism. And if the Court is a lagging indicator, then perhaps Congress, encouraged by reforms in states like Idaho, will move first to take the initiative and reestablish itself in the regulatory process. That would go a long way toward restoring its rightful place in the constitutional order.

149 *See* Jones, *supra* note 12, at 12-13.

150 *Id.* at 13.

151 *Id.* at 14.

152 *Id.* at 3.

153 Broughel & Jones, *supra* note 138, at 5.

154 Jones, *supra* note 12, at 20.

155 *Id.* at 3.

156 *Id.*

157 *See* Adler & Walker, *supra* note 13, at 27.

158 James Broughel, *Idaho Repeals Its Regulatory Code*, Mercatus Center, The Bridge, May 9, 2019.

159 *See* Adler & Walker, *supra* note 13, at 28.

160 Exec. Order 2019-02, (Jan. 21, 2001), *available at* https://gov.idaho.gov/wp-content/uploads/sites/74/2019/01/eo-2019-02.pdf.

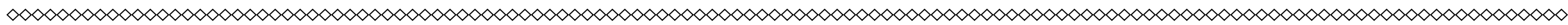
161 Broughel, *supra* note 158.

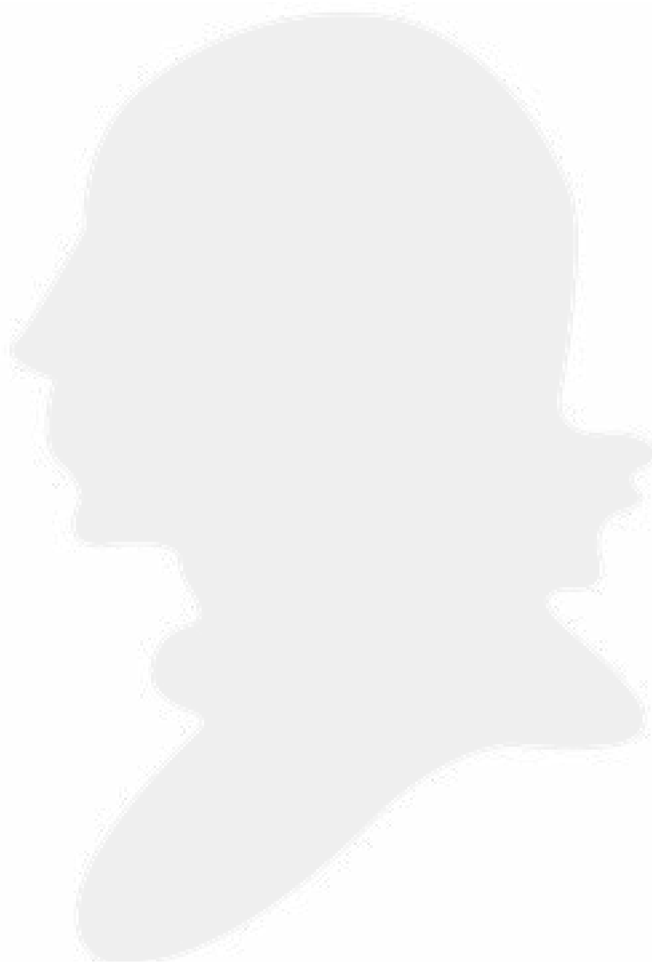
162 *Id.*

163 *Id.*

164 Cynthia Sewell, *Gov. Brad Little: Idaho is now least-regulated state in the country*, Idaho Statesman (Dec. 4, 2019), https://www.idahostatesman.com/news/politics-government/state-politics/article238042974.html.

165 Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 322 (2000).





Escaping the Goldilocks Problem: A Proposal That Would Enable States to Avoid Redistricting Litigation

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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. Whenever we publish an article that advocates for a particular position, as here, we offer other perspectives on the issue, including ones opposed to the position taken in the article. In this case, we are publishing a full rebuttal to the article by Kevin St. John, which you can find at page 102. We also invite responses from our readers. To join the debate, please email us at info@fedsoc.org.

For a generation, state and local governments have faced a Goldilocks problem when they redistrict. Courts require them to use race to design districts in order to comply with Section 2 of the Voting Rights Act (Section 2), but they invalidate maps under the 14th Amendment to the U.S. Constitution when racial considerations "predominated" in the drawing of districts.[1] Seemingly every approach state and local governments have taken to try to draw districts that would comply with these dueling requirements leaves them in the crosshairs of plaintiffs and the federal judiciary: ignoring race entirely,[2] following bright-line concentration rules established by Supreme Court precedents to assure protected classes' voting power,[3] deferring to the requests presented by representatives of protected classes,[4] deferring to the decisions of nominally non-partisan redistricting panels,[5] and more. There is also an obvious disconnect between voting reformers' complaints about our current redistricting systems and those reformers' proposed solutions. Almost no proposal on offer would solve these problems, and almost every proposal on the table would actually make them worse. Indeed, even the remedies imposed by courts have been attacked in later litigation as violating one or both of Goldilocks' warring demands.[6]

But there is a solution to the Goldilocks problem. State and local governments can avoid further redistricting litigation under both the Constitution and Section 2 by simply getting out of the game and drawing no districts whatsoever.

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1 Mark Rush, *The Current State of Election Law in the United States*, 23 Wash. & Lee J. Civ. Rts. & Soc. Just. 383, 400 n.96 (2017) (citing Josh Gerstein, *Supreme Court Takes Case Claiming Racial Gerrymandering in Virginia*, Politico (June 6, 2016). *See also* Hans A. von Spakovsky, *Symposium: The Goldilocks Principle of Redistricting* (May 23, 2017), https://www.heritage.org/courts/commentary/symposium-the-goldilocks-principle-redistricting.

2 Covington v. North Carolina, 2017 U.S. Dist. LEXIS 215089, *4 (M.D.N.C. 2017) (plan enacted without consideration of race "either fail[s] to remedy the identified constitutional violation or [is] otherwise legally unacceptable"). *See also* Covington v. North Carolina, Case No. 1:15-cv-00399; Dkt. 187, *6-7 (M.D.N.C. 2017) ("The committees expressly forbade any consideration of racial data in drawing district lines.").

3 Ala. Legis. Black Caucus v. Alabama, 135 S. Ct. 1257, 1267 (2015) (finding that "Alabama expressly adopted and applied a policy of prioritizing mechanical racial targets above all other districting criteria").

4 Abbott v. Perez, 138 S. Ct. 2305, 2334 (2018).

5 Harris v. Ariz. Indep. Redist. Comm'n, 993 F. Supp. 2d 1042, 1050 (D. Ariz. 2014).

6 *Abbott*, 138 S. Ct. at 2313 ("Before us for review are orders of a three-judge court in the Western District of Texas directing the State not to conduct this year's elections using districting plans that the court itself adopted some years earlier.").

I. Overview of Existing Law

A. Section 2 of the VRA Requires the Use of Race in Redistricting

In addressing Section 2 claims, courts first establish whether plaintiffs have standing to contest the districts at issue. Members of a racial minority residing in a district where that minority has either been "packed" or "cracked" have standing to challenge their district under Section 2.[7] If standing is established, a court gauges the plaintiffs' claims through a two-stage inquiry:[8]

1) First, it determines whether the plaintiffs have met their burden in establishing three preliminary *Gingles* factors:
   a) their group is "sufficiently large and geographically compact to constitute a majority" in an additional single-member district;
   b) the group is "politically cohesive"; and
   c) the "majority votes sufficiently as a bloc to—in the absence of special circumstances . . . —usually defeat the minority's preferred candidate";[9]
2) Then, it analyzes whether the members of the plaintiffs' minority group have been afforded by their enacted districts an equal opportunity to elect their preferred candidates to office.[10] To do this, courts balance a list of factors from the VRA's legislative history that is "neither comprehensive nor exclusive[,]" along with "other factors [that] may also be relevant[.]"[11] This is often referred to as a "totality of the circumstances" analysis.

While Section 2 expressly does not create a right to proportional representation among elected officials,[12] courts gauge the equality of opportunity afforded protected classes of voters by comparing their share of the electorate to the share of elections where their preferred candidates have prevailed.[13] The case law requires states to afford minority populations proportional opportunities to elect representatives, not that they be proportionally represented among officials.

Section 2 of the VRA requires governments, where possible, to draw districts in such a way that cohesive minorities should be able to control the outcome of elections in a proportional share of districts. In Goldilocks terms, map-drawing cannot be "too cold" in its use of race.

B. The Supreme Court's Decision in Shaw *Bans the Use of Race in Redistricting*

The 14th Amendment protects Americans from intentional racial discrimination, unless it is narrowly tailored to meet a compelling governmental interest.[14] Deliberate racial gerrymandering violates the 14th Amendment, as the Supreme Court held in *Shaw v. Reno*.[15] Any American living in a racially gerrymandered district has standing to challenge it,[16] and where "race was the predominant factor motivating [the] decision to place a significant number of voters within or without a particular

7 *See, e.g.,* Shaw v. Hunt, 517 U.S. 899, 914 (1996) ("[A] plaintiff may allege a § 2 violation in a single-member district if the manipulation of districting lines fragments politically cohesive minority voters among several districts . . . and thereby dilutes the voting strength of members of the minority community."); *see also* Gill v. Whitford, 138 S. Ct. 1916, 1936 (2018) (Kagan, J., concurring) ("When a voter resides in a packed district, her preferred candidate will win no matter what; when a voter lives in a cracked district, her chosen candidate stands no chance of prevailing. . . . So when she shows that her district has been packed or cracked, she proves, as she must to establish standing, that she is 'among the injured.'").

8 Some have concluded that the Supreme Court's *Abbott v. Perez* decision added an additional, third step to the *Gingles* analysis. Harding v. Cty. of Dallas, 2020 U.S. App. LEXIS 1682, *24-*26 (5th Cir. 2020) (Ho, J., dissenting in part) ("Prior to *Perez*, the Court made clear that, once a plaintiff is able to meet the three *Gingles* factors, the vote dilution claim proceeds to the totality of the circumstances test. . . . *Perez* alters this framework. In addition to the three *Gingles* factors, Plaintiffs must survive an additional inquiry before reaching the totality of the circumstances test. Plaintiffs must now affirmatively prove that the minority group will have a 'real' opportunity to elect representatives of its choice. . . .' So after *Perez*, it is no longer enough for plaintiffs to draw a proposed district that satisfies the three *Gingles* factors. It must additionally prove that the proposed district will in fact perform as plaintiffs hope.") (internal citations omitted). At a minimum, within the Fifth Circuit, parties must make this additional showing, above and beyond what the *Gingles* factors appear to require, either as a hidden component of the second and third prongs of *Gingles*, or as a new requirement of the case law, before proceeding onward to demonstrating the totality of the circumstances. It is unclear if any other Court of Appeals will share the 5th Circuit's understanding of the Supreme Court's ruling in *Perez*.

9 *See, e.g.,* Thornburg v. Gingles, 478 U.S. 30, 50-51 (1986).

10 *Abbott*, 138 S. Ct. at 2331 ("If a plaintiff makes [the threshold *Gingles*] showing, it must then go on to prove that, under the totality of the circumstances, the district lines dilute the votes of the members of the minority group.").

11 *Gingles*, 478 U.S. at 45.

12 52 U.S.C. § 10301(b) ("Provided that nothing in this section establishes a right to have members of a protected class *elected* in numbers equal to their proportion of the population.") (emphasis added).

13 *Gingles*, 478 U.S. at 48 n.15 ("[U]nless minority group members experience substantial difficulty *electing* representatives of their choice, they cannot prove that a challenged mechanism impairs their ability 'to elect . . . .' By recognizing the primacy of the history and extent of minority electoral success and of racial bloc voting, the Court simply requires that Section 2 plaintiffs prove their claim before they may be awarded relief.") (emphasis added); LULAC v. Perry, 548 U.S. 399, 436-42 (2006) (holding Section 2 to forbid drawing of district to protect a Hispanic incumbent from Hispanic voter opposition). *See also* Sanchez v. Colorado, 97 F.3d 1303, 1320-21 (10th Cir. 1996), (recognizing that while the "*Gingles* majority" "concluded [that] the candidate's race is never irrelevant[,]" it "is 'of less significance than the race of the voter[,]" before announcing that "the VRA ensures members of a protected class equal opportunity 'to elect representatives of their choice,' not 'necessarily members of their class.'"); Perez v. Abbott, 253 F. Supp. 3d 864, 881 (W.D. Tex. 2017) (recognizing that "the Fifth Circuit [has] directed courts to consider . . . the inability *of the protected class to elect*[,]" rather than an inability to candidates from that class to win election) (emphasis added) (citing Salas v. Southwest Texas Junior College District, 964 F.2d 1542, 1547 (5th Cir. 1992)).

14 Washington v. Davis, 426 U.S. 229, 239 (1976).

15 509 U.S. 630, 640 (1993).

16 Hays v. Louisiana, 515 U.S. 737, 744-45 (1995) ("Where a plaintiff resides in a racially gerrymandered district, however, the plaintiff has been denied equal treatment because of the legislature's reliance on racial criteria, and therefore has standing to challenge the legislature's action.").

district[,]" courts invalidate that district.[17] Courts determine actual legislative motivations by reference to "either circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose."[18]

Where plaintiffs establish that racial concerns predominated over all others in the crafting of electoral districts, the burden shifts to the government to "demonstrate that its districting legislation is narrowly tailored to achieve a compelling state interest."[19] That is an affirmative defense, which must be pled with proper evidentiary support to prevail.[20] Most commonly, jurisdictions assert as a defense that they used race only as required by the VRA. While the Supreme Court has never held that compliance with Section 2 is a compelling governmental interest sufficient to meet strict scrutiny,[21] it has assumed that such compliance *could be* sufficiently compelling. The Court said in a 2017 case that a government making that argument would need to show that it had "good reasons to believe" the use of race was required to comply with the VRA, including by demonstrating that it had "a strong basis in evidence in support of the (race-based) choice that it has made."[22] A government must demonstrate—not simply assert—that it had a factual basis to conclude that unless it drew lines based on race, it would have been sued and would have lost.[23]

The 14th Amendment bars governments from drawing districts predominantly on the basis of race, with the possible exception of situations where the VRA requires it. In Goldilocks terms, map-drawing cannot be "too hot" in its use of race.

II. Overview of Existing Redistricting Approaches and Proposals for Reform

A. No Existing Approach Prevents Litigation or Guarantees Victory

No approach jurisdictions have taken to redistricting spares them litigation. A jurisdiction cannot safely engage in non-racial districting. Those avoiding the use of *any* racial data in their drawing of districts get sued for violating Section 2 of the VRA, and they lose.[24]

A jurisdiction cannot safely draw districts conscious of protected minorities by complying with the bright-line concentration rules suggested by Supreme Court Section 2 precedent. The Supreme Court may have just affirmed a ruling that Section 2 "requires the creation of a legislative district" for a cohesive group "constitut[ing] a numerical majority of the voting population in the area under consideration[,]"[25] extolling "the majority-minority rule" as "unlike any [alternative] standards" in producing "an objective, numerical test" that "provides straightforward guidance to courts and to those officials charged with drawing district lines to comply with § 2."[26] But those following that "straightforward guidance" still get sued for violating the equal protection demands of *Shaw v. Reno*, and they lose.[27]

A jurisdiction cannot safely defer to the requests of a protected class' representatives and give the group what it says it wants in a districting plan. Those adopting districts for protected classes, requested by those communities' representatives as fair treatment of the communities get sued for violating the equal protection demands of *Shaw v. Reno*, and they lose.[28]

A jurisdiction's lawmakers cannot even safely call in a designated hitter and have a nominally non-partisan panel redistrict for them.[29] Those who do so can still get sued under both Section 2 and the 14th Amendment, and they can still lose.

B. Proposed Remedies Remedy Nothing

The remedies most often proposed by voting rights activists do not address any of these concerns, or even make a fair map more likely to emerge.[30] Three of the most common proposals would utterly fail on both scores.

The most commonly proposed redistricting reform would transfer responsibility for redistricting from elected officials to appointed, ostensibly non-partisan commissions.[31] But such

17 Miller v. Johnson, 515 U.S. 900, 916 (1995).

18 Bethune-Hill v. Va. St. Bd. of Elections, 137 S. Ct. 788, 798 (2017) (citing *Miller*, 515 U.S. at 916).

19 *Bethune-Hill*, 137 S. Ct. at 800-01 (citing *Miller,* 515 U.S. at 920).

20 Cooper v. Harris, 137 S. Ct. 1455, 1464, 1469 (2017).

21 *Bethune-Hill*, 137 S. Ct. at 801. *Cooper* left *Bethune-Hill*'s statement of the law on this accurate, despite the plurality's analysis of an asserted strict scrutiny defense, as it did not find that any compelling state interest had been demonstrated. *Cooper*, 137 S. Ct. at 1469-72. While no decisions have resolved the matter, there is reason to doubt that, were the Court confronted with the issue, it could conclude that an otherwise unconstitutional plan was constitutionally required by statute.

22 *Bethune-Hill*, 137 S. Ct. at 801 (citing *Ala. Legis. Black Caucus*, 135 S. Ct. at 1274).

23 *Cooper*, 137 S. Ct. at 1471 ("To have a strong basis in evidence to conclude that Section 2 demands such race-based steps, the [jurisdiction] must carefully evaluate whether a plaintiff could establish the *Gingles* preconditions—including effective white bloc-voting—in a new district created without those measures.") (citing *Gingles,* 478 U.S. at 56).

24 *See Covington*, 2017 U.S. Dist. LEXIS 215089 (map drawn with no consideration of race invalidated).

25 Bartlett v. Strickland, 556 U.S. 1, 9 (2009).

26 *Id.* at 18-19.

27 Perez v. Abbott, 2017 U.S. Dist. LEXIS 3501 (Tex. N.D. 2017) (acknowledging Texas' intentional use of *Bartlett*'s straightforward guidance to craft a congressional district where members of a minority constituted more than 50% of electorate, and nevertheless holding that district to be unconstitutional because the state allowed race to predominate in drawing it).

28 *See Abbott*, 138 S. Ct. at 2334-35.

29 *See Harris*, 993 F. Supp. 2d 1042 (Arizona established a redistricting commission composed of non-politicians and was still sued under the 14th Amendment; while it prevailed in this suit, there is no reason to believe that successors uniformly will).

30 This is so under either (a) anything like a common-sense understanding of fairness or (b) a more scholarly interpretation of the term, like the requirements that one would select behind a hypothetical veil of ignorance. *See generally* John Rawls, A Theory of Justice (1971).

31 The "first major bill of the 116th Congress[,]" entitled the "For the People Act[,]" includes a provision requiring states to "use nonpartisan redistricting commissions to draw new congressional maps." Paul Blumenthal, *House Democrats Introduce Their Sweeping New Reform Bill*, Huffington Post (Jan. 4, 2019), https://www.huffingtonpost.com/entry/house-democrats-for-the-people-act_us_5c2eb491e4b08aaf7a97bff3. Additionally, "[s]everal states have seen

redistrictings are as likely to be subject to litigation as those drawn by legislatures.[32] And their usage does not address the central question of how map-making will comply with the relevant competing legal obligations; it says nothing about what data may or must be used to draw a legally acceptable map, but merely changes the officials who vote on the resulting proposals. Given that all modern legislators rely on counsel for substantive advice throughout their redistricting processes,[33] and that redistricting commissions use the same kinds of counsel for the same kinds of advice,[34] there is no obvious reason to expect that the methods or data employed would differ in any way following a shift to commissions. Nor does a move to commissions promise fairer results. California moved from legislatively crafting its maps to having them drawn by commission before 2011, and it emerged with a more aggressive gerrymander than the parties had drawn for themselves in decades.[35] Indeed, shifting decisionmaking from elected officials to appointed commissions promises no improvements, and it threatens to undermine what little transparency and political accountability are currently present in the system.

Other reformers have proposed requiring redistricters to analyze (and minimize) the "efficiency gap" in their proposed maps.[36] "Efficiency gap" analysis, which featured prominently in the *Gill* litigation,[37] assesses the "fairness" of a map by scoring the partisan preferences of all voters and looking to equalize the number of "wasted" votes cast for the candidates of each party, across districts. In 2018, Missouri adopted it in a constitutional amendment to attempt to address redistricting concerns.[38] But the efficiency gap does not address any issue relevant to the *Gingles* framework, so fully employing it likely would not reduce the chances of a court invalidating a map under Section 2. Given that our case law already recognizes that race and party often closely correlate and forbids map-drawers from making racial decisions under a thin veneer of partisan language,[39] reliance on the efficiency gap instead of directly on racial data does not promise to avoid constitutional litigation of *Shaw*-type claims.

Another proposal would have maps define multi-member rather than single-member districts. Under such a plan, the top several finishers in each large, multi-member district would win seats, rather than the top finisher in each small, single-member district.[40] This would allow minorities surrounded by larger communities with divergent preferences to elect representation to the extent of their share of the included, larger district. But even this more analytically rigorous proposal would not fully address the Goldilocks problem. Drawing fewer districts still involves drawing lines and deciding whom to put inside and outside of them. While scaling up and allocating proportionally within such districts may *reduce* the opportunities for redistricting mischief, wherever there are lines, they can be challenged. It is worth remembering that *Gingles* itself invalidated a multi-member district.

III. A New Solution: Abolishing Districts

While single-member districts are traditional—and there can be wisdom in sticking to tradition—the Constitution does not require them, nor is any other element of our current electoral regime legally necessary. We need not, for example:

a) award power through single-member district elections;

b) select candidates through primary and general elections; or

c) use the intermediary of single-party nominations.

A state or locality could choose a different approach on one or all of these dimensions.[41] Governments around the world—and even

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voters passing referenda to create independent, bipartisan redistricting commissions. States should create such commissions if they want a fair, transparent process for redistricting." Billy Corriher and Liz Kennedy, *Distorted Districts, Distorted Laws*, Center for American Progress (Sep. 19, 2017), https://www.americanprogress.org/issues/democracy/reports/2017/09/19/439164/distorted-districts-distorted-laws/.

32 *See, e.g.*, *Harris*, 993 F. Supp. 2d 1042.

33 *See, e.g.*, Common Cause v. Rucho, 318 F. Supp. 3d 777, 803 (M.D.N.C. 2018) ("*Through private counsel*, the committees engaged" an expert "to draw the new congressional districting plan.") (emphasis added); Harding v. Cty. of Dallas, 2018 U.S. Dist. LEXIS 143125, *3 (N.D. Tex. 2018) ("The Commissioners Court retained J. Gerald Hebert, Esquire ("Hebert") and Rolando L. Rios, Esquire ("Rios") as outside redistricting counsel. Hebert, in turn, employed Matt Angle ("Angle") . . . to assist in drawing and presenting redrawn district maps for consideration."); Texas v. U.S., 887 F. Supp. 2d 133, 185 (D.D.C. 2012) ("Ryan Downton, the general counsel to the House Committee on Redistricting . . . was the principal drafter of the Congressional Plan.").

34 *Harris*, 993 F. Supp. 2d at 1051 ("The Commission has authority to hire legal counsel[.]"); *id.* at 1056 ("Before beginning to adjust the grid map, the Commission received presentations on the Voting Rights Act from its attorneys . . . ."); *id.* at 1056-7 ("The Commission originally operated on [an] assumption . . . based on [one of its lawyers'] report . . . .").

35 *See* Olga Pierce and Jeff Larson, *How Democrats Fooled California's Redistricting Commission*, Pro Publica (Dec. 21, 2011), https://www.propublica.org/article/how-democrats-fooled-californias-redistricting-commission.

36 *See* Nicholas Stephanopoulos & Erin McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. Chi. L. Rev. 831 (2015).

37 *Gill*, 138 S. Ct. at 1924-25, 1932-33.

38 Samuel King, *Missouri's New Redistricting Rules are Unique in the U.S., and not Immune from Changing*, KCUR (Dec. 5, 2018), https://www.kcur.org/post/missouri-s-new-redistricting-rules-are-unique-us-and-not-immune-changing#stream/0. Mo. Const. Art. IV, Sec. 2 (amended November 2018).

39 *See, e.g.*, *Abbott*, 138 S. Ct. at 2314 (acknowledging that "because a voter's race sometimes correlates closely with political party preference . . ., it may be very difficult for a court to determine whether a districting decision was based on race or party preference," and stating that a mooted prior map had been found to have used partisan calculations to accomplish racial goals). *See also* LULAC v. Clements, 999 F.2d 831, 860-61 (5th Cir. 1993) (en banc) ("recogniz[ing] that even partisan affiliation may serve as a proxy for illegitimate racial considerations[.]"); Page v. Va. State Bd. of Elections, 58 F.Supp.3d 533, 549 (Va. E.D. 2014) (rejecting evidence of partisan rather than racial motivation as pretextual "post-hoc political justification" and invalidating district as unconstitutional).

40 *See, e.g.*, Rush, *supra* note 1, at 401-02.

41 Current federal law would prohibit such experimentation in the allocation of congressional seats. 2 U.S.C. § 2c. While nothing in the Constitution *requires* the election of representatives through single-member districts,

in one of our own states—prove the availability of alternatives. Consider two examples of approaches that differ from the American norm.

Israeli election law treats the entire country as a single electoral district in national elections.[42] Voters cast their ballots in elections to the Knesset, the national legislature, not for individual members, but for parties.[43] Israel makes it relatively easy for parties to form and participate in elections; every one of its national elections sees new parties splinter from old ones, or old parties merge into new ones.[44] Before each election, each participating party must publish its "list" of proposed representatives.[45] Once votes are tallied, seats in the resulting Knesset are awarded proportionately based on the total share of the votes received by each party (above the minimum threshold for inclusion).[46] Subject to rounding rules and minimal share provisions, a party that wins a third of the vote takes a third of the seats in the 120-member Knesset; as a result, the first 40 candidates on its published list are elected to the legislature.

New York presents another contrast to the American norm. Like most other states and jurisdictions, New York allocates seats in its state assembly to the winners of elections in single-member districts. But like Israel, New York makes it easy for parties to obtain ballot access. In 2018, New York gave eight parties automatic ballot access for their candidates: the Democratic Party, the Republican Party, the Conservative Party of New York State, the Working Families Party, the Green Party, the Libertarian Party, the Independence Party, and the Serve America Movement. Unlike most jurisdictions, New York allows different parties to nominate the same candidates for the same posts, regardless of whether those candidates are members of the nominating party or even intend to participate in its primary election. As a result, when New Yorkers vote for offices, they often see the same candidate appearing on a number of ballot lines; for example, in 2018, the Democratic, Working Families, and Independence Parties nominated the same candidate for the governorship, as did the Conservative and Republican Parties. In any given race, the votes cast for any nominee are summed—a vote for Andrew Cuomo is a vote for Andrew Cuomo, regardless of which party the voter chose—and the candidate with the most votes is elected.

A state or locality could adopt a merged version of these two regimes. Texas, for example, has been tied up in litigation over its various legislative maps for at least twelve of the last seventeen years. Texas could ease its rules concerning ballot access, allowing voters to cast their votes for governor and other state-wide offices as New York does; this would mean individuals could vote for Greg Abbott as the candidate of the Republican Party, or as the candidate of hypothetical alternative parties like Empower Texas, Texas Right to Life, and the Liberty Caucus. But Texas could simultaneously adopt the Israeli approach to allocating seats in its state legislature proportionately, rather than by district, thereby allowing every community (however defined) to elect its proportional share of the legislature. Seats could be awarded, as in Israel, in order of precedence on party lists, beginning with the party receiving the most votes.

The resulting elections would have no districts and no opportunities for gaming of district lines. The state's role in allocating power would be entirely removed, shifting the onus for such decisions entirely to the electorate and the organizational capacities of candidates and parties. Imagine a community dispersed across the state, which included 10,000 West Texans in Lubbock who share political preferences with 10,000 South Texans in McAllen and 10,000 East Texans in Lufkin. Assuming easy ballot access for parties allows them to organize their own party, that community would win exactly the same representation as a community of 30,000 people in Houston. As long as the state's ballot-access rules are sufficiently loose to allow such a group to gain access to the ballot as a new party (to the extent members feel that other parties have not given them an adequate chance of electing their preferred candidates), the group's ability to elect its preferred candidates would be determined entirely by the number of votes in its camp, without regard to the presence or antipathy of any surrounding local majorities or to any choice by the state as to whether members of the group have enough in common to allow their coordinated action.

IV. The Proposed System Would Be Immune from Legal Challenge

A. No Section 2 Challenge Could Survive a Motion to Dismiss

This system would not be subject to attack under Section 2. *Gingles*' second and third preliminary factors would be rendered impossible to prove, since it would be impossible for a local majority to block any local minority's ability to elect its preferred candidate. As these are threshold requirements for a successful Section 2 suit, the impossibility of satisfying them guarantees that no action brought could survive a motion to dismiss.

Congress has the express constitutional authority to make rules concerning the "Manner of holding Elections for . . . Representatives." U.S. Const. art. 1, sec. 4. Until and unless Congress repeals Section 2c, no state could award its congressional seats through an alternative method.

42 Basic Law: The Knesset, 1958, S.H. 69, Art. 4, *available at* https://www.knesset.gov.il/laws/special/eng/basic2_eng.htm. *See also Elections for the Knesset*, The Knesset (last visited Feb. 4, 2019), https://knesset.gov.il/description/eng/eng_mimshal_beh.htm ("The principle of country-wide elections states that Israel is a single electoral district insofar as the distribution of Knesset seats is concerned.").

43 *See FAQ: Elections in Israel*, Israel Ministry of Foreign Affairs (last visited Feb. 4, 2019), https://mfa.gov.il/MFA/AboutIsrael/State/Democracy/Pages/FAQ_Elections_Israel.aspx ("On election day, voters cast one ballot for a single political party to represent them in the Knesset.").

44 *See generally Israel Elections: Political Parties*, Jewish Virtual Library: A Project of AICE, https://www.jewishvirtuallibrary.org/israeli-political-parties. As documented in the sublinks, therein, every Israeli national election to date has seen changes to the partisan composition of the Knesset. Indeed, over the course of this writing, Israel has concluded three national election, and it has seen parties that were not in the prior Knesset win seats in each.

45 *FAQ: Elections in Israel*, *supra* note 43 ("Prior to the elections, each party submits its list of candidates for the Knesset (in order of precedence). The parties select their candidates … in primaries or by other procedures. Only registered parties or an alignment of two or more registered parties can present a list of candidates and participate in the elections.").

46 *See Elections for the Knesset*, *supra* note 42 ("The candidates of any given list are elected to the Knesset on the basis of the order in which they appear on it. If a certain party received sufficient votes for 10 seats, the first 10 candidates on its list will enter the Knesset.").

Still, it is worth noting that this system would also preclude a finding at *Gingles*' totality of the circumstances stage that any redistricting decision of any government leaves "the political processes leading to nomination or election in the State or political subdivision . . . not equally open to participation by members of" any community "in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[47] This would be so both because there would be no state action to challenge as potentially dilutive, and because, even if there were, where every community receives proportional representation, no community could claim to have been denied the same opportunity to elect its candidates afforded any other.

B. No 14th Amendment Challenge Would Succeed

Similarly, if jurisdictions draw no districts, race can never be held to predominate in the drawing of districts. In the absence of any allocative decision in which to include racial considerations, there would be no decision to even hypothetically analyze under strict scrutiny. No plaintiff could bring any 14th Amendment challenge that could survive the motion to dismiss phase of litigation.

V. Conclusion

Whether directly, through appeals to fairness, or indirectly, through *Gingles*' totality of the circumstances test, most people gauge whether an election is producing fair results by considering whether it has enabled groups to elect officials in numbers roughly proportionate to their share of the electorate. Proportional representation directly addresses these concerns. Common proposals like map-drawing commissions do not address them at all. If those campaigning for electoral reform really want to avoid litigation and obtain fairer results, they will shift gears and pursue an alternative to single-member districting schemes.

47 52 U.S.C. § 10301(a) and (b).

Why Proportional Representation Will Not Stem Redistricting Litigation But Will Undermine Normative Representative Values

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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. Whenever we publish an article that advocates for a particular position, as here, we offer other perspectives on the issue, including ones opposed to the position taken in the article. This article is a response to an article by Dan Morenoff, which you can find at page 96; there is also a brief reply at the end of this rebuttal. We also invite responses from our readers. To join the debate, please email us at info@fedsoc.org.

Dan Morenoff's *Escaping the Goldilocks Problem: How States Can Avoid Redistricting Litigation* identifies and explains a significant problem: Modern redistricting invariably results in costly and uncertain litigation.[1] This problem is created by two seemingly contradictory doctrines. Fourteenth Amendment Equal Protection Clause jurisprudence generally forbids mapmakers from predominately considering race when drawing legislative districts, while the Voting Rights Act requires detailed racial considerations. To be sure, there are porridges that are "just right" and avoid violating both doctrines; presumably districts drawn with predominate racial considerations but only to comply with the Voting Rights Act satisfy strict scrutiny.[2] But to get to that conclusion, the porridge must be tested. And because the incongruous commands of the 14th Amendment and the Voting Rights Act require legislation to sit on the head of a pin, a dissatisfied voter-plaintiff's civil rights complaint is always ready-made.

Large volume redistricting litigation is a problem, and Mr. Morenoff is correct that the commonly proposed reforms[3] will not meaningfully reduce the likelihood of litigation that entangles even the best-intentioned maps. But his proposed solution of using multimember statewide districts would not alleviate this problem. Moreover, his proportional representation solution would undermine the values of district-based representation—values that are due for a defense. A better solution to reduce litigation and protect district-based representation values is far more elegant though possibly just as controversial: get the courts out of the political thicket of districting litigation except in cases where there is discriminatory intent.

I. Gerrymandering Litigation Is Uniquely Problematic Because It Undermines the Institutional Capital of Courts and the Integrity of the Legislative Process

Litigation is how we sort out and protect constitutional and statutory rights.[4] All litigation is subject to criticism on the ground that it is too costly, and much of it is problematic because court decisions produce costly uncertainty. So why should we be specially concerned about people petitioning courts for a vindication of rights in the context of redistricting litigation?

1 Dan Morenoff, *Escaping the Goldilocks Problem: How States Can Avoid Redistricting Litigation*, 21 Federalist Soc'y Rev. 96 (2020), *available at* https://fedsoc.org/commentary/publications/escaping-the-goldilocks-problem-a-proposal-that-would-enable-states-to-avoid-redistricting-litigation.

2 The Court has not answered directly whether Voting Rights Act compliance satisfies the Equal Protection Clause's strict scrutiny standard, but it has "assume[d], without deciding, that [a] State's interest in complying with the Voting Rights Act [is a] compelling" state interest. Bethune-Hill v. Virginia State Bd. of Elections, 137 S. Ct. 788, 801 (2017).

3 *See* Morenoff, *supra* note 1, at 98-99.

4 28 U.S.C. § 1983.

Because there are unique facets to redistricting litigation that go beyond both the cost-objection that inures to all litigation and the uncertainty objection that attaches to all totality-of-(often confounding)-circumstances jurisprudence (like Section 2 doctrine). These unique facets undermine both the judicial and legislative branches for multiple reasons; I highlight one reason for each branch here.

A. Judicial Branch Integrity

Invariably, redistricting litigation enmeshes courts in political disputes. As the Supreme Court observed in *Gaffney v. Cummings*, "Politics and political considerations are inseparable from districting and apportionment . . . . The reality is that districting inevitably has and is intended to have substantial political consequences."[5] And it is not just *courts* that are caught up in redistricting litigation; it is the *Supreme Court*. This is because the grant or denial of an injunction relating to legislative districts is directly appealable to the Supreme Court.[6] As a result, the Supreme Court is asked to decide numerous politically charged cases every redistricting cycle.[7]

These are not simply cases with policy implications furthering or frustrating a particular party's platform. These are cases affecting legislative organization and the substantive membership of legislative bodies. While this concern is most acute in partisan gerrymandering cases,[8] it is also present in apportionment[9] and VRA Section 2 cases.[10] Indeed, Section 2 cases are premised on the understanding that one kind of district constituency with an opportunity to elect one kind of preferred candidate is valid while another is not.[11] Not all candidates are the same, even within parties. Different district constituencies will produce substantively or descriptively different types of Democrats and substantively or descriptively different types of Republicans.[12]

Districting decisions have direct political implications that shape not just whether a Democrat or Republican is more likely to be elected, but what *kind* of Democrat or Republican will be elected, and even what those parties will look like.[13] Whether it affirms or invalidates maps, the Supreme Court's decisions will be controversial, and thus all districting litigation requires the expenditure of political capital that can undermine the Court's institutional legitimacy.[14] In short, the current volume of inexorably political litigation undermines the public's perception of the judiciary as a neutral and non-political institution.

B. Legislative Branch Integrity

Redistricting litigation undermines the legislative branch because it imposes unique burdens on legislators and introduces

5 412 U.S. 735, 753 (1973). *See also* Vieth v. Jubelirer, 541 U.S. 267, 285 (2004) (plurality op. of Scalia, J.) (stating that districting is "root-and-branch a matter of politics"); Davis v. Bandemer, 478 U.S. 109, 145 (1986) (concurring op. of O'Connor, J.) ("[T]he legislative business of apportionment is fundamentally a political affair[.] . . . To turn these matters over to the federal judiciary is to inject the courts into the most heated partisan issues.").

6 28 U.S.C. § 1253.

7 Redistricting happens every ten years following the decennial census. By my count, the Supreme Court has issued 17 opinions involving whether post-2010 Census state legislative or congressional district lines were valid. *See* Rucho v. Common Cause, 139 S. Ct. 2484 (2019); Lamone v. Benisek (reported with *Rucho*); Virginia House of Delegates v. Bethune-Hill, 139 S. Ct. 1945 (2019); North Carolina v. Covington, 138 S. Ct. 2548 (2018); Abbott v. Perez, 138 S. Ct. 2305 (2018); Benisek v. Lamone, 138 S. Ct. 1942 (2018); Gill v. Whitford, 138 S. Ct. 1916 (2018); North Carolina v. Covington, 137 S. Ct. 1624 (2017); Cooper v. Harris, 137 S. Ct. 1455 (2017); *Bethune-Hill*, 137 S. Ct. 788; Whitman v. Personhuballah, 136 S. Ct. 1732 (2016); Harris v. Arizona Independent Redistricting Comm'n, 136 S. Ct. 1301 (2016); Evenwel v. Abbott, 136 S. Ct. 1120 (2016); Shapiro v. McManus, 136 S. Ct. 450 (2016); Arizona State Legislature v. Arizona Independent Redistricting Commission, 135 S. Ct. 2652 (2015); Alabama Legislative Black Caucus v. Alabama, 135 S. Ct. 1257 (2015); Tennant v. Jefferson County Comm'n, 567 U.S. 758 (2012); Perry v. Perez, 565 U.S. 388 (2012). More were decided summarily. *See* Joshua Leavitt, *All About Redistricting*, http://redistricting.lls.edu/cases.php#sct (collecting 2010 cycle redistricting cases, listing Supreme Court dispositions).

8 *See, e.g.*, *Rucho*, 139 S. Ct. at 2498-50, 2458 (holding partisan gerrymandering claims are not justiciable, observing that partisan gerrymandering claims "inevitably ask the court to make their own political judgment about how much representation political parties deserve," and concluding courts have "no commission to allocate political power and influence in the absence of a constitutional directive. . . .").

9 *See, e.g.*, *Gaffney*, 412 U.S. at 749-50 ("That the Court was not deterred by the hazards of the political thicket when it undertook to adjudicate the reapportionment cases does not mean that it should become bogged down in a vast, intractable apportionment slough, particularly when there is little, if anything, to be accomplished by doing so.").

10 *See* Morenoff, *supra* note 1, at 97.

11 52 U.S.C. § 10301(b) (providing voting rights are deemed abridged if it is shown that members of a racial class of citizens "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice").

12 In the lingo of representation, "substantive" relates to policy outlooks and outcomes and "descriptive" relates to characteristics such as race, sex, sexual orientation, or other status. *See, e.g.,* Kenneth Lowande, Melinda Ritchie, & Erinn Lauterbach, *Descriptive and Substantive Representation in Congress: Evidence from 80,000 Congressional Inquiries*, 63 Am. J. Pol. Sci. 644 (2019).

13 For a thoughtful exploration as to why different district lines will yield different constituencies and thus impact the substantive platforms of the candidates who represent those constituencies, see Jacob Eisler, *Partisan Gerrymandering and the Illusion of Unfairness*, 67 Cath. U. L. Rev. 229, 244-59 (2018). While Eisler's article concentrates on partisan gerrymandering, there is no reason to believe that the substantive implications of line drawing are confined to the underlying intent of the drafters as opposed to the actual makeup of district constituencies—makeups that are directly or indirectly influenced by litigation.

14 This appears to be a central concern to Chief Justice John Roberts in resolving partisan gerrymandering cases. *See* Gill v. Whitford, No. 16-1611 (S. Ct.), Oral Ar. Tr. at 36-38 (identifying the "main problem" with partisan gerrymandering cases as public perception that the Court is making decisions to favor one party over another). As Professors Gibson and Caldeira have observed, "[t]he driving mechanism for change in institutional support has to do with whether the Supreme Court is seen as an ordinary political institution or whether it is judged to be distinctive. To the extent that people believe the Court is a relatively non-political institution, support for it is more easily generated. Anything that drags the Court into ordinary politics damages the esteem of the institution." James L. Gibson & Gregory A. Caldeira, Citizens, Courts, and Confirmations: Positivity Theory and the Judgments of the American People 119-20 (2009).

external factors into their deliberative process by subjecting them to litigation from which they are usually immune. Typically, legislators are shielded from judicial inquiry into their legislative activities, either as an application of the Speech and Debate Clause (for members of Congress),[15] or as an application of the federal common law of legislative immunity and privilege.[16] These mechanisms protect legislators (and their aides) in their exercise of any core legislative activity, not just what they say on the floor.[17] Legislative privilege extends to those activities that are "necessary to prevent indirect impairment [of legislative] deliberations."[18] And while the set of constitutive elements comprising core legislative activities may be open to some debate,[19] drafting legislation like redistricting laws is indisputably the core of the core of legislative activities.

The doctrines of legislative immunity and privilege are indispensable to proper democratic functioning. Compelling legislators to participate in a "private civil action . . . creates a distraction and forces [legislators] to divert their time, energy, and attention from their legislative tasks to defend litigation."[20] This can "delay and disrupt the legislative function."[21] Separation of powers is another concern. The "central purpose" of the protections for legislators against liability and judicial inquiry into the legislative process is to "avoid intrusion by the Executive or Judiciary into the affairs of a coequal branch," "protect legislative independence," and thus "'preserve the constitutional structure of separate, coequal, and independent branches of government.'"[22]

Nevertheless, many district courts have "qualified" (a euphemism for eliminated) the legislative privilege in numerous redistricting cases.[23] The result is that legislators and their staffs have been compelled to produce testimony, documents, or both. Courts abrogating the privilege have typically reasoned that, because legislative privilege is not absolute, legislative testimony of intent is the best evidence of legislative intent, and civil rights actions are very important, it is appropriate to deviate from the norm of legislative privilege.[24]

That reasoning is dubious. First, the premise is overstated. To be sure, the Supreme Court has held that legislative privilege is not absolute in *criminal* proceedings.[25] But the Court has never held that a legislator may be compelled to testify in a *civil* action. The Court has speculated that in "extraordinary instances" legislators might be called "to testify concerning the purpose of official action, *although even then such testimony frequently will be barred by the privilege*."[26] Second, the abrogating courts' substantive logic is flawed. An individual legislator's intent is not the same as the intent of the legislature as a body.[27] Moreover, the Supreme Court has already, in *Tenney*, asked and answered the question of whether Congress intended to abrogate legislative privilege in civil rights cases, saying it did not.[28]

The ease with which these courts have abrogated the privilege is mystifying.[29] Were legislative bodies, in the exercise of their legislative subpoena power, to compel judges and justices to testify about their case deliberations and individual motivations for judicial decisions, the interference with the judicial function would be obvious. Redistricting cases involve an interference with legislative branch deliberations and operations that is unlike any other kind of civil litigation. This anomaly alone should cause us special concern about the volume of redistricting litigation.

So Mr. Morenoff is right. Voluminous redistricting litigation is a unique problem that threatens the judicial and legislative branches. But his strategy for avoiding this damaging litigation will not work.

II. A Statewide Multimember District Would Not Reduce Litigation

Absent from Mr. Morenoff's otherwise accurate description of current racial gerrymandering and Voting Rights Act

15 U.S. Const. art. I, sec. 6, cl. 1 (providing Senators and Representatives "shall not be questioned in any other Place" "for Speech or Debate in either House").

16 Lake County Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 403 (1979); Tenney v. Brandhove, 341 U.S. 367, 376-77 (1951).

17 *See, e.g.*, Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 505-06 (Speech and Debate protection applies to congressional aide's issuance of subpoenas as part of congressional committee inquiry); *Tenney*, 341 U.S. at 376-78 (state legislator's speech at legislative investigative committee hearing entitled to legislative immunity).

18 Gravel v. United States, 408 U.S. 606, 625 (1982).

19 *See, e.g.*, Favors v. Cuomo, 11-CV-5632, 2013 WL 11319831, *8-*9 (E.D.N.Y. Feb 8, 2013) (collecting court decisions addressing activities found to be and not to be part of legislative functions).

20 *Eastland*, 421 U.S. at 503.

21 *Id.*

22 United States v. Gillock, 445 U.S. 360, 369 (1980); (quoting United States v. Helstoski, 442 U.S. 477, 491 (1979)).

23 *See, e.g.*, Whitford v. Gill, 331 F.R.D. 375, 378 (W.D. Wis. 2019) (vacated by Whitford v. Vos, No. 19-2066, 2019 WL 4571109, (7th Cir. July 11, 2019); Benisek v. Lamone, 241 F. Supp. 3d 566, 572–74 (D. Md. 2017); Lee v. Virginia State Bd. of Elections, No. 15-cv-357 (HEH-RCY), 2015 WL 9461505, at *5 (E.D. Va. Dec. 23, 2015); Bethune-Hill v. Virginia State Bd. of Elections, 114 F. Supp. 3d 323, 333 (E.D. Va. 2015); Favors v. Cuomo, 285 F.R.D. 187, 213–14 (E.D.N.Y. 2012); Committee for a Fair & Balanced Map v. Ill. State Bd. of Elections, No. 11 C 5065, 2011 WL 4837508 (N.D. Ill. 2011); Rodriguez v. Pataki, 280 F. Supp. 2d 89, 101 (S.D.N.Y. 2003).

24 *See, e.g.*, *Whitford*, 331 F.R.D. at 378-82; *Benisek*, 241 F. Supp. 3d at 572-77.

25 United States v. Gillock, 445 U.S. 360, 372-73 (1980).

26 Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 268 (1977) (emphasis added) (citing *Tenney* and United States v. Nixon, 418 U.S. 683, 705 (1974)).

27 *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 383-84 (1968) ("What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it.").

28 *Tenney*, 341 U.S. at 369; *see also Gillock*, 445 U.S. at 372-73 (explaining *Tenney*).

29 While the trend appears to be that courts will pierce the privilege, *see supra* note 23, a couple of recent appellate decisions explicitly or implicitly have pushed back against this trend. *See Whitford*, No. 19-2066 (*Munsingwear* vacation of order to compel Speaker of Wisconsin Assembly to testify in redistricting case); Lee v. City of Los Angeles, 908 F.3d 1175, 1187 (9th Cir. 2018) (holding municipal legislative officials may not be deposed in municipal redistricting case).

jurisprudence is a history of racial gerrymandering cases. This history shows that Mr. Morenoff's proposed solution of electing all legislators in single statewide at-large districts would not free legislatures from litigation.

In fact, suspicion of multimember districts is what drove the development of racial gerrymandering jurisprudence in the first place. In the 1960s, the Supreme Court recognized multimember districts may "operate to minimize or cancel out the voting strength of racial or political elements of the voting population."[30] Far from alleviating litigation risks, multimember districts invited litigation because "the invidious effect" of canceling out the voting strength of racial or political elements of the voting population "can be more easily shown" in large, multimember districts that lack residential requirements for candidates.[31]

In the 1960s, the idea that multimember districts could support a race-based equal protection claim was largely theoretical. The Court recognized that multimember districts could be used to dilute the minority vote, but multimember districts were not per se unconstitutional and the Court regularly upheld the validity of multimember districts against racial gerrymandering challenges.[32] But in 1973's *White v. Regester*, the Supreme Court struck down two Texas multimember legislative districts on the principle that members of political minorities "had less opportunity than did other residents of the district to participate in the political processes and to elect legislators of their choice."[33] In these multimember districts, each primary candidate was selected by a majority of the multimember district voters. Such an arrangement turned what would be minority-majority constituencies in single-member districts into powerless minority-minority constituencies in the multi-member district.[34] In the phraseology the *Whitcomb*, decided two years earlier, Texas had created multimember districts that "submerge[d] minorities."[35] Other Supreme Court cases followed *White* in striking down multimember districts.[36]

In 1980, the Supreme Court noted equal protection challenges to "at-large electoral schemes" had "been advanced in numerous cases before this Court[,] . . . most often with regard to multimember constituencies within a state legislative apportionment system."[37] In that case, *City of Mobile v. Bolden*, the Supreme Court reversed the lower courts' decisions that Mobile's decades-old at-large election system for local legislators violated equal protection, and the plurality famously held that race dilution claims—like other equal protection claims—required a showing of discriminatory effect *and* discriminatory purpose.[38]

Section 2 of the Voting Rights Act was enacted "largely [as] a response" to *City of Mobile v. Bolden*.[39] Section 2 adopts as its relevant legal standard the Court's "results" test applied in *White v. Regester*,[40] but eliminates any need to demonstrate a discriminatory purpose.[41] As pre-*Bolden* constitutional racial vote dilution challenges were typically aimed at multimember districts, so too was the first Section 2 challenge considered by the Supreme Court.[42] What had been a constitutional equal protection claim simply became a statutory claim with one less element to prove.[43] And if a constitutional vote dilution claim would have succeeded under the constitutional jurisprudence that Section 2 incorporated (which was already suspicious of multimember districts), surely it would succeed under Section 2.

Against this history of skepticism about the disproportionately negative effects multimember districts can have on minority representation, Mr. Morenoff doubles down. He proposes that states should adopt a single statewide district—a mega-multimember district—where voters choose political parties, not specific candidates. In this scheme, representatives would be selected by the parties in numbers corresponding with the statewide legislative vote. In a nutshell, he proposes proportional representation.

Mr. Morenoff asserts these statewide party-based elections are impervious to Section 2 Voting Rights Act challenges because "it would be impossible for a local majority to block any local minority's ability to elect its preferred candidate." Thus, he concludes no plaintiff could survive the preliminary stage of the *Gingles* analysis, and that Section 2 litigation would therefore be cut off at the outset.[44]

30 Fortson v. Dorsey, 379 U.S. 433, 439 (1965).

31 Burns v. Richarson, 384 U.S. 73, 88 (1966).

32 *See, e.g.*, Whitcomb v. Chavis, 403 U.S. 124 (1971); *Fortson*, 379 U.S. 433; *Burns*, 384 U.S. 73.

33 412 U.S. 755, 765-71 (1973).

34 *Id.*

35 *Whitcomb*, 403 U.S. at 158-59.

36 *See, e.g.*, Rogers v. Lodge, 458 U.S. 613, 622-27 (1982) (affirming district court findings that multimember district resulted in minority exclusion from the political process); East Parish School Bd. v. Marshall, 424 U.S. 636, 639 (1976) (striking down a court-drawn plan that included multimember districts while avoiding a constitutional claim that such districts violated equal protection rights).

37 City of Mobile v. Bolden, 446 U.S. 55, 65, 80 (1980) (plurality op.).

38 *Id.* at 66-70 (plurality op.).

39 Thornburg v. Gingles, 478 U.S. 30, 35 (1986).

40 *Id. Compare White*, 412 U.S. at 766 (requiring plaintiffs to prove that a minority group's members "had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice") *with* 52 U.S.C. § 13101(b) (providing that a denial or abridgment of the right to vote claim is established where a "totality of the circumstances" shows that a protected class of citizens "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice").

41 *Gingles*, 478 U.S. at 35.

42 *Id.* (plaintiffs challenged 6 multimember North Carolina general assembly districts).

43 While this might have rendered constitutional racial gerrymandering claims unnecessary, in *Shaw v. Reno*, the Supreme Court more or less dispensed with the "effects" components articulated in *White.* Rather than having to show that a minority group was frozen out of the political process, the "effect" of a classification is the separation of voters into different districts because of their race, which "reinforces stereotypes and threatens to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole." Shaw v. Reno, 509 U.S. 630, 649-51 (1993).

44 Morenoff, *supra* note 1, at 100-01.

But Mr. Morenoff's shorthand description of *Gingles*' preliminary requirements, which puts load-bearing weight on term "local," is not accurate. *Gingles* asks whether a minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district," whether that majority-minority hypothetical single-member district constituency is "politically cohesive," and whether the "majority votes sufficiently as a bloc . . . usually to defeat the protected group's preferred candidate.[45] *Gingles* does not require that the blocking be done by a "local majority," but instead the majority as constituted in the district created by the law being challenged. *Gingles* is simply a judicial test for assessing whether the minority vote is being submerged.[46] Those factors seem to apply in any statewide scenario. As Judge Frank Easterbrook commented when he was sitting on a district court panel in a 2002 Wisconsin redistricting impasse case, "at-large election[s] of the entire Assembly . . . would likely violate the Voting Rights Act."[47]

And in many states, a mega-district would have all of the demographic attributes necessary for a majority or plurality to submerge the representative interests of protected classes. Let's keep with Wisconsin to illustrate. Wisconsin is a swing state, having in the past decade elected both Democrats and Republicans in each of the state's most significant statewide elections: President, U.S. Senator, Governor, and state Attorney General.[48] Let's stipulate it is comprised of an equal number of Democrat and Republican voters. According to the 2010 U.S. Census, approximately 7% of residents reported as "Black or African American" "alone or in combination with one or more other races." Hispanics comprise 6% of the population.[49] Some members of these groups exhibit residential and voting patterns that satisfy *Gingles*' preliminary test.[50]

If we presume that there is no demographic difference between those who vote and those who are counted in the census, and if we presume every black or Hispanic voter is a Democrat—two counterfactuals that surely overstate the percentage of Democratic votes that come from these groups[51]—then neither group makes up greater than 14% of the Democratic electorate. To be sure, the members of these groups *might* be present in the "party lists" offered up in European- or Israeli-style legislative elections,[52] even in demographically proportional numbers. But it is not self-evident that this would be so. Discrimination (purposeful or not—the VRA requires only disparate impact) might very well exist within the party list selection process.[53] And anytime the statewide-elected legislature or congressional delegation is demographically different than the population as a whole, a VRA plaintiff should be able to craft a pleading that survives a dismissal motion.

It is not enough to respond, as Mr. Morenoff does,[54] that the discrimination would not be the result of state action. The state action is the adoption of the statewide redistricting plan,[55] and underlying facts outside of the state action always contribute to VRA analysis. Courts consider facts ranging from the political cohesion of a minority group (a preliminary *Gingles* inquiry) to any number of factors that make up the "totality of circumstances" analysis that comprises the second part of the *Gingles* test. One of these listed in the Senate Committee on Judiciary Report accompanying the legislation is "the exclusion of members of the minority group from [the] candidate slating process."[56]

That leaves Mr. Morenoff to rest his argument on this assertion: "where every community receives proportional rep-

45 *Gingles*, 478 U.S. at 50-51.

46 *Whitcomb*, 403 U.S. at 158-59.

47 Baumgart v. Weidelberg, No. 01-C-0121, 02-C-0366, 2002 WL 34127471, *6 (E.D. Wis. May 30, 2002).

48 For statewide election results, see Wisconsin Elections Commission, https://elections.wi.gov/elections-voting/results.

49 United States Census, Wisconsin (2010), *available at* https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=CF.

50 *See generally* Baldus v. Members of Wisconsin Government Accountability Bd., 849 F. Supp. 2d 840, 848, 854-58 (E.D. Wis. 2012) (describing African American VRA districts that were not challenged at trial, and holding VRA required legislature to create one majority-minority Latino district).

51 Four percent of CNN's 2016 Wisconsin Presidential exit poll respondents were Latino—far less than the percentage of Hispanic persons in 2010 Census figures—while seven percent were African American. CNN, "exit polls: wisconsin president," *available at* https://www.cnn.com/election/2016/results/exitpolls/wisconsin/president. The same exit poll reported that, in this close contest, 92% of African Americans voted for Clinton (with an "other/no answer" rate of 2%) and 63% of Latinos voted for Clinton (with an "other/no answer" rate of 3%)—far less than the 100% Democratic Party allegiance assumed for simplicity in our hypothetical. *Id.*

52 *See* Morenoff, *supra* note 1, at 100.

53 Consider Wisconsin again. Eight of the 36 Democratic members of the Wisconsin State Assembly are African American or Hispanic. *See* Wisconsin State Legislature, 2019 Wisconsin State Representatives, *available at* https://docs.legis.wisconsin.gov/2019/legislators/assembly. This 2:7 ratio is likely equal to or greater than the percentage of Wisconsin Democrats who are African American or Hispanic—a result likely influenced by VRA-compliant districts. Yet none of these minority representatives are included among the Democratic party's 6-member legislative officer ranks. *See* Wisconsin State Legislature, Wisconsin State Assembly, *available at* https://legis.wisconsin.gov/assembly/. Leadership positions are the result of the Assembly Democratic caucus votes, and the caucus presumably includes the same party leaders who would be responsible for developing party lists of representatives to be seated after a general ticket election.

54 Morenoff, *supra* note 1, at 100-01.

55 That redistricting legislation qualifies as a "voting . . . practice or procedure" within the meaning of Section 2 of the VRA is certainly contestable, but the Supreme Court has assumed it is as long as it has decided such claims. *See Gingles*, 478 U.S. at 47.

56 S. Rep. No. 97-417, 97th Cong., 2d Sess. (1982), pp. 28-29. Another factor within the state's control is whether there are "unusually large election districts[.]" *Id.*

While I suspect that many readers harbor my general skepticism toward the utility of legislative committee reports in the proper interpretation of statutes, this committee report is a part of Supreme Court jurisprudence interpreting Section 2, *Gingles*, 478 U.S. at 36, 45, and the report draws its factors from prior Supreme Court decisions that Congress designed to incorporate into Section 2. *See, e.g., White*, 412 U.S. at 767 (citing minority exclusion from candidate selection process to be a factor evincing discriminatory impact of multimember district). Moreover, without these factors, the statutory language would appear to leave

resentation, no community could claim to have been denied the same opportunity to elect its candidates afforded any other."[57] But *candidates* aren't elected in a proportional representation system, *parties* are. Whether a community is afforded the same opportunity to elect its candidates as another pushes the VRA question into a judicial inquiry into the operations of political parties: How is the party list selected and ordered? Answering this and related questions (e.g., why is a candidate favored by minority groups so low on the list?) would involve substantial judicial inquiry into the operations of political associations and may prove extremely disruptive to political participation. This may be problematic from a First Amendment perspective; at the very least, it creates tensions with First Amendment principles.

Mr. Morenoff might reply that in a proportional representation system, we would expect to see third parties flourish. Fair enough, and that may contextually make a VRA claim more difficult to prove. But it will by no means end litigation. We do not know what a VRA analysis would look like in that scenario, but one can easily imagine arguments that there is discrimination if this system produces a need to create "special interest" third parties in order for minority groups to see candidates of their choice in the legislature. Only "majority" parties in this scenario would have the benefit of having the majorities or core pluralities that enable party dominance of legislative organization and leadership that is key to moving bills and setting legislative agendas.

Thus, while Mr. Morenoff is likely correct that a statewide mega-district would avoid *Shaw* problems (because there are no statutory classifications as everyone is in a single district), it would invite Voting Rights Act litigation in every case in which it is adopted. At least single-member districts today carry the potential of a just-right porridge. Proportional representation morphs the analogy into Scylla and Charybdis, and gives Odysseus no choice but to sail into Scylla.

But if I am wrong that courts would still entertain VRA claims after third parties emerge, then Mr. Morenoff's proposal's VRA effectiveness depends on the balkanization of political parties and the emergence of parties designed to chiefly accommodate descriptive racial identities. Some may not see this as problematic, though the Supreme Court has noted that when legislators perceive themselves as just representing particular racial groups, it may "threaten[] to undermine our system of representative democracy. . . ."[58] Even if Mr. Morenoff's proposal were to solve the litigation problem (which I do not believe it would), the negative consequence of proportional representation to "our system of representative democracy" should be better understood.

ample room for judicial discretion (it employs "totality of circumstances" terminology), and this discretion is sure to be filled in with a sort of jurisprudential common law. This is what courts did in the 1960s and 1970s constitutional gerrymandering decisions, with no other textual hook than the Equal Protection Clause. Absent an about-face on the pre-VRA doctrine that developed to assess racial vote dilution, the Court would surely mine these principles to assess a Section 2 claim.

57 Morenoff, *supra* note 1, at 101.

58 *Shaw*, 509 U.S. at 650.

III. Proportional Representation Undermines Important Values of Representation

One salient criticism of the Supreme Court's gerrymandering and apportionment jurisprudence—and more generally all political process jurisprudence—is that while the Court has addressed these cases through the doctrinal lens of equal protection and individual rights (whether constitutional or statutory), its opinions are largely devoid of an overarching political theory of representation.[59] This may be, in part, because the Framers did not adopt a single theory of representation, and therefore countenanced many.[60] Indeed, the Constitution established a bicameral legislature[61] that was substantively designed to curb the legislative power and structurally denies predominance to any single theory of representation. Not only must measures pass both houses before they become law,[62] but the houses were designed to reflect different interests in part based on their modes of election. As James Madison wrote in *Federalist 51*:

> In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit.[63]

Without a clear historical marker for what is the proper translation of the people's interests into a republican form of government, the Court's treatment of this question has been (appropriately, in my view) to simply put up markers for what the Constitution does *not* compel. For example, proportional representation is not required by the Constitution because, among other reasons, it is fundamentally inconsistent with the concept of winner-take-all elections and multimember bodies comprised

59 *See generally* James A. Gardner, *Partitioning and Rights: The Supreme Court's Accidental Jurisprudence of Democratic Process*, 42 Fla. St. U. L. Rev. 61 (2014).

60 The manner of holding elections to choose Representatives was left to state legislatures, subject to Congress' laws prescribing otherwise. U.S. Const. art. I, § 4, cl. 1. In the first 50 years post-ratification, many states selected congressional delegations in general ticket elections in which the party receiving the plurality of votes would comprise the state's entire congressional delegation. *Rucho*, 139 S. Ct. at 2499 (describing practice of many states post-ratification). It was only in 1842 that Congress required single-member geographically contiguous districts. Later statutes required those districts to be compact and equipopulous (though these "traditional" criteria outside of a requirement for single-member congressional districts are no longer codified by federal law). *Id.*

61 *See* U.S. Const. art. I, §§ 2, 3 (creating House of Representatives and Senate, and requiring bills to pass each house and be signed by the President (or overridden on reconsideration by two-thirds majorities of each house) before they become law).

62 *See* U.S. Const. art. I, § 7.

63 The Federalist No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

of separately elected individuals.[64] Nor are competitive districts constitutionally compelled.[65]

Every mode or manner of choosing legislators will endorse different underlying representational values. A legislature comprised of the winners of winner-take-all single-member elections in equipopulous and geographically contiguous districts (today's dominant model for state legislatures and exclusive model for Congress) will reflect different representational values than a legislature that is the product of proportional representation derived from statewide general ticket elections. These possibilities are by no means the only ones,[66] but they are the ones to compare when evaluating the effect of Mr. Morenoff's proposal on values other than litigation-avoidance. And the proposal undermines several current conceptions of representation, three of which are highlighted below.

A. Proportional Representation Denies Individuals a Personal Representative

Among the most troubling aspects of proportional representation is that it denies citizens a personal representative in the legislative body. It is obvious, if often overlooked, that legislators elected in geographically contiguous districts represent *all* of their constituents, not just the ones who voted for them. While a losing candidate's supporters might be "without representation" by their candidate of choice,[67] it "cannot [be] presume[d] . . . the candidate elected will entirely ignore the interests of those voters."[68] Instead, those voters "have as much opportunity to influence that candidate as other voters in the district."[69]

This personal representation is about more than substantive influence on policy. A legislator's job is not just substantive policymaking; "*Serving constituents* . . . is the everyday business of a legislator."[70] Indeed, as one district court observed, "[t]he modern role of legislators centers less on the formal aspects of representing—e.g., legislating and policymaking—and more on maintaining the relationship between legislators and their constituents."[71]

Proportional representation systems in which candidates are selected from a party list after a general ticket election deprive constituents of a single point of contact to influence policy or navigate government bureaucracies. A legislator elected under such a system is not dependent on the votes of any particular category of citizens, and there is thus limited incentive to forge responsive constituent relations.[72] This, in turn, would seem to undermine legislative responsiveness to constituents, a chief tenet of republicanism.

B. Proportional Representation Elevates Party Over People

For similar reasons, a proportional representation system perverts *Shaw*'s representative ideal that legislators represent a whole constituency and not just a part.[73] In a proportional representation system, a legislator represents the *party* (and after that its members and supporters), not the *polity*. A legislator remains or moves up on the party list because of his or her ability to please not constituents, but party leaders. This is one of the principal criticisms of the Knesset, which Mr. Morenoff holds up as a template for his proposal:

> Israel is an illuminating (and discouraging) example [of party list voting]: The political parties there have been subject to withering, albeit ineffective, criticism for picking their slates more in response to the imperatives of internal party politics than by consideration of something so abstract as the public good or the capacity for public leadership. It is indeed hard to see how turning over such important decisions [as candidate selection] to a party bureaucracy necessarily maintains the values of a republican government.[74]

I would not assume parties would be *wholly* unresponsive to the people in the candidate selection process, of course. For example, the DNC's changes to the power of "superdelegates" was responsive to Senator Bernie Sanders' supporters' claim that the party's presidential nomination was fixed for Secretary Hillary

64 *Bandemer*, 478 U.S. at 130 (plurality op.); *Whitcomb*, 403 U.S. at 160.

65 *Id.* at 131 (describing Court's holding in *Gaffney* as upholding collusively drawn map that tended "to deny safe district [political] minorities any realistic chance to elect their own representatives").

66 For example, representation in the United States Senate is based on static geographic lines surrounding distinct sovereign entities (to the extent not delegated to the United States). Prior to *Reynolds v. Sims*' holding in 1964 that state legislative seats must be apportioned on the basis of population, 377 U.S. 533, 568, a majority of states did not require equipopulous districts and recognized some component of area-based apportionment. 377 U.S. at 610-11 (Harlan, J., dissenting). Moving in another direction, one might imagine an electoral system where the districts or candidates must meet certain descriptive qualities, such as race, gender, or occupation. Approximately 50 countries "officially allocate access to political power by gender, ethnicity, or both." Mala Htun, *Is Gender Like Ethnicity? The Political Representation Of Identity Groups, Perspectives of Politics*, Vol. 2, No. 3 (American Political Science Association, Sept. 2004).

67 *Whitcomb*, 403 U.S. at 153.

68 *Bandemer*, 478 U.S. at 132 (plurality op.).

69 *Id.* at 131. *See also* Whitford v. Gill, 218 F. Supp. 3d 837, 954 (W.D. Wis. 2016) (explaining how political minorities influence elected representatives) (Griesbach, J., dissenting), *overruled on jurisdictional grounds by Gill*, 138 S. Ct. 1916.

70 McCormick v. United States, 500 U.S. 257, 272 (1991).

71 Gordon v. Griffith, 88 F. Supp.2d 38, 47 (E.D.N.Y. 2000) (attributing increasing significance of legislator-constituent relationship to voter-demand for assistance in navigating modern state bureaucracies) (citing Malcolm E. Jewell, Representation in State Legislatures 10-18 (1982)).

72 This could be addressed somewhat by assigning constituent-services responsibilities to representatives or requiring party lists to include representatives from distinct geographic areas. Doing so, however, might reintroduce the VRA problems Mr. Morenoff seeks to avoid and could not fully substitute for the powerful pro-constituent-service incentive structure created by single-member, geographically contiguous districts.

73 *Shaw*, 509 U.S. at 650.

74 Sanford Levinson, *Gerrymandering and the Brooding Omnipresence of Proportional Representation: Why Won't It Go Away?*, 33 U.C.L.A. L. Rev. 257, 273 (1985).

Clinton in 2016.[75] But it took Sanders' improbably strong primary campaign and Clinton's improbable general election defeat for the party to make even modest changes to the candidate selection process.

Perhaps more significantly, many political scientists, reformers, and members of the public believe that increased partisan polarization is a problem with modern politics.[76] But Mr. Morenoff's proposal, which places with party bosses the power of candidate selection and retention, would predictably exacerbate polarized voting in legislative bodies. Gone would be competitive districts, where elected officials must sometimes part ways with party platforms in order to "vote their district." Proponents of proportional representation might see this as a feature, not a bug, as parties provide clear values for voters to choose. But political parties reflect only one type of representational value: policymaking influenced by political ideology. Citizens have dynamic representational interests that are not always ideological and that might not be captured in party platforms. Enabling those dynamic interests to flourish may be essential to curbing partisan excesses.

C. Proportional Representation Excludes All Representational Interests but One, Increasing Risks of Minority Oppression

What did James Madison mean in *Federalist 51* when he observed that "different modes of election and different principles in action" would operate to mitigate potentially oppressive legislative authority? He explains the many ways in which the proposed Constitution's bicameral legislature would accomplish this end in *Federalist 62*.[77] Some are dependent on the Senate's state-equality structure and are not directly applicable to state legislatures. But the *goal* those mechanisms attempt to reinforce are still worth remembering and incorporating into state representative systems:

> It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure. There are but two methods of providing against this evil: the one by creating a will in the community independent of the majority—that is, of the society itself; the other, by comprehending in the society so many separate descriptions of citizens as will render an unjust combination of a majority of the whole very improbable, if not impracticable. . . . The second method will be exemplified in the federal republic of the United States. Whilst all authority in it will be derived from and dependent on the society, the society itself will be broken into so many parts, interests, and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority.[78]

States, of course, do not have a federal character like the United States. Nevertheless, there are distinct political communities within states: counties, cities, towns, and so forth. *Reynolds v. Sims*, of course, found purely area-based state legislative districting to be unconstitutional,[79] upsetting many state constitutional designs where "representatives were allocated among districts of fixed territory, typically counties and towns."[80] Yet territorially based representation—contiguity—is still used to define district boundaries. Geographic contiguity, particularly when combined with compactness and some fidelity to municipal boundaries, recognizes that *place* matters. Places contain communities of interest separate and distinct from partisan ideology. Communities are distinct from one another on multiple levels: political organization (towns, cities, counties), economic character (agricultural, manufacturing, commerce), density (urban, suburban, rural), demographics (age, race), and others. Each community cross-section might be seen as a "different class of citizens" with "different interests." Just as Madison presumed that senators would balance the interests of their states with national interests, state legislators elected in geographically contiguous districts must balance their district's unique local interests with state interests.[81]

And those local interests often depart from the party line. In Wisconsin, for example, urban black Democrats have supported a Milwaukee-only school choice program against statewide Democrats,[82] university-town Republicans have voted against labor reforms supported by Republican state leadership,[83] and

75 *See* Adam Levy, *DNC changes superdelegate rules in presidential nomination process*, CNN (Aug. 25, 2018) *available at* https://www.cnn.com/2018/08/25/politics/democrats-superdelegates-voting-changes/index.html.

76 *See generally* Nolan McCarty, Polarization: What Everyone Needs To Know (2019).

77 The Federalist No. 62, at 377-78 (James Madison) (Clinton Rossiter ed., 1961).

78 The Federalist No. 51, at 323-24 (James Madison) (Clinton Rossiter ed., 1961).

79 *See supra* note 66.

80 James A. Gardner, *What is "Fair" Partisan Representation, and How Can It Be Constitutionalized? The Case For A Return to Fixed Election Districts*, 90 Marq. L. Rev. 555, 560 (2007).

81 For a detailed discussion of territories and their interests, see generally James Gardner, *Representation Without Party: Lessons From State Constitutional Attempts To Control Gerrymandering*, 37 Rutgers L. Rev. 881 (2006).

82 *See, e.g.*, Gary C. George and Walter C. Farrel, *School Choice and African American Students: A Legislative View*, 59 Journal of Negro Education, 521, 521-55 (1990) (legislator-author explains that school choice initiative was "supported sizable segment of Milwaukee's low-income African-American community," and legislator worked to enact choice plan that would satisfy local interests while responding to some of the more significant criticisms offered by fellow Democrats).

83 Wisconsin State Representative Travis Tranel, whose Mississippi River-bordering district includes UW-Platteville, voted against Act 10, Governor Scott Walker's signature public sector labor reform bill. In the subsequent election cycle (2012), Tranel outperformed Republican presidential candidate Mitt Romney by 11 points. The Wisconsin Assembly's roll call vote on Act 10 is available at http://docs.legis.wisconsin.gov/2011/related/votes/assembly/av0184. For discussion of the controversy surrounding the bill, see *State v. Fitzgerald*, 798 N.W.2d 436, 442-443 (Wis. 2011) (Prosser, J., concurring).

Democratic representatives have voted against their party to support tax breaks for a local development project.[84]

But in a proportional representation system, there are no countervailing place-informed interests to introduce heterogeneity into parties, and there is no way to reflect representational interests that have both local and state dimensions. Party interests, after all, *cross* geographic and political boundaries.[85] Without a system that recognizes the significance of place, the examples above likely never occur, and local interests (in the case of the Milwaukee school choice program and the local development project) would be subordinated to state interests. Without the internal party fracturing caused by dyadic concerns, it is far more likely for "an unjust combination of a majority of the whole" to arise.

Short of that, it seems plain that territorially elected legislatures and proportionally elected legislatures will have different focuses, with the former more concerned with local issues and the latter concerned with ideological and statewide issues. "[T]erritorial representation might well provide a kind of institutional formula for promoting governmental minimalism," while "[p]erhaps it is no coincidence that party-based, proportional systems of representations tend to be found in nations that favor policies associated with the modern welfare state."[86]

IV. Conclusion

Dan Morenoff's proportional representation solution to endless litigation over district lines is likely to be both ineffective in its aims and destructive to the traditional construction of representation. A better solution to attack the former and protect the latter is far more elegant though possibly just as controversial: get the courts out of the political thicket of districting litigation except in cases where there is discriminatory intent.

After all, as Chief Justice Roberts memorably said, "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[87] But Section 2 of the Voting Rights Act, when applied to districting, *requires* mapmakers to do just that. While there is no question the government has a compelling interest in ensuring the right to vote is not denied or abridged on account of race, *Shaw* and its progeny protect that interest by making it unconstitutional for districting decisions to be predominately motivated by racial considerations. Moreover, it is difficult to see how any law whose compliance requires an imprecise "totality of the circumstances" test and involves meritoriously contentious, highly technical, and uncertain litigation where experts speculate on the political proclivities of racial groups in hypothetical future elections is narrowly tailored towards any ends. While the Supreme Court has assumed that complying with the Voting Rights Act is a compelling state interest, it first ought to address head on the question of whether Section 2 of the Voting Rights Act, when applied to redistricting, passes constitutional muster.

Author's Reply

I'm grateful for Kevin St. John's thoughtful response. While I fear Mr. St. John has missed the mark in concluding that a jurisdiction could not avoid redistricting litigation by avoiding redistricting, the first and most important point to emphasize is how broadly we agree on the core issues. We wholly agree:

1. On the substance of existing doctrine.
2. That the Court has never addressed whether seeking to comply with the Voting Rights Act may qualify as the kind of "compelling state interest" strict scrutiny requires for a use of race to be constitutional (and that it likely could not).
3. That existing doctrine poses a Hobson's Choice between legislatures' picks of poison. Mr. St. John sees the menu as composed of a Scylla of litigation under Section 2 of the Voting Rights Act (what I, using a Goldilocks analogy, described as a map's creation being "too cold" in its use of race) and a Charybdis of *Shaw*-style 14th Amendment claims under the Equal Protection Clause (that I described as a map's creation being "too hot" in its use of race). I'm actually less sanguine than Mr. St. John that current doctrine "carries the potential of a just-right porridge"—no conceivable "temperate" use of race would spare a jurisdiction litigation in order to find out, ex-post, whether it complied with federal law.
4. That common voting-rights reforms are red-herrings, which would neither increase the fairness of elections, nor decrease the likelihood of redistricting litigation if implemented.

Still, we have two important disagreements. The first is a "who" question. Mr. St. John concludes that the "better solution to" the dilemma redistrictors face would be to "address head on" the tension between the case law applying the Equal Protection Clause and the Voting Rights Act, even proposing that the best resolution would be to "get the courts out of the 'political thicket' of districting litigation except in cases where there is discriminatory intent." No doubt there are those who sit at the

84 In 2017, Representative Peter Barca, who had been elected minority leader, was one of four assembly Democrats to vote in favor of a tax break package that aimed to bring FoxConn—and 13,000 promised jobs—to Racine County. *See* Jason Stein and Patrick Marley, *Wisconsin Assembly sends $3 billion Foxconn incentive package to Scott Walker*, Milwaukee J. Sentinel (September 14, 2017), *available at* https://www.jsonline.com/story/news/politics/2017/09/14/wisconsin-assembly-set-approve-3-billion-foxconn-incentive-package/664590001/. Barca's district straddled Racine and neighboring Kenosha County. Two of the other three Democrats voting for the measure were from Racine or Kenosha. For roll call votes on the measure, see https://docs.legis.wisconsin.gov/2017/related/votes/assembly/av0143 (August 17, 2017 Assembly vote sending measure to Senate) and https://docs.legis.wisconsin.gov/2017/related/votes/assembly/av0165 (September 14, 2017 roll call vote concurring in measure as amended by Senate).

85 *See* Gardner, *supra* note 80, at 573 ("[T]o represent voters by territory is to organize the electorate according to bonds of local community and interest; to represent voters by party, in contrast, is to represent them according to bonds and interests that are found statewide, and that by definition transcend the boundaries of any single district.").

86 *Id.* at 580-81.

87 Parents Involved in Community Schools v. Seattle School Dist. No. 1, 551 U.S. 701, 748 (2007).

necessary, commanding, Olympian heights (in Congress and the federal courts) who have that option. I don't doubt that the optimal systematic solution to a conflict of law is to resolve it. Bracketing for another day what resolution would be best, I simply wasn't addressing such Olympians. I wrote to the state and local legislators whom the gods and federal authorities have placed on the boat with Odysseus and required to act every ten years. They lack the option to "address head on" the conflict by removing one of the threats. Since there is little prospect that those who do have the option will exercise it before the next decennial cycle unfolds, I see value in proposing to such actors a way to limit their time in the dock.

The second goes to whether I've identified for legislators a real way out of the crosshairs. In saying "no," Mr. St. John errs in at least two ways. He conflates dissimilar systems to conclude that existing law dooms the proposal. Then, he dramatically overstates the power of parties to discipline their members in proportional regimes, so generating a false entry in his parade of horribles.

In concluding that existing case law bars proportional representation systems, Mr. St. John relies on cases rejecting at-large elections (which award victory to the prevailing candidate for each seat on a first-past-the-post basis).[88] Although each involves jurisdiction-wide votes, at-large and proportional systems differ in a fundamental way: how they award seats following an election. The courts rejecting at-large systems have done so under *Gingles* 3, finding a risk of submergence of large, persistent minorities within the electorate—a group with 45% of the population, hypothetically producing 45% of all ballots cast through a bloc-vote, would win 0% of the resulting representation. On the other hand, a proportional system imposes *no* risk of submergence—the 45% minority casting 45% of hypothetical ballots through a bloc-vote would elect 45% of the resulting officials. Respectfully, the difference vitiates the applicability of the cited cases and leaves no risk of a finding that *Gingles* 3 has been violated.

Much of Mr. St. John's analysis of the likely results of a proportional regime (especially the potential losses of centrist elected officials and of official accountability to voters as a result of political parties' supposedly enhanced powers to force uniformity on members, but also his concerns for enhanced risk of litigation against jurisdictions based on how they allow parties to compile their candidate lists) is both familiar and misguided.[89] While the idea that a proportional system would undermine centrism and accountability finds support in decades-old political-science literature, more recent history has not been kind to those conclusions.

On the greater difficulties for centrists to win election in proportional regimes, the last two decades have seen American political parties, operating in first-past-the-post environments, exhibit greater and greater polarization,[90] giving rise to greater swings in policy at transitions of power;[91] the same period has seen Israeli political parties, operating in a context of proportional representation, converge toward a national consensus on most issues,[92] minimizing potential policy instability. The systems are not having the impact the literature suggests, or perhaps that impact is insufficiently strong to dictate results; either way, events have greatly weakened the deference due the theory.

On accountability, it is not clear either that American incumbents exhibiting politburo-like reelection numbers *are* accountable to their constituents,[93] or that parties in proportional-representation systems are not,[94] leaving that argument, too, without legs. And the claim that party-power will hold elected officials in line, whatever voters prefer, would surprise: (a) voters in Britain, where last year saw the two historically largest parties suffer mass-defections from their Parliamentary ranks of MPs unwilling to follow leadership's chosen courses; and (b) those in Israel, where *all* elections since the State's founding have seen candidates unhappy with their party leadership go their own way and win seats with new parties (or join parties with different leadership). As the last implies, governmental exposure to suit

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88 *See supra* notes 30-43 and accompanying text.

89 I readily admit this is not true of *all* of his analysis. Mr. St. John is correct that a move to proportional representation would prioritize one value ("fairness") over another (the centrality of locality and geographic community). Similarly, Mr. St. John's contention that a proportional system could give rise to a balkanization into ethnically-based parties is entirely accurate, although I cynically note that this reality would arise from ethnic groups' divergent preferences, not from a potential shift to proportional representation. Indeed, the frequency with which jurisdictions defend suits under *Shaw* and the VRA by arguing that they have engaged solely in legal partisan gerrymandering strongly suggests that we largely already live in the world Mr. St. John fears might emerge from the shift.

90 *See* Cynthia R. Farina, *Congressional Polarization: Terminal Constitutional Dysfunction?*, 115 Colum. L. Rev. 1689, 1701 (2015) ("[P]olarization has been steadily and consistently increasing since the 1980s."); Nolan McCarty, *Reducing Polarization: Some Facts for Reformers*, 2015 U. Chi. Legal F. 243, 249 (2015) ("The current trend towards greater and greater polarization began in the late 1970s and was detectable by academics as early as 1982.").

91 *See* Nolan McCarty, *Polarization, Congressional Dysfunction, and Constitutional Change*, 50 Ind. L. Rev. 223, 231 (2016) ("Polarization should simply lead to wider policy swings upon a change in power, not paralysis.").

92 For this counter-intuitive conclusion, see Natan Sachs, *The End of Netanyahu's Unchecked Reign*, The Atlantic, Sep. 19, 2019, https://www.theatlantic.com/ideas/archive/2019/09/israel-steps-back-two-brinks/598384/ ("Most Israeli policy would not change with a different prime minister. The basic attitudes of [all the main parties] on Iran, on Hezbollah, on Hamas, on world relations, and even on the prospects of achieving peace with the Palestinians, are all more or less in consensus. . . . [I]n terms of actionable policy, continuity would be the rule."). For an older analysis reaching the same conclusion as the consensus first emerged into reality, see Barry Rubin, *The Region: Israel's New National Consensus*, The Jerusalem Post, Jul. 19, 2009, https://www.jpost.com/opinion/columnists/the-region-israels-new-national-consensus.

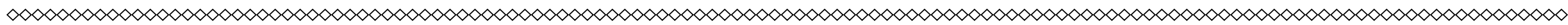
93 *E.g.*, Corinna Barrett Lain, *Judicial Supremacy v. Departmentalism Symposium: Soft Supremacy*, 58 Wm. & Mary L. Rev. 1609 (2017) ("'[S]afe seats[ ]' . . . distort[ ] not only electoral results, but also the electoral process as a mechanism by which representatives are held accountable to the people they represent. Almost 90 percent of the House of Representatives['] seats are safe seats today. . . . As a practical matter, representatives today do not represent the people; they represent the hardliners that form their party base.").

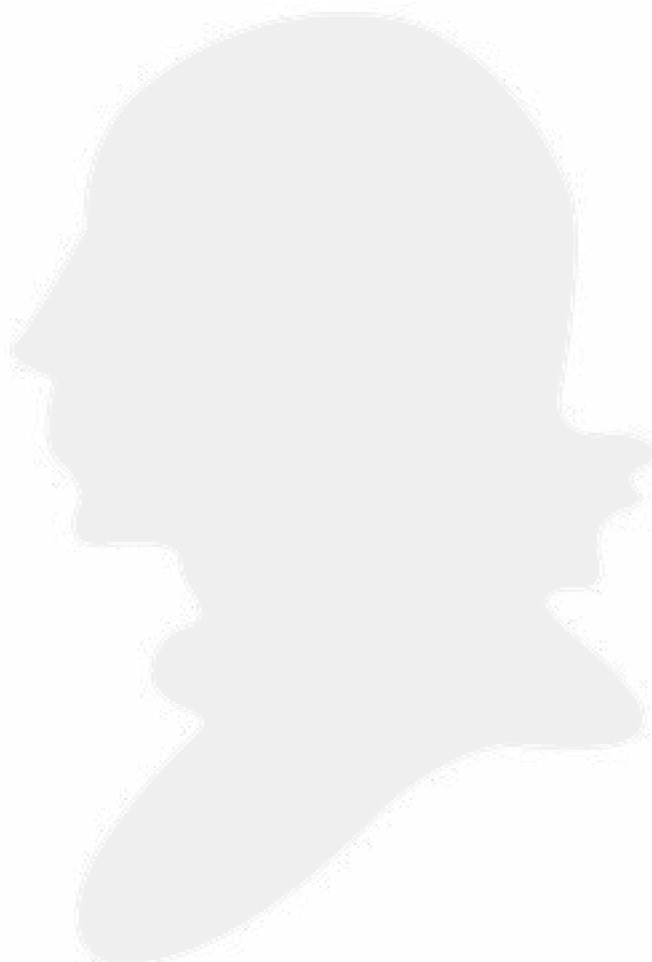
94 *See* Mark E. Warren, *Chapter 3: Accountability and Democracy*, *in* The Oxford Handbook of Public Accountability (2014) ("From the perspective of accountability, [proportional representation] systems tend to be more responsive and inclusive than [single member plurality] systems; voters can maintain closer relationships with smaller parties that have more specific platforms relative to parties in SMP systems.").

based in a community's difficulties founding a new party and running separately are entirely a function of *how* easy the easy-ballot-access rules adopted for proportional representation are. Only if those rules impose meaningful hurdles that divergently impact minority constituencies would they support a claim that they afforded such groups "less opportunity than . . . other residents . . . to participate in the political processes and to elect legislators of their choice."[95] That's not an objection in principal; it's a drafting guideline to bear in mind while making the move to a proportional system.

As a whole, this exchange strongly suggests that state or local governments could avoid substantive redistricting litigation by avoiding redistricting. It also highlights both that there would be real costs counterbalancing that benefit and that the benefit would remain uncertain until proved up by the Rule 12 motion practice which I contend litigation could not survive. But we'll only find out who is correct if some intrepid jurisdiction pursues the option before Congress or the courts remake the landscape. I hope one will.

95 *White*, 412 U.S. at 765-71.





The Evolution of Modern Use-of-Force Policies and the Need for Professionalism in Policing

By Arthur Rizer & Emily Mooney

Criminal Law & Procedure Practice Group

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Other Views:

• Matthew C. Harris, Jinseong Park, Donald J. Bruce, & Matthew N. Murray, *Peacekeeping Force: Effects of Providing Tactical Equipment to Law Enforcement*, 9 Am. Econ. J. 291 (2017), *available at* https://www.aeaweb.org/articles?id=10.1257/pol.20150525.

• Bernard B. Kerik, *Ex–NYPD Commissioner: Why President Trump Is Right to Let Local Police Buy Military Equipment*, Time, Sept. 8, 2017, https://time.com/4933453/trump-police-military-equipment/.

• Olugbenga Ajilore, *Is there a 1033 Effect? Police Militarization and Aggressive Policing*, MPRA Paper, Oct. 30, 2017, *available at* https://mpra.ub.uni-muenchen.de/82543/1/MPRA_paper_82543.pdf.

• German Lopez, *American policing is broken. Here's how to fix it.*, Vox, Sept. 1, 2017, https://www.vox.com/policy-and-politics/2016/11/29/12989428/police-shooting-race-crime.

The American people delegate to the police the authority to enforce criminal laws and promote public safety. As part of that delegation, we give officers the power to use force and even violence—that is, force applied to the body—to accomplish those goals. This practice is familiar to us, but it is in deep tension with our system of limited government that prizes personal autonomy and liberty. That tension can only be maintained by careful application of rules and procedures that restrain the use of force, and by instilling humility and care in the police themselves.

Unfortunately, existing guardrails against excessive police use of force are far too weak. Almost all large police departments (and most smaller ones) have use-of-force policies that define a continuum of force that can be applied to suspects in varying circumstances. But these policies can be ineffective in practice. And while other efforts to reduce police use of force—such as promoting racial diversity in hiring and instituting new academy training—seemed promising initially, they have fallen short of solving the police violence problem.

Recent cases of excessive police use of force—including incidents in Missouri, Minnesota, and Texas[1]—were caused by poor cultures within departments, especially an attitude of militarism that has infected many departments in the United States. Poor police culture includes a lack of professionalism and respect for human dignity during interactions with community members on the part of some police officers. It is compounded when accountability, transparency, and a desire for continued professional development are not priorities for police forces.

Police agencies have also developed "special weapons and tactics teams," or SWAT units, which employ weapons and tactics drawn from the military. The proliferation of these teams was driven by the largely unsupported belief that American

1 In Ferguson, Missouri, in 2014, by the second day of (until-then) largely peaceful protests, "police officers showed up in armored vehicles wearing camouflage, bullet-proof vests, and gas masks brandishing shotguns and M4 rifles," which helped to spark the violent riots that followed. Casey Delehanty et al., *Militarization and police violence: The case of the 1033 program*, 4 Research & Politics 1 (April-June 2017), https://www.researchgate.net/publication/317581659_Militarization_and_police_violence_The_case_of_the_1033_program. Philando Castile was killed by a Minnesota police officer while reaching for his wallet, after repeatedly and calmly telling the officer that was what he was doing. Mark Berman and Wesley Lowery, *Video footage shows Minn. traffic stop that ended with Philando Castile's death*, Washington Post, June 20, 2017, https://www.washingtonpost.com/news/post-nation/wp/2017/06/20/video-footage-shows-minn-traffic-stop-that-ended-with-philando-castiles-death/. Officer Aaron Dean employed a "no-knock" approach to a home and nearly instantaneously followed a verbal command with deadly force, killing homeowner Atatiana Johnson in Fort Worth, Texas. *Atatiana Jefferson shooting: Did Aaron Dean receive proper training?*, WFAA-TV (viewed January 6, 2020), https://www.youtube.com/watch?time_continue=1&v=pDIiwgonrds&feature=emb_title. In each of these instances, we contend, officers went into encounters with civilian populations primed for confrontation and convinced that they were operating in uniquely hostile territory.

streets constitute a war zone and supplied by a steady stream of cast-off military equipment from the Pentagon. These units are increasingly assuming standard on-duty policing roles, as opposed to responsibility only for unusual or especially dangerous policing situations. Now, the warrior mentality affects even those officers who are not members of SWAT units and is reflected in police uniforms, tactics, culture, and language. Reversing this police-against-the-world mentality is essential to restoring police-community relations and preserving the legitimacy of the police.

Below, we briefly recount the ways in which poor police culture and militarism have taken hold in police departments, starting with the creation of SWAT units in the 1960s and continuing with their increasing integration into everyday policing. We then move to a case study of police controls around use of force in a large urban department, Miami-Dade, which demonstrates the evolution of use-of-force policies from an idealistic and minimalist approach to something far more practical and nuanced. This history shows how departments have tried to influence police use of force through professionalization, recruitment, and training. We then show how, in recent years, use-of-force policies have become far more humane, with new strategies such as de-escalation increasingly being used to improve police-civilian encounters. However, due to the continued militarization of the police, these reforms have yet to be fully reflected in departmental priorities and encounter practical resistance. We conclude with a series of proposed policy and legal reforms that could help further professionalize policing in America, reduce inappropriate use of force, and root out the militaristic mentality that is the cause of much excessive police violence.

I. Militarism and the Use of Force—A Short History

What is striking about the recent public protests against excessive police violence is how unusual they are. Law enforcement has been increasingly militarized and its tactics more confrontational since at least the early 1970s, yet a majority of Americans have seemed largely untroubled by aggressive police tactics.[2] How did the regular use of violent force by the police become normalized? Two interconnected developments are driving this shift: the expansion of SWAT units and tactics, and a concomitant attitudinal change among police, even among those who are not members of these units. Both can directly conflict with and undermine good use-of-force policies, and they partially explain recent instances of police violence.

Police departments began developing SWAT units in the 1960s.[3] Half a century later, these units are ubiquitous. Even as the violent crime rate continues to fall,[4] the number of SWAT deployments has increased.[5] Criminologists Peter B. Kraska and Victor E. Kappeler observe that, from the early 1970s to the mid-1990s, there were sharp increases in the number of what they call police paramilitary units, the number of activities they took part in, the integration of paramilitary units and tactics into standard on-duty policing, and the interconnectedness of paramilitary units and the armed forces.[6] In the early 1980s, SWAT-team deployments averaged around 3,000 per year; by 2007, that number was projected to be 45,000.[7] And these teams are everywhere, in all different kinds of communities. Towards the end of the 1990s, 89 percent of police departments in cities with more than 50,000 people had police paramilitary units (close to twice the rate in the mid-1980s); by 2007, 80 percent of departments in towns with 25,000 to 50,000 people had them (compared to an estimated 20 percent in the mid-1980s).[8]

The police are also armed like the military, taking advantage of the Pentagon's 1033 Program that permits the federal government to transfer military-grade weaponry to local police departments.[9] Since its inception, the program has transferred more than $6.9 billion worth of equipment to local law enforcement.[10] President Barack Obama limited and prohibited transfer of certain types of military equipment by executive order,[11] but President Donald Trump has since revived the 1033 Program in its entirety.[12]

Contrary to public perception, these SWAT teams do not exist primarily to respond to unusual and dangerous situations

2 Victor E. Kappeler & Peter B. Kraska, *Normalising Police Militarisation, Living in Denial*, 25 Policing & Soc'y 268, 268-75 (2015). It is important to note that recent public survey data suggests attitudes around police tactics vary incredibly along demographic, economic, and political lines. For example, a 2016 survey found that 56 percent of African-Americans, 33 percent of Hispanics, and 26 percent of whites believed police actions are generally too harsh. Emily Ekins, *Policing in America: Understanding Public Attitudes Toward the Police. Results from a National Survey*, The Cato Institute (2016), https://www.cato.org/sites/cato.org/files/survey-reports/pdf/policing-in-america-august-1-2017.pdf.

3 Radley Balko, Rise of the Warrior Cop: The Militarization of America's Police Forces 10 (2013).

4 The violent crime rate peaked in 1991 at 716 violent crimes per 100,000, and it now stands at 366, about half that rate. Matthew Friedman, Ames C. Grawert, & James Cullen, *Crime Trends: 1990-2016*, Brennan Center for Justice (2017), https://www.brennancenter.org/sites/default/files/2019-08/Report_Crime%20Trends%201990-2016.pdf.

5 *Cops or Soldiers?,* The Economist, March 22, 2014, https://www.economist.com/news/united-states/21599349-americas-police-have-become-too-militarised-cops-or-soldiers.

6 Peter B. Kraska & Victor E. Kappeler, *Militarizing American Police: The Rise and Normalization of Paramilitary Units*, 44 Social Problems 1 (1997), https://lsa.umich.edu/content/dam/sid-assets/SID%20Docs/_Militarizing%20America%20Police._.pdf.

7 Peter B. Kraska, *Militarization and Policing—Its Relevance to 21st Century Police*, 4 Policing 6 (2007), https://cjmasters.eku.edu/sites/cjmasters.eku.edu/files/21stmilitarization.pdf.

8 *Id.* at 6.

9 Matt Apuzzo, *War Gear Flows to Police Departments*, N.Y. Times, June 8, 2014, https://nyti.ms/2k3GpNk.

10 Defense Logistics Agency: Law Enforcement Support Office (last accessed December 5, 2019), https://www.dla.mil/DispositionServices/Offers/Reutilization/LawEnforcement.aspx.

11 Gregory Korte, *Obama bans some military equipment sales to police*, USA Today, May 18, 2015, http://usat.ly/1bZY5oI. *See also* Tom McCarthy and Lauren Gambino, *Obama ban on police military gear falls short as critics say it's a "publicity stunt*," The Guardian, May 22, 2015, https://www.theguardian.com/us-news/2015/may/22/obama-ban-police-military-gear-falls-short.

12 Kevin Johnson, *Trump lifts ban on military gear to local police forces*, USA Today, August 28, 2017, https://usat.ly/2xEwNzI. *See also* C.J. Ciaramella, *Trump Wants Police to Keep Getting Military Equipment*

like active-shooter scenarios or hostage taking. A 2014 analysis of SWAT deployments found that 79 percent of those studied were for executing a search warrant, most commonly in drug investigations. Only a small handful of deployments (7 percent) were for hostage, barricade, or active-shooter scenarios.[13] As Kraska and others have noted, members of these units operate under a mentality that American streets constitute a "war zone" and have implemented a program of "proactive policing" that resembles a military unit on patrol, actively seeking out crime often on the flimsiest of suspicions.[14] No-knock warrants were employed in about 60 percent of all SWAT deployments where teams were looking for drugs.[15] "Zero tolerance" and "order maintenance" policing have given police departments a mandate to seek out and even manufacture community ills under the guise of "improving citizen satisfaction, reduc[ing] the fear of crime, and remov[ing] the 'we/they' attitude."[16]

Militarization exacerbates police use of force problems in two significant ways. The first is a matter of opportunity. The larger or more powerful the weapons police have available to them, the greater the opportunity for them to respond with disproportionate force. Military equipment like armored vehicles and other advanced weaponry, used in a civilian setting, give police the opportunity to respond with overwhelming, sometimes deadly force.

The second is a matter of psychology. Even when departments recruit quality officers representative of the communities they police and attempt to train officers to use force minimally, a problematic police culture and poor mindset among individual officers can corrupt that agenda. When people adopt particular roles, they also adopt the behaviors and psychologies associated with those roles.[17] As the police come to operate like the military, they can come to think like the military, too, adopting a mindset that comes to see the citizens with whom they interact as collateral damage and even likely assailants. The attitudes and tactics that are appropriate to the battlefield (where the goal is to overwhelm an enemy) fit uneasily in a domestic, civilian setting in which the goal is the *avoidance* of deadly force and the de-escalation of civilian-police encounters; in this setting, even when force is necessary, police are to use only proportional force. The hypothesized causal link between police militarization and excessive force is simple: when the only tool you have is a hammer, every problem comes to resemble a nail. While this causal link is far from conclusively established (indeed, research has found mixed results), this phenomenon is supported by some recent research finding that more militarized law enforcement departments are more likely to have violent and lethal interactions with civilians.[18] Excessive force is influenced by police filling their toolbox with increasingly powerful hammers instead of other, potentially less violent tools.

There is a lot of evidence for police militarization. Kraska observed that, since the early 1970s, police departments have changed their uniforms, weaponry, training, operative and tactical strategies, and even language, always tending toward military models.[19] In its 2014 report on police militarization, the ACLU observed a more martial tone in police training materials that had seeped "into officers' everyday interactions with their communities."[20] Journalist Radley Balko has collected a variety of police unit shirts designed by members that use violent language and imagery, including "Hunter of men," "We get up Early, to BEAT the crowds," "Baby Daddy Removal Team," and "Narcotics: You huff and you puff and we'll blow your door down."[21] The rise of police militarization has infected policing in the United States—even outside of SWAT units—with a warrior mentality that trains officers to see every encounter with the public as a battle to be won. The result is increased, poorly managed use of force. Research suggests that law enforcement agencies that have the most military-style weaponry have rates of officer-involved deaths that are 129 percent higher than agencies that do not use military-style equipment.[22]

This warrior mentality affects every level of police training. Half of police recruits are trained in academies that employ a "stress" model derived from military boot camps that emphasizes military-style drills, daily inspections, intense physical demands, public discipline, withholding privileges, and immediate reaction

from the Pentagon, Reason.com, August 23, 2016, https://reason.com/2016/08/23/trump-wants-police-to-keep-getting-milit/.

13 *War Comes Home: The Excessive Militarization of American Policing* 5, American Civil Liberties Union (2014), https://www.aclu.org/report/war-comes-home-excessive-militarization-american-police.

14 Peter B. Kraska, *Enjoying militarism: Political/personal dilemmas in studying U.S. police paramilitary units*, 13 Justice Quarterly 404, 417-20 (1996). Kraska describes the cultural moment at the end of the Cold War, where political leaders such as then-Attorney General Janet Reno invoked the military as a model for policing and explicitly invited it to "help[] us with the war we're now fighting daily in the streets of our towns and cities." *Id*. at 419.

15 *War Comes Home*, *supra* note 13, at 33.

16 Matthew T. DeMichele & Peter B. Kraska, *Community Policing in Battle Garb: A Paradox or Coherent Strategy?* at 85, in Peter B. Kraska, ed., Militarizing the American Criminal Justice System: The Changing Roles of the Armed Forces and the Police 82-101 (2001).

17 *Id*.

18 *See generally* Delehanty, *supra* note 1. This research field is still developing, and other studies have not reached similar conclusions. Matthew C. Harris, Jinseong Park, Donald J. Bruce, & Matthew N. Murray, *Peacekeeping Force: Effects of Providing Tactical Equipment to Law Enforcement*, 9 Am. Econ. J. 291 (2017) (finding that "the causal effects of receiving tactical equipment are largely positive, though rather small, and consistent with the stated objectives of the 1033 Program").

19 Kraska, *supra* note 14, at 417-18. Elsewhere, Kraska and Kappeler documented the explosion in the number of police paramilitary units in jurisdictions across the country—reaching 89 percent of the localities they surveyed in 1995, with 20 percent of those localities that didn't have such units actively planning to establish them—and a dramatic increase in these units' "callouts," quadrupling from 1980 to 1995. Kraska and Kappeler, *supra* note 6, at 6.

20 *War Comes Home, supra* note 13 at 23.

21 Radley Balko, *What Cop T-Shirts Tell Us About Police Culture*, The Huffington Post, June 22, 2013, http://www.huffingtonpost.com/2013/06/21/what-cop-tshirts-tell-us-_n_3479017.html.

22 Delehanty, *supra* note 1, at 3. *But see* Harris et al., *supra* note 18.

to infractions.[23] That training tends to focus on operations—investigations, vehicle and weapons training, policing tactics—with little time spent on the profession of policing, use-of-force policies, or emotional intelligence skills.[24] Indeed, as of 2017, thirty-four states had no requirement that officers be trained in de-escalation techniques that can defuse encounters with the public before the use of force is required.[25]

There are proposed reforms and national models that seek to roll back the warrior cop mentality. For example, in 2016 the Police Executive Research Forum, a national organization of police officials, issued guidelines advocating a "guardian" model for policing.[26] These guidelines stress respect for human life, restrictive standards for the use of force, proportionality and de-escalation techniques, and transparent and independent post-action investigations.[27] These kinds of changes in mentality and policy can translate into reductions in police use of force. Indeed, a study published in 2016 analyzing over 3,000 use of force incidents from three police agencies found that officers who operated under the least restrictive use-of-force policies were significantly more likely to use higher levels of force than those policing under more restrictive policies.[28] Unfortunately, calls for reform find difficulty gaining traction in the face of pressures that push police to adopt military weapons, tactics, and culture, which in turn foster excessive use of force.

II. Miami: A Case Study in the Evolution of Department Controls Over Police Violence

Policies defining acceptable use of force are meant to constrain police action by protecting the public from excessive use of force, while permitting proportionate use of force when necessary for the public good. Use-of-force policies should both define norms and reflect on-the-ground realities. However, they may not do so when they fail to correct and account for police attitudes and mindsets.

Those who don't remember history are doomed to repeat it.[29] For this reason, a critical evaluation of the current state of police use-of-force policy—and all policy mechanisms that aim to control police violence—must be grounded in an understanding of the past.

In this section, we present a short history of the evolution of use-of-force policy in a large urban police department: Miami-Dade. This history includes key related changes to recruitment and training practices meant to curtail police violence and uphold norms around police use of force. The history of policing in Miami-Dade shows in microcosm the national turn toward a more professional approach to policing starting in the 1960s and 1970s, as well as a more recent shift to a more force-avoidant model that emphasizes the sanctity of life and de-escalation. However, the legacy of militarism remains, and the history suggests some divergence between modern use-of-force policies and police practice.

A. The Beginnings of Policing in Miami: Evolution of the Miami Police Forces

For almost a century, policing power in the larger Miami-Dade area largely rested in the hands of the Dade County Sheriff's Office, first founded in 1863 when Dade County was officially established.[30] The City of Miami Police Department (MPD) was organized in 1896 under City Marshal Young Gray, who was the sole police officer in the city of Miami for several years following its incorporation.[31] In 1957, the Dade County Sheriff's Office was dubbed the Public Safety Department (PSD), taking on new tasks beyond traditional police work, including fighting fires, supervising the jail and stockade, and even inspecting vehicles.[32] This work continued with only a few changes until 1966.

After complaints concerning department corruption and the process for electing the county sheriff arose, voters decided the sheriff and the department director would be appointed by the county manager.[33] Following this change, E. Wilson Purdy was appointed director of the PSD, and the department began a period of professionalization that would continue throughout the next several decades amidst much turmoil and controversy. The department was renamed the Metro-Dade Police Department in 1981, a title it held until its name was changed again in 1997 to its current title, the Miami-Dade Police Department (MDPD).[34] Today, the MDPD employs approximately 2,800 sworn officers and an additional 1,500 support personnel in order to protect

23 Brian A. Reaves, *State and Local Law Enforcement Training Academies, 2013*, Bureau of Justice Statistics, U.S. Dep't of Justice, at 1 (2016), https://www.bjs.gov/content/pub/pdf/slleta13.pdf.

24 *Critical Issues in Policing Series: Re-Engineering Training on Police Use of Force*, Police Executive Research Forum, at 11-12 (Aug. 2015), https://www.policeforum.org/assets/reengineeringtraining1.pdf.

25 Curtis Gilbert, *Not Trained to Not Kill*, American Public Media (2017), https://www.apmreports.org/not-trained-to-not-kill ("Which states require de-escalation training").

26 *Guiding Principles On Use of Force,* Police Executive Research Forum (March 2016*)*, https://www.policeforum.org/assets/30%20guiding%20principles.pdf?source=post_page.

27 *Id.* at 34-78.

28 William Terrill and Eugene A. Paoline III, *Police Use of Less Lethal Force: Does Administrative Policy Matter?*, Justice Quarterly, at 17-18 (2016), https://de-escalate.org/wp-content/uploads/2015/07/LE-Use-of-Less-Lethal-Force_Does-Policy-Matter.pdf.

29 *See* Grady Atwater, *Realizing the importance of local history,* Miami County Republic, Oct. 9, 2019, https://www.republic-online.com/opinion/columns/realizing-the-importance-of-local-history/article_086cb680-e92f-11e9-beeb-6fd898dcddd0.html.

30 *Analysis of Potential Merger of the Miami-Dade Police Department and the Department of Corrections and Rehabilitation*, Performance Improvement Div., Miami Dade Cnty. Office of Strat. Bus. Mgmt. (June 30, 2004), https://web.archive.org/web/20070810221403/http://www.miamidade.gov/mppa/library/pdf_project_files/2004/PoliceCorrectionsMergerAnalysis.pdf.

31 Paul George, *Miami's City Marshal and Law Enforcement in a New Community, 1896-1907*, 34 Tequesta 32, 34-36 (1984), http://digitalcollections.fiu.edu/tequesta/files/1984/84_1_03.pdf.

32 Performance Improvement Division, *supra* note 30, at 3.

33 Dade County Public Safety Department, *Ten Years Towards Professionalism: Progress Report, 1976* at 3 (Dec. 1976) (scanned document on file with authors).

34 Performance Improvement Division, *supra* note 30, at 3.

and serve more than 2.5 million residents within over 2,100 square miles.[35]

Police departments in Miami did more than just change in name and grow in size during the sixty-year period from the early 1960s to today. Over time, use-of-force policy became more detailed and practical and new techniques were adopted to restrain police violence.

B. An Idealistic, Minimalist Beginning: Use-of-Force Policy in the 1960s

In 1962, the first manual of the Metropolitan Dade County Public Safety Department was published.[36] Recruits were taught that the force they were allowed to use to carry out an arrest "depends on the resistance offered by the subject and the crime which he has committed."[37] As a general rule, police officers could use the amount of force necessary to complete the arrest: If the person was fleeing or only physically resisting arrest, then physical force would likely be sufficient; if the person was armed, deadly force could be used if the officer believed his or her life to be at risk.[38] Department policy on use of force was made very clear: "[E]xcessive force on the part of police officers will not be tolerated. . . . If the person being arrested offers no resistance and if bystanders offer no resistance, then no force is required and none will be used."[39]

Given this policy, officers were to be purposeful when deciding whether to draw their weapons and to consider the likely reaction of individuals if they did so. Officers were not to use their firearms to fire warning shots or to prevent a suspect from escaping an arrest; their guns were only to be used if the situation warranted a justified killing.[40] If it seemed that armed resistance from an individual was likely, officers could use their discretion and draw a weapon to ensure the suspect was "at as great technical disadvantage as possible" in an "utterly hopeless" situation.[41] Recruits were warned that drawing a gun otherwise would likely expose them to "ridicule and contempt."[42] Throughout the arrest, officers were to be alert, decisive, professional, and courageous, but also humane, with the understanding that arrested individuals may react in a negative manner to unnecessarily harsh, cruel, or humiliating treatment.[43]

The PSD instituted an internal reporting process as well as a system in which official complaints could be filed by external actors as mechanisms for reviewing use-of-force incidents. At this time, all employees who used physical force during the process of arrest or to retain custody of an individual were to write up reports describing the circumstances and present them to their supervisors. A report was to include information on the logistics of the incident (date, time, location, degree of force used, what was used to inflict force, and information on what and where any medical treatment for the individual was provided) as well as any conversation with the individual that could be considered "profane, obscene, threatening or incoherent."[44] Once submitted, the supervisor was to read it, talk with the officer, and provide his own thoughts in a separate document on an appropriate course of action.[45] The Internal Affairs Section and the division chief received copies of both reports, and the division chief ensured it was retained in the department's files.[46] Police officers could also be reported for an inappropriate use of force or violence in official complaints. If a "major" complaint was levied against a PSD employee, Internal Affairs was to be immediately alerted.[47]

A police recruit's manual[48] from 1967 is filled with notes, presentations, and policies articulating a principled rationale for these restraints on use of force. Some of the lessons contained in the manual promote a form of model policing that many communities would be ecstatic to have today. Police officers were instructed to respect individual liberty and limited government

35 Miami Dade County, *Apply for a County Police Job*, Miami-Dade County (accessed Nov. 22. 2019), https://www.miamidade.gov/global/service.page?Mduid_service=ser1470668102245350.

36 Sheriff T. A. Buchanan, Administrative Order No. 25-65, Dade County Sheriff's Office, Nov. 8, 1965 (scanned document on file with authors).

37 Dade County Public Safety Department Training Bureau*, Introduction to the Mechanics of Arrest* at 21, in James T. Buchanan, Police Recruit Class – 44 Manual Vol. II (1967) (hereinafter "Buchanan Manual"). As part of our research into present-day policing practices among the Miami-Dade police force, we acquired Public Safety Department police recruit James T. Buchanan's manual which was composed of two volumes filled with notes, presentations, and department documents and policies. Buchanan's personal notes during instructional sessions are dated 1967 so we assume any policies included therein were reflective of the policies that year unless otherwise dated. The "Introduction to the Mechanics of Arrest" is just one document included in the manual. An electronically scanned version of the document is on file with the authors.

38 *Id*. According to the principles laid out by the Dade County Sheriff's Office Training Bureau, several factors needed to be met for the use of force to be justified: "(1) [The officer] is acting officially as a policeman within the boundaries of his legal authority, (2) [The officer] has sufficient cause, as would appear real and reasonable to a prudent police officer, to fear for his personal safety or that of another; (3) The means and the force employed by [the officer], including the use of firearms, are not such as a prudent officer would consider excessive, unreasonable, or unnecessary; (4) The officer sees no acceptable alternative available to him considering his obligation no to retreat from his official mission and his inherent right to protect himself." Dade County Sheriff's Office Training Bureau, *Police-Community Relations Statement: How Police Officers Will Enforce Laws* at 2, in Buchanan Manual Vol. II.

39 Dade County Sheriff's Office Training Bureau, *supra* note 38, at 1.

40 Dade County Public Safety Department Training Bureau, *supra* note 37, at 21.

41 *Id*. at 22.

42 *Id*.

43 *Id*. at 24, 30; Dade County Sheriff's Office Training Bureau, *supra* note 37, at 2.

44 *Use of Force in Effecting an Arrest or Subsequent Use of Force to Maintain Custody* 15-16, in Manual of Rules and Procedures, Dade County Sheriff's Office (1966).

45 *Id*.

46 *Id*.

47 If the complaint was filed outside of typical office hours, the Communications Bureau would request the on-call Internal Affairs Investigator. Major complaints included actions such as criminal activity, cowardice, immorality, drug use, accepting bribes, malfeasance, and mistreatment of prisoners. *See Complaints against Employers* at 39, in Manual, *supra* note 44.

48 *See supra* note 37.

when deciding whether and how to use their power and to treat all individuals with respect. For example, one note on arrests stated that "[t]he law of arrest represents an effort to achieve a balance between the right of a person in a free society to enjoy his liberty, and the right of society to protect itself against crime and the criminal."[49] Another note said officers were instructed to be courteous, composed, and patient with drivers they stopped after a car chase: "[B]y being a gentleman and treating others with respect, it makes them feel important, too."[50]

Unfortunately, the city and county police did not demonstrate such respect for life and liberty when policing all communities in Miami. Stop and frisk policies and mistreatment of black tenants by white landlords had increased racial tension in Miami and eventually set the stage for three days of rioting in Miami's black Liberty City neighborhood in August 1968.[51] During the riots, police killed three community members, eighteen were injured, and hundreds were arrested.[52] Two of those community members were killed when police fired twenty gunshots over the course of ten minutes toward an alley.[53] The police believed they had heard gunshots from a sniper nearby, but their gunfire was never returned and the two young men killed were found unarmed.[54] Residents present during the riot believed the sniper the police supposedly heard was simply police firing shots a block over.[55] Police also used tear gas arbitrarily.[56] A reporter later described the racially insensitive response by Miami Police Chief Walter Headley, saying that the chief tried "to control Liberty City by flooding the black ghetto with white officers equipped with shotguns and dogs."[57] The year before, Headley had been quoted as saying, "When the looting starts, the shooting starts"—a phrase that would come to exemplify his "no-nonsense philosophy" as described by six-term Miami Mayor Maurice Ferre.[58] These events and statements demonstrate that even idealistic use-of-force policies are no match for poor police culture, attitudes, and practices.

C. Changes to Recruitment and Training: Policing from the late 1960s to the early 1980s

Fortunately, the poor police response to the 1968 riot occurred during a time in which police training, recruitment, and practices were changing. A Community Police Council was created in 1967 to facilitate conversations between the PSD and residents, and a community services section was tasked with improving police-community relations.[59] In an effort to attract, produce, and retain qualified officers, the Florida Legislature passed the Police Standards Act in 1967, creating new agencies tasked with overseeing recruiting standards and training.[60] The Metropolitan Police Institute (now known as the Miami-Dade Public Safety Training Institute) was formed in 1968 and tasked with training both recruits and supervisors, including in community relations.[61] Positions for a staff psychologist and a human resources coordinator—who was tapped to develop an affirmative action plan for the department—were created in 1972.[62] The new Miami Department of Corrections and Rehabilitation was founded in 1970 and soon assumed the PSD's jail duties, while auxiliary functions like fire services were handed off to other agencies to allow PSD to focus solely on law enforcement.[63]

Soon, the demographics of the departments also began to change. It was thought that creating a police force reflective of the community would have a positive impact on police attitudes and reduce excessive use of force.[64] In 1965, the PSD had only three female police officers; by 1970, there were twenty-two.[65] Under PSD Sheriff E. Wilson Purdy, these women were able to do work outside of the more traditional female roles—being a member of the juvenile squad, doing clerical work, or handing out parking tickets—and were given assignments signaling increasing parity

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49 Charles Donelan, *Notes on Arrest* at 11-12, Dade County Sheriff's Office Training Bureau, in Buchanan Manual Vol. II.

50 *Pursuit Driving* § 28 at 3-5, in Buchanan Manual Vol. II.

51 Terence McArdle, *How three violent days gripped a black Miami neighborhood as Nixon was nominated in 1968*, Washington Post, August 7, 2018, https://www.washingtonpost.com/news/retropolis/wp/2018/08/07/how-three-violent-days-gripped-a-black-miami-neighborhood-as-nixon-was-nominated-in-1968/. In one infamous stop and frisk case, police officers held a young teenager over a bridge after strip-searching him. *Id.*

52 At the time, a homicide committed by a police officer could be considered justified if it was "necessarily committed" when trying to suppress a riot, apprehend an individual alleged to have committed a felony, or in lawfully keeping the peace. Homicides were also justified when "necessarily committed in overcoming actual resistance to the execution of some legal process, or in the discharge of any legal duty or when necessarily committed in retaking felons who may have been rescued or who have escaped, or when necessarily committed in arresting felons fleeing from justice." Dade County Public Safety Department, *Homicide* § 782.02(1)(c), in Fla. Law Enforcement Handbook (1975).

53 McArdle, *supra* note 51.

54 *Id.*

55 *Id.*

56 *Id.*

57 Andy Rosenblatt, *Guard Shows Dade a New Face*, Miami Herald, May 21, 1980 (accessed via Newsbank).

58 Maurice Ferre, *On racial issues, good intentions aren't enough*, Miami Herald, August 25, 2014, https://www.miamiherald.com/opinion/op-ed/article1981602.html.

59 Dade County Public Safety Department, *supra* note 33.

60 *Id.*

61 *Id.* at 4-11.

62 *Id.* at 12-13.

63 Performance Improvement Division, *supra* note 30 at 3; Dade County Public Safety Department, *supra* note 33 at 3-4.

64 Rosenblatt, *supra* note 57. Interestingly, research suggests a racially diverse police force can help improve community relations and may reduce discriminatory stops; however, it does not support the conclusion that officer race is generally associated with excessive use of force. Rather, it seems the department's culture plays an important role in promoting or reducing use of force. *See* U.S. Commission on Civil Rights, *Police Use of Force: An Examination of Modern Policing Practices* at 99-100 (November 2018), *available at* https://www.usccr.gov/pubs/2018/11-15-Police-Force.pdf.

65 *Women wearing the police badge*, Miami Herald, Nov. 19, 1970 (accessed via Newsbank).

with men.[66] This came as a result of top-down support from the PSD: "'We want women to work in organized crime, vice, gambling, homicide, narcotics, robberies, accidents—anything the men do,'" Sheriff Purdy stated.[67] By 1980, women made up about 14 percent of the PSD force and 9 percent of the MPD force.[68]

Black and Latino police officers also increased in numbers during this period. In 1975, blacks and Latinos each made up less than a tenth of the PSD force (less than 20 percent together), and in 1976, they made up roughly a quarter of the MPD.[69] But by December 1980, over a quarter of the PSD and roughly 38 percent of the MPD was either black or Latino.[70] The continued incorporation of people of color into the police force was a direct response to a federal consent decree in the late 1970s that ordered MPD to reverse past discrimination by bolstering minority hiring and promotions.[71]

In 1980, newly appointed MPD Chief Kenneth Harms and PSD Director Bobby Jones began implementing their plans to better address police brutality and increase accountability.[72] The MPD began compiling a list of officers with an unreasonable number of complaints filed against them, or who often discharged their weapons or used force, requiring them to participate in a stress-reduction program and receive counseling.[73]

When riots broke out again in Liberty City in May 1980 following the acquittal of four officers who had badly beaten and killed black Miami resident Arthur McDuffie, responding officers had received sensitivity training and instruction on mob psychology, race relations, and using self-control when provoked.[74] One reporter noted, "They have been told to maintain a low profile, ignore taunts and use their weapons as a last resort."[75] Police leaders believed that training changes and a more diverse force would lead to a more effective response; however, members of the black community were less confident in this outcome.[76] Some officers vandalized Liberty City residents' cars during the riots, and McDuffie's death and the subsequent acquittals (by an all-white jury) were taken as proof by many residents that black lives and property did not matter as much to the police and public as white lives and property.

Following the May 1980 riot and amidst increased crime and under-resourced police departments,[77] the Miami police forces continued to grow and change.[78] After McDuffie's murder, the Metro-Dade police force began using psychological screening tests in its recruiting process to screen out impulsive, prejudiced, insecure, aggressive, and passive candidates (the MPD had already begun using psychological tests).[79] The goal of this change was to ensure that only high quality, psychologically and emotionally stable officers were recruited into the force. Leaders recognized that the consequences of recruiting the wrong officers were high, and the topic often arose in conversations on policing. A paper presented during the Florida Department of Law Enforcement's Statewide Conference on Law Enforcement Officer Selection in 1981 clearly stated the negative repercussions of poor recruitment strategies:

> The presence of even a few undesirable officers in a police agency has enormous social and financial implications. The excessive or injudicious use of force by an emotionally unstable officer can result in tragic consequences, and an officer who becomes involved in illegal activities causes an erosion of the public's confidence in the agency. A major goal in police selection is screening out such "misfits" from positions in law enforcement.[80]

The MPD and PSD continued to prioritize minority recruiting.[81] By May 1981, both police forces had added around 200 officers to their ranks within the previous year.[82] News accounts noted that a recruitment campaign targeting potential black and Latino officers, as well as Police Appreciation Week and Crime Prevention Week, were all intended to improve the image of policing following a year of turmoil and low morale within the two departments.[83] According to one MPD human resources official, the goal of these strategies was simple: "What we're trying to do is make the department reflective of the makeup of the entire

66 *Id.*

67 *Id.*

68 *Authorities begin series of reforms*, Miami Herald, Dec. 30, 1980 (accessed via Newsbank).

69 Latinos almost composed a majority of the population within the city of Miami at this time. *Id.*

70 *Id.*

71 Dan Williams, *City Looking for a Few (150) Good Cops*, Miami Herald, Oct. 10, 1980 (accessed via Newsbank). *See also* United States v. City of Miami, 195 F.3d 1292, 1301 (11th Cir. 1999).

72 *Probes improve, Harms and Jones say*, Miami Herald, Dec. 30, 1980. *See also Authorities begin*, *supra* note 68.

73 *Id.*

74 Rosenblatt, *supra* note 57; David Smiley, *McDuffie riots; revisiting, retelling story—35 years later*, Miami Herald, May 17, 2015, https://www.miamiherald.com/news/local/community/miami-dade/article21178995.html.

75 Rosenblatt, *supra* note 57.

76 *Id.*

77 *Miami Herald* reporting noted that, during this period, some police officers told citizens to arm themselves because they could not count on the police to protect them due to insufficient police resources. Williams, *supra* note 71.

78 *Id.*

79 *Authorities begin*, *supra* note 68. *See also* Rick Hirsch, *Drive to recruit blacks, Latins led to young force*, Miami Herald, Dec. 31, 1982 (accessed via Newsbank).

80 Charles D. Spielberger, Harry C. Spaulding, Margie T. Jolley, and John C. Ward (eds.), *Selection of Effective Law Enforcement Officers: The Florida Police Standards Research Project*, in Police Selection and Evaluation: Issues and Techniques (1979).

81 *Id.*

82 Anders Gyllenhaal, *Police polish image on 3 fronts*, Miami Herald, May 12, 1981 (accessed via Newsbank).

83 *Id.*

community."[84] By the end of 1982, almost six of every ten MPD officers were either female, Latino, or black.[85]

D. Community Fallout from the 1980s Hiring Spree: Policing in the Mid- to Late 1980s

This period of rapid growth and change did not come without collateral consequences. For one, the MPD was increasingly made up of young, inexperienced officers. In October 1982, one in three city police officers had been on the job for less than eighteen months.[86] Two of these young officers were involved in the shooting of 20-year-old Nevell Johnson, Jr., a black Miamian, in December 1982, which sparked further unrest and violence.[87] Civil rights leaders called for MPD Chief Kenneth Harms to be fired after he called the young people rioting following the Johnson killing "hoodlums."[88] In 1984, after 24-year-old Dade County officer Luis Alvarez was acquitted of manslaughter charges in the Johnson case by an all-white jury, riots broke out again in Miami.[89] During this time of racial tension, police leaders often struggled to lead effectively and to orchestrate peace and healing within their communities.

But this was not the only problem plaguing Miami area police forces. In the late 1980s, the Miami River Cops scandal and associated events led Miami Police Chief Clarence Dickson to purge roughly a tenth of the MPD force.[90] Many of these officers had become involved in corruption and drug trafficking after being recruited in the early 1980s, or they knew their fellow officers were involved in illegal matters but failed to investigate or report them.[91] Several county officers were also found to be involved in the drug trade.[92] The overwhelming number of new recruits, the relative youth of the department, subsequent failures to sufficiently train and supervise new officers, and a police code of silence were credited as possible reasons for the widespread corruption and lethal uses of force.[93] Indeed, a Dade County grand jury report called for an overhaul of both Dade County's and the city's Field Training Officer (FTO) programs:

> The Field Training Officer programs, in both the Metro-Dade and the City of Miami Police Departments, are substandard at best. Until this defect is remedied, the implementation of all of the other recommendations made in this Report will, collectively, still not bring our police department to performance levels which this community expects and deserves."[94]

In 1982, the Supreme Court established the doctrine of "qualified immunity." Qualified immunity is a legal doctrine that allows public officers—including law enforcement—to escape the civil liability they would otherwise face for violating an individual's constitutional rights "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[95] This doctrine has since made it extremely difficult to hold law enforcement officers who use excessive force or otherwise violate people's constitutional rights accountable.

Nevertheless, the 1980s were largely a time of increased progress toward the professionalization of policing—a trend which continued into the 1990s.

E. Use-of-Force Policy Becomes More Nuanced while Militarization Becomes More Apparent: Policing in the 1990s and the 21st Century

Despite the dramatic changes that took place from the 1960s to the 1980s, the police use-of-force policy in the 1980s remained largely similar to that of the 1960s—and overly simple. In the 1960s, department policy had considered police use of force, including deadly force, to be justified when used in defense of the officer or another or while capturing a fleeing suspect or prisoner if the officer had sufficient cause to anticipate harm, was without alternatives, and his or her exercise of force would appear reasonable to a prudent officer.[96] According to the MDPD's 1985 version of the Florida Law Enforcement Handbook:

> [A law enforcement officer] is justified in the use of any force which he reasonably believes to be necessary to defend himself or another from bodily harm while making the arrest or when necessarily committed in retaking felons who have escaped, or when necessarily committed in arresting felons fleeing from justice.[97]

But by 1996, the MDPD manual dedicated ten pages to an in-depth articulation of the policy, rules, and standard operating

84 *Id.*

85 Hirsch, *supra* note 79.

86 *Id.*

87 *Id. See also* Reginald Stuart, *Policeman in Miami is Acquitted by Jury in Slaying of Black*, N.Y. Times, March 16, 1984, https://www.nytimes.com/1984/03/16/us/policeman-in-miami-is-aquitted-by-jury-in-slaying-of-black.html.

88 Associated Press, *Civil Rights Leaders Ask Dismissal of Miami Police Chief in Shooting*, N.Y. Times, Jan. 6, 1983, https://www.nytimes.com/1983/01/06/us/civil-rights-leaders-ask-dismissal-of-miami-police-chief-in-shooting.html.

89 Stuart, *supra* note 87.

90 In the Miami River Cops case, a group of Miami police officers robbed and killed drug traffickers bringing cocaine into the city by way of the Miami River. Morris S. Thompson, *Miami Vice Police Trafficking in Drugs*, Washington Post, Feb. 7, 1988, https://www.washingtonpost.com/archive/politics/1988/02/07/miami-vice-police-trafficking-in-drugs/b2c36dc8-1dbb-4e93-9a06-c89011c3946d/.

91 *Id.*

92 United Press International, *Dade Police Director Quits*, South Florida Sun Sentinel, Nov. 21, 1986, https://www.sun-sentinel.com/news/fl-xpm-1986-11-21-8603110689-story.html.

93 *Id.*; Thompson, *supra* note 90.

94 Dade County Fall Term 1982 Grand Jury, Final Report of the Grand Jury 7-8 (1983, May 10), www.miamisao.com/publications/grand_jury/1980s/gj1982f4.pdf.

95 *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), https://caselaw.findlaw.com/us-supreme-court/457/800.html.

96 Dade County Sheriff's Office Training Bureau, *supra* note 38, at 1-2.

97 Metro-Dade Police Department, *State Substantive Laws,* Florida Law Enforcement Handbook § 776.05 (1985) (scanned document on file with authors).

procedures around use of force. Force was to be an officer's last resort, to be used only when all other options—verbal commands, pursuit, nondeadly force—had been used or when not using force would be unsuitable for the circumstances.[98] Instead of using physical force against someone, officers were told that they could advise, give them a warning, or use other forms of persuasion.[99] If force had to be used, an officer could use nonlethal options, such as a police baton or chemical agents.[100] Firearms were only to be drawn or pointed at someone if it presented a tactical advantage for the officer and if there was "a substantial and imminent risk that the situation may escalate to a point where deadly force may be justified."[101] And deadly force was only to be used when an officer had a clear reason to think they or another individual could be in immediate danger of being killed or critically injured.[102]

Building on the internal affairs process described in the 1960s policy, the 1990s policy added that if an officer used force to control a situation, their supervisor would be alerted, and the supervisor would fill out a Supervisor's Report of Use of Force to Control form accompanied by photos of any individuals injured during the incident.[103] Depending on the type of force used, the officer could be placed on administrative assignment as the incident was reviewed.[104]

The MDPD's use-of-force policy did not change much between the 1990s and 2010s, with some key exceptions. In 2015, the MDPD allowed officers to use "Electronic Control Devices"—also known as tasers—as a nonlethal tool of force if they had completed the department's training course.[105] Additionally, the use-of-force policy was updated to lay out three specific instances in which deadly force could be used: (1) when it is reasonably assumed to be necessary to stop the commission of a violent felony in the near future, (2) when it is reasonably necessary for self-defense or to protect the officer or another person from imminent death or serious injury, and (3) when it is reasonably necessary to prevent an individual convicted of a violent felony from escaping prison or jail.[106]

Yet while policing policy changed little in the two decades preceding the 2010s, key changes outside of local policy—like the founding of the 1033 Program and the 9/11 terrorist attacks—influenced the mindset of officers and the practice of policing. Miami police forces became able to acquire and use military weaponry, and police leaders could use a possible terror threat to galvanize public and official support for such acquisitions.[107] By the time of the Ferguson protests in 2014—one of the first widely recognized displays of police militarization in the United States—the MDPD had acquired an armored personnel carrier (a "Bearcat"), multiple mine-resistant vehicles, several grenade launchers, and almost 250 assault rifles.[108] Dr. James Sewell, the former Assistant Commissioner of the Florida Department of Law Enforcement speculated that while some military-style equipment may aid officer safety, it also could create a dangerous attitude among police in which members of the community were labeled the enemy.[109] In 2016, protestors outside the Miami county hall were patrolled by an officer with a semi-automatic weapon, an unusual display of force.[110] And in 2017, the MDPD declared it would be randomly showcasing its Rapid Deployment Force—which includes armored vehicles—at key infrastructure sites and potential targets, such as government buildings or the metro system.[111]

Given the increased militarization of policing and the public outcry following several lethal police shootings, the policing community soon came to realize police training needed to be amended. Police were holding ever more potent weapons in their hands, increasing the need for de-escalation—"the strategic slowing down of an incident," where police seek to calm civilians who are agitated, obviating the need to use force, rather than immediately seeking to obtain compliance by means of force—as well as communication and crisis-intervention training that better permits officers to identify and respond effectively to

98 Metro-Dade Police Department, Administrative Order 2-34: "Use of Force and Discharge and Firearm Reporting," in Metro-Dade Police Departmental Manual pt. 1 (1996).

99 *Id.*

100 Only individuals who had completed training and demonstrated proficiency in lateral vascular neck restraints (LVNR) could use it as a technique for subduing an individual; individuals upon which a LVNR was applied were to be examined by Fire Rescue and medical personnel before being incarcerated. *See id.*

101 *Id.*

102 The department policy specifically articulates that "fleeing felons" are included in this protection. *See id.*

103 *Id.*

104 *Id.*

105 Miami Dade Police Department, Use of Force and Weapons ch. 31 pt. 1 (June 30, 2015), https://www.muckrock.com/foi/miami-dade-county-7318/use-of-force-policy-miami-dade-county-police-18608/#comms.

106 The specific mention that deadly force was allowed to be used when necessary to prevent an individual from escaping a penal institution seems to be a direct reversal of the 1996 policy, which instructed officers "not to use deadly force against any person, including fleeing felons, except as necessary in self-defense or the defense of another when they have reason to believe they or another are in immediate danger of death or serious physical injury." Metro-Dade Police Department, *supra* note 98 at § C.

107 Jerry Ianelli, *Miami-Dade Police Deploying Military Unit Randomly Across Town*, Miami New Times, August 8, 2017, https://www.miaminewtimes.com/news/miami-dade-county-police-deploy-military-unit-armored-trucks-across-town-9559428.

108 Carol Marbin Miller, *South Florida cities can roll out Ferguson-like arsenals*, Miami Herald, August 22, 2014, https://www.miamiherald.com/news/local/community/miami-dade/article1981225.html.

109 *Id.*

110 Jerry Ianelli, *Miami-Dade Police Deploying Military Unit Randomly Across Town*, Miami New Times, August 8, 2017, https://www.miaminewtimes.com/news/miami-dade-county-police-deploy-military-unit-armored-trucks-across-town-9559428.

111 *Id.*

persons undergoing mental health crises.[112] Yet a 2015 survey by the Police Executive Research Forum found that the median recruit received an estimated 58 hours of firearms training and 49 hours of defensive tactics training, but only eight hours of de-escalation training and 24 hours of use-of-force scenario-based training (which is how recruits learn to respond proportionately to interactions with civilians who are agitated or resisting).[113] Making matters worse, only 65 percent of responding agencies reported even offering de-escalation instruction as part of their in-service training.[114] Given these results, the Police Executive Research Forum concluded that more training time needed to be spent on de-escalation and crisis intervention.[115]

Interviews with police chiefs led the Police Executive Research Forum to conclude that use-of-force policies also needed to refocus on the sanctity of human life.[116] Use-of-force policy and informal police culture often told officers to focus on their own safety—an obviously important consideration—but analysis of contemporary police shootings suggests that officers could have avoided lethal outcomes if they had thought more broadly about every individual's safety rather than solely their own.[117] Indeed, several police shootings involving MPD officers led to a Department of Justice investigation and ultimately the signing of a federal consent decree in 2016, which required MPD to (among other reforms) beef up with reporting systems on use of force incidents, increase oversight of line officers, and complete use-of-force investigations more quickly than in the past.[118] Although the MDPD did not face such an investigation, Miami-Dade officers were also involved in several publicly criticized shootings.[119]

F. Policing in Miami-Dade Today

The MDPD followed these recommendations by focusing their latest use-of-force policy updates on de-escalation and preserving the sanctity of human life. "[T]he sanctity of human life," the policy now states, "is central to the department's mission, policies, training and tactics."[120] This is perhaps the biggest change in Miami-Dade's use-of-force policy from the 1960s until now. As part of the agenda that aims to implement this mission, officers today are to use de-escalation before using force when able and, even when the circumstances could warrant deadly force, are instructed to only use the force required to protect individuals' lives.[121] They are not to use deadly force if an individual is only a danger to themselves or to stop a fleeing felon unless that individual poses an immediate harm to another or to the officer.[122] If they use force, officers must notify the dispatcher and ask that their supervisor respond; this supervisor will then take photos and complete the "Supervisor's Report of Response to Resistance" document that will be sent to the Professional Compliance Bureau (PCB).[123] While the incident is being investigated, an officer will be put on administrative assignment if the use of force resulted in death or serious injury.[124] And following any use of deadly force, officers must attend a Miami-Dade Public Safety Training Institute training program either immediately or as soon as possible.[125]

However, an officer's decision of whether to use force and, if so, how much is often highly context-dependent. Even a factor as simple as whether the officer is working a day or night shift can influence an officer's tendency to de-escalate a situation.[126] To truly prepare officers to successfully use de-escalation techniques, officers need to be able run through different scenarios and practice de-escalation frequently. Moreover, given the fact that the MDPD still has military-grade equipment and thus may be influenced both subconsciously and consciously by a more militaristic attitude, the need for effective training and policy becomes all the more apparent.

The Miami-Dade Police Department has already begun to better incorporate these principles into their training. Although de-escalation training is not highlighted as one of the major training priorities for new Florida recruits, MDPD recruits do receive the more helpful scenario-based training recommended by groups like the Police Executive Research Forum during their time at the academy and in practicums (and forty hours of crisis-intervention training is available as an advanced course).[127] Additionally, the Miami-Dade Public Safety Training Institute teaches officers de-escalation tactics during their annual training,

112 This is how the MDPD defines de-escalation today. *See* Miami-Dade Police Department, Use of Force and Weapons ch. 31, pt. 1, Miami-Dade Police Department Manual (March 1, 2017) (not publicly available, received from Lt. Thomas Buchanan on June 27, 2019) (electronic copy on file with author).

113 Police Executive Research Forum, *supra* note 24, at 11.

114 *Id*. at 12.

115 *Id*.

116 *Id*. at 4.

117 *Id*.

118 *See* Bryan Gerhert, *Who's Policing Miami Cops After 63 Unsolved Civilian Shootings*, ColorLines, July 14, 2011, https://www.colorlines.com/articles/whos-policing-miami-cops-after-63-unsolved-civilian-shootings; David Ovalle, *High-profile Miami police shootings still under investigation, five years later*, Miami Herald, April 10, 2015, https://www.miamiherald.com/news/local/community/miami-dade/article18215174.html; Joey Flechas & Charles Rabin, *Tampa's new mayor at odds with Justice Department over her oversight of Miami Police*, Miami Herald, May 3, 2019, https://www.miamiherald.com/news/local/community/miami-dade/article229983224.html; Agreement between the United State Department of Justice and the City of Miami Regarding the City of Miami Police Department, Miami Police Department, March 10, 2016, https://www.justice.gov/crt/file/833286/download.

119 Gerhert, *supra* note 118.

120 Miami-Dade Police Department, *supra* note 112.

121 *Id.*

122 *Id.*

123 *Id.*

124 *Id.*

125 *Id.*

126 Lois James, Stephen James, and Bryan Vila, *The Impact of Work Shift and Fatigue on Police Officer Response in Simulated Interactions with Citizens*, 14 J. of Experimental Criminology 111, 117-19 (2018), https://link.springer.com/article/10.1007/s11292-017-9294-2.

127 Personal communication (email), Sergeant Troy Lee, Miami-Dade Police Department, Miami-Dade Public Safety Training Institute, Dec. 2, 2019; Police Executive Research Forum, *supra* note 24, at 11.

with scenario-based training provided every other year.[128] More research is needed to determine whether more regular scenario-based or other forms of training, perhaps when probates are under the supervision of FTOs, would aid police in keeping the public safe while minimizing use of force.

G. Lessons Learned from Miami: Professionalization is Important

The evolution of the MDPD's attempts to control police use of force and violence is largely a story of the professionalization of policing. While the policing policy of the 1960s purported to emphasize ideals, such as respect for individual liberty and courtesy toward fellow citizens, public accounts suggest these ideals were often absent in interactions with black residents—a trend that was common in policing across the country. As a result, the department's reputation suffered, and police-community relationships frayed. Both police policy and police attitudes needed to shift.

New recruitment standards were adopted in the late 1960s through the 1980s, and new priorities were set. Departmental leadership began to tackle the problem of police brutality. Officers were recruited to reflect the community they served and to demonstrate a character and personality well suited to the job. Moreover, department training was changed to better prepare officers for sometimes tense citizen encounters and teach them to respond in less lethal or forceful ways.

As the Miami community grew, so did the number of officers. At times this came with collateral consequences—the hiring spree of the 1980s is credited with creating several of the corruption problems that marked the MPD in the latter half of the decade. And the relative inexperience among the young recruits was thought to account for some of the poor judgment leading to a few officer-involved shootings.

But for the most part, these changes abetted a positive trend of increased professionalism. Department corruption was rooted out, and use-of-force policies became more detailed. While the increasing militarization of Miami police forces in the last two decades has led to new fractures and debates between the police and community, a recently articulated focus on the sanctity of life and de-escalation is intended to further reduce police use of force and, in turn, police violence. As to how these policies interact with police attitudes, only time and more research will tell. Regardless, we believe that for most Miami-Dade residents, policing policy is undoubtedly better today than it was decades ago.

III. Policy Recommendations

This is not the end of the evolution of policing in America. Bringing greater professionalism into policing and amending policies to control police use of force and violence has improved the outlook and actions of police officers before, and it can do so again. For this reason, we must continue with the task of reform. In this section, we present several policy recommendations to further reduce police use of force and violence.

A. Emphasize and Support De-escalation in Use-of-Force Policy and Training

De-escalation is now an articulated priority of many police departments, and local stakeholders should push for it to be included in their departments' use-of-force policies. However, to truly promote successful use of de-escalation tactics, policymakers should pass state laws requiring active, scenario-based de-escalation training in police academies. Moreover, states should require expanded post-academy continuing education for mid-career officers that focuses on de-escalation and control of the use of force. Without such training, new de-escalation policies risk being no more than words on a piece of paper, and officers may be under-equipped for the often difficult scenarios at hand, risking both their safety and that of community members.

Local departments should also move to a non-stress model of police training that emphasizes academic training, physical training, and supervisor-supervisee relationships. This model is superior to the current "boot camp" model, which emphasizes military-style drills, daily inspections, intense physical demands, public discipline, withholding privileges, and immediate reaction to infractions.[129] While training on investigations, vehicles, weapons, and policing tactics is no doubt important, time spent on the profession of policing, use-of-force policies, and developing emotional intelligence skills is critical for controlling police use of force and violence.

B. Require Greater Transparency around Department Use-of-Force Policies

Citizens have a right to know the policies of their government, particularly when it comes to government-controlled use of force. Moreover, citizen oversight has often been the impetus for positive reforms. For these reasons, state laws should require department use-of-force policies and other policies governing citizen encounters to be made public. In addition to clarifying what the use-of-force policy is within a given jurisdiction, greater knowledge around use-of-force policies will allow community members to compare local policies to those of other departments and push for improvements where they are needed.

C. Study and Promote Successful Field Training Officer Programs

As seen in the historical account of policing in Miami, many reforms which aim to curb police use of force have focused on changing academy training or recruitment efforts. Although academy training is important, it is just one part of a new recruit's professional development. A recruit must also study under a Field Training Officer (FTO) who is tasked with mentoring and teaching them when they first join the force as a probationary officer. FTO programs are where great officers are forged and terrible officers are revealed. They are where a new recruit sees how policy is (or is not) put into practice. And research suggests FTOs can have a significant impact on their supervisees' future conduct.[130] It is thus critical that departments have strong FTO

128 *Id.*

129 *See* Reaves, *supra* note 23.

130 Ryan M. Getty, John L. Worrall & Robert G. Morris, *How Far From the Tree Does the Apple Fall? Field Training Officers, Their Trainees, and Allegations of Misconduct*, 62 Crime & Delinquency 821, 831-33

programs featuring FTOs who model the implementation of department policies and who are high-quality instructors. More research needs to be done on what makes for an effective FTO program. Moreover, departments should review and, if needed, reform current incentives and qualifications to become and remain an FTO to ensure new probates are placed under the wings of the department's highest quality instructors.

D. Limit Police Acquisition and Use of Military Resources from the 1033 Program

In a few cases, having military-style weapons or vehicles may be helpful to local police departments. But for the most part, tools such as armored trucks, camouflage uniforms, and assault rifles do more to create fear and confusion among the public and promote police use of force than they do to preserve public safety.

Federal standards for police acquisition of military equipment and vehicles via the 1033 Program need to be raised, as do local standards for deploying such equipment. Civilian protests should not be met with armored trucks and M-16s, nor should tanks be features of routine surveillance. It is essential that the line between police and soldier stay intact and that community members do not feel like they are living in a war zone.

E. Ensure Greater Accountability for Misuse of Force

There are bound to be instances in which police officers misuse their force. How departments and the larger policing community respond to these misuses of force is critical not only for the sake of justice, but also for the sake of the department's credibility and relationship with the community it has sworn to preserve and protect.

At the federal level, the DOJ should vigorously enforce constitutional policing, including the Law Enforcement Misconduct Statute,[131] using consent decrees as necessary. This enforcement has largely stalled under the Trump presidency thanks to a memo issued by then-Attorney General Jeff Sessions, which placed new parameters on the use of federal consent decrees (the order was not aimed at consent decrees involving police agencies specifically, but many federal consent decrees do focus on local law enforcement).[132] Though consent decrees have sometimes gone on too long and intrude unnecessarily on the operations of local police agencies, the literature on consent decrees suggests that they can be used successfully to promote reform in the short term.[133] Despite perhaps pushing for change too rapidly and without proper planning, the 1977 federal consent decree with the MPD successfully pushed the department to adopt more diverse hiring practices in the early 1980s. Public opinion polling suggests that communities governed by consent decrees have a better opinion of their local police that those without consent decrees.[134] However, in the absence of true department buy-in for the reforms and continued community oversight once a department is found to be compliant and the consent decree ends, the monitored department may return to previous practices.[135] Thus, consent decrees should not be the only form of police accountability.

The federal government should also provide grants supporting research around the development of effective internal accountability measures, such as the use of body-worn cameras. While some new research suggests these tools may be helpful in promoting better law enforcement, many questions surrounding their appropriate use remain unanswered.[136] Moreover, more research and investment should be done on the development of peer-intervention training programs, such as the New Orleans Police Department's Ethical Policing is Courageous (EPIC) program, which uses officers' unique knowledge and relationships to change police culture and increase officer wellness.[137]

Finally, the Supreme Court should put an end to qualified immunity. This doctrine makes public officers' civil liability dependent on proof that they violated a "clearly established right," which has evolved to require that plaintiffs find a nearly identical case in order to support their argument. With this jurisprudence, the courts have made it nearly impossible to hold individual officers financially accountable for their misuse of force.[138] Many legal scholars also believe that the doctrine has a relatively weak legal foundation. For these reasons, the Court should end or limit qualified immunity.[139]

IV. Conclusion

Police officers have an incredibly difficult job. They are charged to protect and to serve, and at the same time, we often call upon them as mental health professionals, crisis interventionists, and emergency responders. Many of them put their lives on the line every day.

(2014), https://www.researchgate.net/publication/274453141_How_Far_From_the_Tree_Does_the_Apple_Fall_Field_Training_Officers_Their_Trainees_and_Allegations_of_Misconduct.

131 42 U.S.C. § 14141.

132 Radley Balko, *The Trump administration gave up on federal oversight of police agencies—just as it was starting to work*, Washington Post, Jan. 28, 2019, https://www.washingtonpost.com/opinions/2019/01/28/trump-administration-gave-up-federal-oversight-police-agencies-just-it-was-starting-work/.

133 Geoffrey P. Alpert, Kyle McLean, and Scott Wolfe, *Consent decrees: An approach to police accountability and reform,* 20 Police Q. 243, 243-46 (2017), https://www.researchgate.net/profile/Geoffrey_Alpert2/publication/317049351_Consent_Decrees_An_Approach_to_Police_Accountability_and_Reform/links/59f4a76faca272607e2a83a2/Consent-Decrees-An-Approach-to-Police-Accountability-and-Reform.pdf.

134 Balko, *supra* note 132.

135 Alpert et al., *supra* note 133; SteVon Felton, *Policing Requires an 'EPIC' Shift* 1, R Street Institute (April 2019), https://www.rstreet.org/wp-content/uploads/2019/04/Final-Short-No.-70.pdf.

136 Brett Chapman, *Body-Worn Cameras: What the evidence tells us*, Nat'l Inst. of Justice (Nov. 14, 2018), https://nij.ojp.gov/topics/articles/body-worn-cameras-what-evidence-tells-us.

137 Felton, *supra* note 135, at 1.

138 David French, *End Qualified Immunity*, National Review, Sept. 13, 2018, https://www.nationalreview.com/2018/09/end-qualified-immunity-supreme-court/.

139 For a pathbreaking discussion of the "shoddy" underpinnings of this judge-made doctrine that calls for a reworking of immunity doctrine from the bottom up on textualist grounds, see generally William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. R. 45 (2018).

We also grant them the unique authority to use force, and we expect them to wield that power with great care and discretion. Unfortunately, there is a long history of law enforcement officers in this country not using their power in an appropriate manner, particularly when dealing with people of color. U.S. Senator Tim Scott described his own experiences of multiple seemingly trivial and targeted police stops:

> While I thank God I have not endured any bodily harm, I have however felt the pressure applied by the scales of justice when they are slanted. . . . There is absolutely nothing more frustrating, more damaging to your soul than when you know you're following the rules and being treated like you're not.[140]

This is absolutely detrimental to the police image and the trust between police and the community.

To be arbiters of peace and safety as well as the guardians of public trust, police officers must use violence sparingly and discernment constantly. Over the last century, police forces have sought to fulfill this mandate by bolstering their use-of-force policies, amending hiring and recruitment practices, and instituting new training methods and priorities. This paper recounted how this occurred in the Miami-Dade area. At the same time, police militarization has infected police attitudes and mindsets, and new fractures have opened in the relationships between the police and the communities they serve.

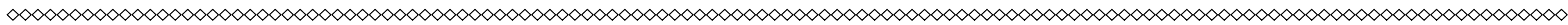
Much work remains to be done. Police still routinely misuse their power of enforcement and lack the professionalism appropriate for encounters with community members.[141] Police use of excessive force is still all too common for a society that prides itself on its limited government. And police militarization has created new fears and distance between police officers and the public.

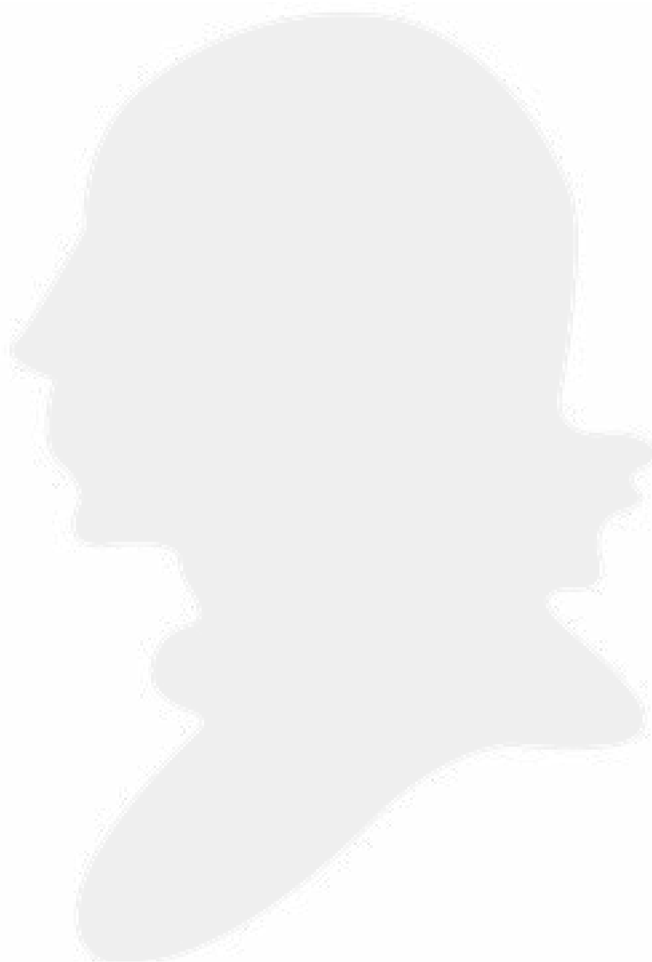
Everyone has a role to play in ensuring mechanisms to control and limit police use of force are strong. At the local level, departments should incorporate de-escalation practices into their use-of-force policies, move to a non-stress model of academy training, invest in stronger FTO programs, greatly limit police use of military equipment, and create new internal accountability policies and programs. At the state level, policymakers should require greater transparency around department use-of-force policies, require scenario-based de-escalation training, and support research around successful FTO programs and internal accountability mechanisms. At the federal level, the DOJ can use its investigation and enforcement authority via consent decrees, Congress can levy its power of the purse by investing in research and the development of new accountability mechanisms, and the Supreme Court can review past legal doctrines such as qualified immunity.

Miami's example shows that change is possible. Innovative, transparent, and progress-oriented local safety institutions, community partnership, and state and federal support can move the needle on these issues. Our police officers play an integral role in preserving the public safety of our society, but as a society, we have a critical role in ensuring their enforcement powers are used for good and justice.

140 *Senators Scott and Boxer on Race Relations*, C-SPAN, July 13, 2016, https://www.c-span.org/video/?412664-9/senators-scott-boxer-race-relations.

141 Jason Meisner, *2 gang officers used police powers 'to lie, cheat and steal,' prosecutors allege as trial starts in earnest*, Chicago Tribune, Oct. 9, 2019, https://www.chicagotribune.com/news/criminal-justice/ct-chicago-cops-corruption-trial-20191008-7xrxbwha6rapbcxmncje4ogbm-story.html; Richard Luscombe, *Florida police duo who slammed black teen's head suspended as outrage grows,* The Guardian, April 24, 2019, https://www.theguardian.com/us-news/2019/apr/24/florida-police-broward-county-delucca-rolle.





Police Use of Force and the Practical Limits of Popular Reform Proposals: A Response to Rizer and Mooney

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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. Whenever we publish an article that advocates for a particular position, as here, we offer other perspectives on the issue, including ones opposed to the position taken in the article. This article is a response to an article by Arthur Rizer and Emily Mooney, which you can find at page 114. We also invite responses from our readers. To join the debate, please email us at info@fedsoc.org.

Since 2015, police in the United States have shot and killed an average of 988 people a year. This is based on reporting by the *Washington Post*, which began maintaining a national database of such incidents after the controversial 2014 shooting of Michael Brown in Ferguson, Missouri.[1] Without more analysis, the fact that 5,000 Americans lost their lives to armed agents of the state in half a decade is undoubtedly concerning. But context is important, and viewing the number of fatal police encounters in its proper context undercuts the claim—central to the argument advanced by Rizer and Mooney in their thoughtful article—that America has a "police violence problem."[2] This is not to say that police *never* use excessive force, nor is it to assert that there is no room for improvement in police training practices that might, at least at the margins, reduce the number of fatal police shootings and other uses of force.

However, to the extent the police violence problem is overstated, so too will be the potential impact of any policy levers pulled to address that problem. This is important because the advisability of a particular policy change will depend in part on how much the change will help if adopted.

Rizer and Mooney propose five policy recommendations to reduce police violence:

- Emphasize and Support De-escalation in Use-of-Force Policy and Training
- Require Greater Transparency Around Department Use-of-Force Policies
- Study and Promote Successful Field Training Officer Programs
- Limit Police Acquisition and Use of Military Resources from the 1033 Program
- Ensure Greater Accountability for Misuse of Force

These recommendations are measured and well-intentioned. But Rizer and Mooney overestimate their potential impact. That overestimation—which varies in degree as to each of the recommendations made—becomes more apparent upon a closer examination of what the available data and literature tell us we can expect from acting on them.

This response will begin by placing police use-of-force data in their proper context. Doing so casts doubt on Rizer and Mooney's assertion that there exists a significant "police violence problem" in America. It will then assess Rizer and Mooney's policy

1 *Fatal Force*, Wash. Post. (updated May 8, 2020), https://www.washingtonpost.com/graphics/investigations/police-shootings-database/.

2 Arthur Rizer & Emily Mooney, *The Evolution of Modern Use-of-Force Policies and the Need for Professionalism in Policing*, 21 Federalist Soc'y Rev. 114 (2020), https://fedsoc.org/commentary/publications/the-evolution-of-modern-use-of-force-policies-and-the-need-for-professionalism-in-policing.

recommendations, offering specific critiques and highlighting competing analyses of the underlying issues.

I. Use-of-Force Statistics in Their Proper Context

A. The Statistics

Rizer and Mooney write that "Existing guardrails against excessive police use-of-force are far too weak," which, they argue, is evidenced by America's "police violence problem."[3] There is no question that, every year, there are many documented instances of excessive police violence which are *individually* problematic. However, to establish that there exists a "police violence problem," one would need to demonstrate that such individual incidents are *representative* of a larger pattern. The data on police shootings and other uses of force weighs heavily against such a conclusion.

According to the *Washington Post*'s database, there were 992 fatal police shootings across the country in 2018.[4] The vast majority of these shootings—91.6%—involved visibly armed suspects and were therefore quite likely justified.[5] But *fatal* police shootings are only a subset of the total instances in which police applied deadly force with their firearms, given that many suspects survive their wounds or are not hit at all. To get a more complete picture of how many times police used deadly force in 2018, I analyzed a dataset of police shootings by officers working in the nation's 50 largest departments maintained by *VICE News*.[6] *VICE*'s dataset documents 3,936 police shootings in those departments since 2010, 32.6% of which were fatal.[7] Based on that breakdown, let us assume that the fatal shootings documented by the *Post* in 2018 represented 32.6% of total shootings that year. Having so assumed, we can estimate that, in addition to the 992 *fatal* police shootings documented by the *Post* in 2018, there were another 2,051 *non-fatal* police shootings, for a total of 3,043 firearm discharges (including those in which no one was hit). That represents an average of more than eight shootings every day. That sounds like a lot, but it needs to be contextualized in light of the overall volume of police activity.

B. The Context

The Federal Bureau of Investigation's Uniform Crime Reports document that in 2018 (the most recent available year), there were an estimated 686,665 full-time police officers working in the United States.[8] That year, those officers made 10,310,960 arrests.[9] Those arrests represent a small fraction of the total number of contacts police have with the public. The Bureau of Justice Statistics (BJS) reports that, in 2015, 53.5 million people in the United States had contact with the police;[10] it stands to reason that some of those people had more than one such contact.

This data should frame our analysis. If we attribute each of the 3,043 estimated firearm discharges by police in 2018 to a unique officer, we can infer that, *at most*, 0.4% of police officers purposely discharged a firearm in 2018. If we assume that every shooting happened during the course of a separate arrest, we can infer that, *at most*, police applied deadly force with a firearm in 0.003% of arrests.

The case for the existence a national police violence problem doesn't get much stronger when considering the data on non-deadly force. According to a BJS study covering the 10-year period between 2002-2011, 0.8% of people who had contact with the police reported being subjected to physical force.[11] In 2018, a research team of doctors and a criminologist published a thorough study of police use of force in *The Journal of Trauma and Acute Care Surgery*, entitled "Injuries associated with police use-of-force."[12] The study analyzed over a million calls for service to three midsized police departments in Arizona, Louisiana, and North Carolina over a two-year period. Those calls resulted in more than 114,000 arrests.[13] Physical force was used in 1 of every 128 of them, meaning that more than 99% of arrests were effected without any use of force.[14] The study went on to find that, based on expert medical examinations of suspects' medical records, 98% of suspects on whom police used physical force "sustained no or mild injury," and 1.8% of suspects sustained moderate or severe injuries (only one suspect was fatally wounded by police gun fire during the study period).[15]

Another important contextual consideration is that not all police uses of force are unjustified. Incidents of *excessive* force—force that goes beyond what a situation warrants—are a small subset of a small whole. While an exact assessment of what percentage of police uses of force are unjustifiable is hard to come by, there are some instructive scholarly estimates that have been published. One example: A BJS study of 2002 data on citizen complaints filed against officers in departments with more than 100 full-time sworn officers found that just 8% of

3 *Id.* at 114.

4 *See Fatal Force*, *supra* note 1 (specifically, 2018 data).

5 *See id.*

6 *Get the Data: Explore Data on All Police Shootings From the Nation's 50 Largest Local Police Departments*, VICE News (Dec. 10, 2017), https://news.vice.com/en_us/article/a3jjpa/nonfatal-police-shootings-data.

7 *See* Appendix A for a table of fatal and non-fatal shootings reported by the departments in the *VICE News* database.

8 *Crime in the United States, 2018: Table 74 (Full-time Law Enforcement Employees)*, Federal Bureau of Investigation, https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/tables/table-74. Note: This number likely undercounts the total number of law enforcement officers operating within the U.S., given that in many parts of the country—particularly in rural, exurban, and suburban areas—many public safety operations use part-time and reserve officers.

9 *Crime in the United States, 2018: Table 29 (Estimated Number of Arrests)*, Federal Bureau of Investigation, https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/tables/table-29.

10 *Contacts Between Police and the Public, 2015*, BJS Summary (Oct. 2018), https://www.bjs.gov/content/pub/pdf/cpp15_sum.pdf.

11 Shelley Hyland, Lynn Langton, & Elizabeth Davis, *Police Use of Nonfatal Force, 2002-11*, Bureau of Justice Statistics (Nov. 2015), https://www.bjs.gov/content/pub/pdf/punf0211.pdf.

12 William P. Bozeman et al., *Injuries associated with police use of force*, 84 J. Trauma & Acute Care Surgery 466 (Mar. 2018), https://journals.lww.com/jtrauma/Abstract/2018/03000/Injuries_associated_with_police_use_of_force.9.aspx.

13 *Id.*

14 *Id.*

15 *Id.*

force complaints for which there was a final disposition were sustained. Some may dismiss this as an illustration of a general unwillingness among police administrators to hold their own officers accountable. However, an even smaller percentage (6%) of complaints were sustained in jurisdictions with a Civilian Complaint Review Board (CCRB), which takes the disposition of those complaints out of the hands of the police themselves. The BJS study arrived at an estimated rate of excessive force of 1 incident per 200 full-time sworn officers.[16] This is in line with the most recent available data out of New York City—home to the nation's largest police department, which employs approximately 36,000 officers.[17] In 2018, New York's CCRB received 4,745 total complaints, and just 226 complaints were substantiated against 326 officers. 2,919 of the complaints contained allegations of excessive physical force, and only 73 of those allegations were substantiated.[18] That year, the New York City Police Department (NYPD) made 245,392 arrests—89,685 felony and 155,707 misdemeanor arrests[19]—to say nothing of other enforcement-related encounters such as pedestrian and traffic stops.

Because they are human, even the most competent and well-intentioned police officers will fall short of perfection—a standard to which they are often unfairly held. But there is a great deal of space between imperfection and deficiency. Police use force tens of thousands of times every year, and among those are cases of both carelessness and malevolence. But in the context of almost 700,000 officers making more than 10 million arrests and engaging in millions more stops and other interactions, can we infer an *institutional* police violence problem? Given the data outlined above, it would be difficult to answer this question in the affirmative.

II. Militarization and Police Violence: A Very Tenuous Relationship

A. There Is No Evidence That Militarization Causes Excessive Force

If the case that America has a police violence problem is weak, the connection between that problem and police militarization is weaker still. Rizer and Mooney argue, in part, that police attitudes have become militaristic. To their credit, they acknowledge that "[t]he hypothesized causal link between police militarization and excessive force is . . . far from conclusively established."[20] But this acknowledgement is understated: absent from Rizer and Mooney's article are hard data outlining how and to what degree such attitudes have changed, let alone any evidence linking such changes to actual outcomes in police-citizen encounters.

To be clear, a diligent research effort would uncover *some* suggestive evidence. For example, one study, published in the Oxford *Journal of Public Health* last year, found that military veterans were significantly more likely to be involved in officer-involved shootings (OISs).[21] However, that study did not shed light on the mechanisms that explain that relationship. One potential explanation could be that police officers with military experience are placed in units more likely to be involved in dangerous encounters.

On the other hand, there are other data points which cast doubt on the validity of the hypothesis that police militarization begets unjustified uses of force. For example, in making the case that police have become more militarized, Rizer and Mooney point to the creation of Special Weapons and Tactics (SWAT) units and "their increasing integration into everyday policing."[22] However, at least within the NYPD, Emergency Service Unit (ESU) officers (the department's SWAT team members) seem to be extremely well-disciplined. The NYPD's ESU commands did not record a single on-duty shooting in 2019.[23] In 2018, ESU officers were involved in just one shooting.[24] In 2017, the number was just two.[25] In Chicago, SWAT teams filed just 26 (approximately 0.003%) of the department's 10,068 Tactical Response Reports—paperwork filed whenever officers are involved in reportable uses of force such as a takedowns, punches, and firearm discharges—filed in 2017 and 2018.[26] Windy City SWAT officers were involved in just four firearms discharges during that two-year period—4.5% of the department's 88 reported discharges.[27]

Rizer and Mooney argue further that "law enforcement has been increasingly militarized and its tactics more confrontational since at least the early 1970s."[28] The empirical support for this proposition is quite tenuous. Looking again at the NYPD, we see that even as the department has grown in size,[29] OIS numbers

16 Matthew J. Hickman, *Citizen Complaints about Police Use of Force*, Bureau of Justice Statistics (Jun. 2006), https://www.bjs.gov/content/pub/pdf/ccpuf.pdf.

17 *About NYPD*, New York City Police Department, https://www1.nyc.gov/site/nypd/about/about-nypd/about-nypd-landing.page.

18 *See generally* Civilian Complaint Review Board, *Annual Report: 2018*, https://www1.nyc.gov/assets/ccrb/downloads/pdf/policy_pdf/annual_bi-annual/2018CCRB_AnnualReport.pdf (For the total number of force allegations substantiated, see Figure 52).

19 *See* NYC Mayor's Office of Criminal Justice, *Data Stories*, https://criminaljustice.cityofnewyork.us/data_stories/ (see individual charts on *Felony Arrests* & *Misdemeanor Arrests*).

20 Rizer & Mooney, *supra* note 2, at 116.

21 Jennifer M. Reingle Gonzalez et al., *Does military veteran status and deployment history impact officer involved shootings? A case–control study*, 41 J. Pub. Health 245 (Sep. 2019), https://academic.oup.com/jpubhealth/article-abstract/41/3/e245/5114353.

22 Rizer & Mooney, *supra* note 2, at 115.

23 *See Annual Use of Force/Firearms Discharge Report Data Tables*, NYPD, https://www1.nyc.gov/site/nypd/stats/reports-analysis/firearms-discharge.page.

24 *Id.*

25 *Id.*

26 *See 2018 Annual Report*, Chicago Police Department, at 78-79 (2019), http://home.chicagopolice.org/wp-content/uploads/2019/07/2018AnnualReport-05July19.pdf.

27 *Id.* at 82.

28 Rizer & Mooney, *supra* note 2, at 115.

29 *Compare* Leonard Buder, *Number of Police in New York Force is Lowest in Years*, N.Y. Times (Dec. 6, 1981), https://www.nytimes.com/1981/12/06/nyregion/number-of-police-in-new-york-force-is-lowest-in-years.html (putting size of NYPD in 1981 "at 22,170 officers,

have declined precipitously during the time frame identified as marking a rise in police militarization. In 1971, NYPD officers shot and injured 221 people; in 1972 they shot and injured 145.[30] In 1990 that number was down to 72, and in 2016, it was just 23.[31] In Chicago, police shot 523 civilians between 1974 and 1978—approximately 131 per year.[32] Chicago police reported just 43 firearm discharges in 2018.[33]

Among the other reasons to be skeptical of the asserted link between increasing militarization and police violence are a series of BJS reports on citizen perceptions of police use of force in 2005, 2008, and 2015. The percentage of those subjected to actual force who felt the force was excessive held essentially steady over the 13-year period. In fact, the percentage of citizens characterizing the force used against them as excessive *declined* slightly from 83% in 2005, to 80.6% in 2008, to 78% in 2015.[34]

In 2006, the BJS compared the rate of citizen complaints about police use of force in the United States with the rate of such complaints in England & Wales.[35] With the vast majority of police in the United Kingdom patrolling without a firearm,[36] it would be difficult to argue that they suffer from the same militarization problem alleged to exist here in the U.S. Still, the BJS reported that "the overall rates of complaint per 100 officers in both countries are similar (7.5 force complaints per 100 officers in large U.S. local agencies, versus 7.2 oppressive behavior complaints per 100 officers in England and Wales)."[37]

B. Limiting the 1033 Program Is Unlikely to Reduce Police Use of Force

Perhaps the strongest evidence offered in support of a causal connection between police militarization and violence concerns the federal government's "1033 Program," which Rizer and Mooney propose limiting. That program allows tribal, state, and local law enforcement agencies to obtain excess equipment from the U.S. Department of Defense through the Defense Logistics Agency.[38] Rizer and Mooney rightly point out that since the very public display of military equipment by police during the 2014 riots in Ferguson, Missouri, this program has become the object of much scrutiny. Despite that scrutiny, the best attempts to assess the connection between the program and police use of force weigh against the recommendations to limit both an agency's ability to acquire equipment through the program and the circumstances in which officers can use such equipment.

In prosecuting the case against the 1033 program, Rizer and Mooney rely heavily on a 2017 study which found "a positive and statistically significant relationship between 1033 transfers and fatalities from officer-involved shootings."[39] However, the authors of that study base their analysis on county-level data in just four states (Connecticut, Maine, Nevada, and New Hampshire) and acknowledge that their analysis is "relatively preliminary."[40]

On the other hand, three other empirical assessments have found the opposite. The first, cited but not expounded on by Rizer and Mooney, is a study by researchers at the University of Tennessee.[41] That study uses a much larger sample of police agencies, and it finds that certain acquisitions made through the 1033 program "reduce[] citizen complaints," as well as "assaults on and deaths of police officers."[42] Most relevantly, the study finds no effect on fatal police shootings. The same journal concurrently published a second study of the 1033 program's effects that used slightly different methods and also found that the program had "no effect on the number of offenders killed."[43] The second study also found that the program showed a cost-effective crime reduction effect through the mechanism of deterrence. The authors make the case for a deterrent effect partly by noting that "two highly visible tools, gears and vehicles, have strong and sizable effects on all the types of crime," which, they go on to explain, "is consistent with early studies by e.g., Bell (1982), which explore how police wearing military-style uniforms influences citizens' perception of the police's authority and legitimacy, and reinforces the notion that a main causal channel could be based on perceptual deterrence."[44]

detectives, supervisors and recruits, according to new figures made available by the Police Department") *and About NYPD*, *supra* note 17 (putting the size of today's NYPD at 36,000).

30 *Annual Use of Force/Firearms Discharge Report Data Tables*, *supra* note 23 (see 2016 data table, which provides annual shooting numbers going back to 1971).

31 *Id.*

32 William A. Geller & Kevin J. Karales, *Shootings of and by Chicago Police: Uncommon Crises—Part I: Shootings by Chicago Police*, 72 J. Crim. L. & Criminology 1813, 1832 (1981), *available at* https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=6284&context=jclc.

33 *See 2018 Annual Report, supra* note 26, at 82.

34 *See* Matthew R. Durose et al., *Contacts between Police and the Public, 2005*, Bureau of Justice Statistics (Apr. 2007), https://www.bjs.gov/content/pub/pdf/cpp05.pdf; Christine Eith & Matthew R. Durose, *Contacts between Police and the Public, 2008*, Bureau of Justice Statistics (Oct. 2011), https://www.bjs.gov/content/pub/pdf/cpp08.pdf; Elizabeth Davis et al., *Contacts Between Police and the Public, 2015*, Bureau of Justice Statistics (Oct. 2018), https://www.bjs.gov/content/pub/pdf/cpp15.pdf.

35 *See* Hickman, *supra* note 16.

36 Alexander Smith, *The Vast Majority of U.K. Police Don't Carry Guns. Here's Why.*, NBC News (Mar. 23, 2017), https://www.nbcnews.com/news/world/why-london-won-t-arm-all-police-despite-severe-terror-n737551.

37 *See* Hickman, *supra* note 16.

38 Excess Federal Property, Justice Technology Information Center, https://www.justnet.org/resources/Excess-Federal-Property.html.

39 *See* Casey Delehanty et al., *Militarization and police violence: The case of the 1033 program*, Research & Politics (Apr. 2017), https://www.researchgate.net/publication/317581659_Militarization_and_police_violence_The_case_of_the_1033_program.

40 *Id.*

41 Matthew C. Harris et al., *Peacekeeping Force: Effects of Providing Tactical Equipment to Local Law Enforcement*, Am. Econ. J.: Econ. Pol'y (2017), https://pubs.aeaweb.org/doi/pdfplus/10.1257/pol.20150525.

42 *Id.*

43 Vincenzo Bove & Evelina Gavrilova, *Police Officer on the Frontline or a Soldier? The Effect of Police Militarization on Crime*, Am. Econ. J.: Econ. Pol'y (2017), https://pubs.aeaweb.org/doi/pdfplus/10.1257/pol.20150478.

44 *Id.* at 14.

The third study—a working paper authored by Olugbenga Ajilore,[45] a senior economist at the liberal Center for American Progress—found "little evidence of a causal link between general military surplus acquisition and documented use-of-force incidents."[46] "In fact," Ajilore says, "the acquisition of military vehicles leads to *fewer* use-of-force incidents."[47] If there is additional support for the conclusions reached by Rizer and Mooney as to the 1033 program, it can be found in Ajilore's conclusion that the program does seem to increase use of force by SWAT teams—an increase that was, in the end, too small to change the overall effect on use of force.

III. The Practical Limits of De-escalation Tactics in OIS Contexts

According to a comprehensive field guide of best practices for law enforcement published by the Department of Justice last year, "Research has identified five attributes common to the clinical literature of de-escalation: communication, self-regulation, assessment, actions, and maintaining safety."[48] The guide defines those attributes as follows:

1. *Communication* encompasses specific verbal and non-verbal strategies to begin an effective dialogue with an individual and earn that individual's trust and cooperation.
2. *Self-regulation* reflects skills and techniques used by individual service providers to manage their emotional or behavioral responses to an individual encounter. This includes techniques that they can use to provide the subject time and space to cool down.
3. *Assessment* is the task of collecting as much data about the person and situation as possible to make informed decisions about subsequent actions, including understanding when using force becomes imperative.
4. *Actions* refer to the behaviors and activities a service provider can engage in to reduce the likelihood and the severity of use of force.
5. *Maintaining safety* describes the paramount need of service providers to ensure their own welfare and public safety. Specific actions can reduce the likelihood that they will be injured if the person becomes violent or coercive methods of control are required.[49]

While the guide seems to favor de-escalation training for law enforcement officers around the country, it acknowledges that "to date, there is still limited empirical literature examining the effects of de-escalation in law enforcement beyond C[risis] I[ntervention] T[raining]."[50] There is indeed a paucity of empirical research on whether de-escalation techniques can be learned, internalized, and effectively deployed by police in the field.

However, there is a relatively substantial literature on the effectiveness of de-escalation in healthcare settings—the context in which comprehensive de-escalation strategies were developed before being marketed to law enforcement agencies.[51] The development of that literature is not encouraging for those holding out hope that a broader commitment to employing de-escalation tactics in the field will, as Rizer and Mooney put it, "further reduce police use of force and violence."[52] A comprehensive systematic literature review published in the *British Journal of Psychiatry* offers little cause for optimism.[53] Pertinently, given Rizer and Mooney's focus on police *attitudes*, the reviewers concluded that "No study of moderate quality or above provided any evidence of attitudinal change impacting de-escalation performance or rates of violence and aggression," and that "There was little evidence to suggest that de-escalation skills may be influenced through modification of staff attitudes."[54] That review did find "evidence that de-escalation trained wards *increased* staff risk of exposure to being involved in an aggressive incident when compared with control and restraint trained wards,"[55] and it ultimately concluded that while "It is assumed that [de-escalation] training may improve staff's ability to de-escalate violent and aggressive behavior, [t]here is currently limited evidence to suggest that this form of training has this desirable effect."[56]

Even less promising is the literature on the application of de-escalation techniques developed in healthcare settings to policing. A 2019 review of the literature on the effectiveness of police crisis intervention training (CIT) programs published in the *Journal of the American Academy of Psychiatry and Law* concluded that "There is little evidence in the peer-reviewed literature . . . that shows CIT's benefits on objective measures of arrests, officer

45 *Olugbenga Ajilore Bio*, Center for American Progress, https://www.americanprogress.org/about/staff/ajilore-olugbenga/bio/.

46 Olugbenga Ajilore, *Is there a 1033 Effect? Police Militarization and Aggressive Policing*, Munich Personal RePEc Archive (Oct. 2017), https://mpra.ub.uni-muenchen.de/82543/1/MPRA_.

47 *Id.* (emphasis added).

48 *See* U.S. Department of Justice, *Law Enforcement Best Practices: Lessons Learned from the Field* at 27, Office of Community Oriented Policing Services (2019), https://cops.usdoj.gov/RIC/Publications/cops-w0875-pub.pdf (citing Len Bowers, *A Model of De-Escalation*, Mental Health Practice, Vol. 17, No. 9 (Jun. 2014), https://www.deepdyve.com/lp/royal-college-of-nursing-rcn/a-model-of-de-escalation-1tglcwO9E0).

49 *Id.*

50 *Id.*

51 *Id.* at 27 ("[M]uch of what we know about de-escalation comes from the empirical literature of clinicians. These practitioners were—just as law enforcement agencies are today—looking to reduce the instances of violent or otherwise disruptive behaviors in healthcare settings.") (citations omitted).

52 *See* Rizer & Mooney, *supra* note 2, at 124.

53 *See* Owen Price et al., *Learning and performance outcomes of mental health staff training in de-escalation techniques for the management of violence and aggression*, British J. of Psychiatry 206, 447-455 (2015), https://www.cambridge.org/core/services/aop-cambridge-core/content/view/27C0A4A25B1E733FFA8A64B310A45975/S0007125000279026a.pdf/learning_and_performance_outcomes_of_mental_health_staff_training_in_deescalation_techniques_for_the_management_of_violence_and_aggression.pdf.

54 *Id.* at 452-53.

55 *Id.* at 452.

56 *Id.* at 454.

injury, citizen injury, or use of force."[57] Another comprehensive literature review—of empirical research on de-escalation training more broadly, not specifically focused on CIT—concluded that the "conclusions concerning the effectiveness of de-escalation training" identified by the reviewers—which were both mixed and not particularly weighty—were "limited by the questionable quality of almost all evaluation research designs."[58]

Just as there is a paucity of evidence in support of de-escalation training, there is of course little evidence that an expansion of de-escalation would *hurt*. It is quite possible that this particular policy recommendation advanced by Rizer and Mooney could have some moderate, positive effects on at least some relevant outcomes. However, given the extremely short and chaotic time frames within which so many police shootings occur,[59] de-escalation may not even be a viable option for those trained in such tactics in a substantial majority of the situations likely to receive significant media attention and, as a result, impact public perceptions. Moreover, there may also exist a subset of police shootings in which even an ideal deployment of de-escalation tactics fails to avoid the need for deadly force.[60] An empirical assessment of how many police shootings might be avoided by using de-escalation techniques (assuming, for the purposes of argument, their effectiveness) could shed more light on the likely limits of the impact better and more-intense de-escalation training might have on police use-of-force.

IV. Litigation and Police Accountability

While police violence is relatively rare and usually justified, those who violate the public's trust by abusing or exceeding their power ought to be held accountable, and systematically failing to hold police to account for such violations would understandably strain the relationship between a centuries-old institution and the society to which it has become an essential source of protection. On this, I am in full agreement with Rizer and Mooney.

But on the question of qualified immunity, the controversial doctrine's actual role in police litigation is far from clear. The legal foundation upon which modern qualified immunity doctrine has been built is controversial, and there are strong arguments on both sides; I will leave it to others to fight it out. Instead, I'll focus on the claim that qualified immunity has "made it extremely difficult to hold law enforcement officers who use excessive force or otherwise violate people's constitutional rights accountable."[61] While one can surely find egregious examples of judicial deference to clear police misconduct on qualified immunity grounds, the aggregate role the doctrine plays in modern police litigation is overstated.

Consider first an empirical assessment of qualified immunity by Joanna C. Schwartz, published in a 2017 issue of the *Yale Law Journal*.[62] Her study analyzed 1,183 cases filed against state and local law enforcement defendants under 42 U.S.C. § 1983, which creates a right of action for constitutional violations committed by state actors. Qualified immunity could be raised as a defense in 979 (82.8%) of those cases, yet just 38 (3.9%) of *those* cases resulted in dismissals or grants of summary judgement on qualified immunity grounds.[63]

Consider also the data out of New York City, compiled in a database launched by the Legal Aid Society last year.[64] The database contains data on federal lawsuits filed against New York City police in the Eastern and Southern Districts of New York between January 2015 and June 2018.[65] The database contains 2,387 such lawsuits. Filtering the entries by case disposition reveals just 74 cases resolved in favor of the defendants.[66] Even if all 74 were decided on qualified immunity grounds, that would mean that the doctrine proved to be an effective bar to plaintiffs' recovery in just 3.1% of cases.[67] Here again, we must temper our expectations of just how much life would change in a world with no qualified immunity.

While it has no bearing on the validity of the criticisms of the federal judiciary's development of the qualified immunity doctrine, it's worth mentioning that the Supreme Court has done quite a bit to expand police accountability through its constitutional jurisprudence. The Supreme Court's 1989 decision in *City of Canton, Ohio v. Harris* held that "under certain

57 Michael S. Rogers et al., *Effectiveness of Police Crisis Intervention Training Programs*, J. Am. Acad. Psychiatry Law 47(4) online (2019), http://jaapl.org/content/jaapl/early/2019/09/24/JAAPL.003863-19.full.pdf.

58 Robin S. Engel et al., *Does de-escalation training work?: A systematic review and call for evidence in police use-of-force reform*, Criminology & Pub. Pol'y (2020), https://onlinelibrary.wiley.com/doi/abs/10.1111/1745-9133.12467.

59 *See*, *e.g.*, this video of a 2018 OIS in Los Angeles, California in which police officers who, in response to a noise complaint in the early morning hours, knock on a door only to be greeted by a naked man wielding a large knife who then rushes one of the officers within *seven seconds* of the door opening: https://www.youtube.com/watch?v=bI4qB66UY10.

60 *See, e.g.,* this video of another 2018 OIS in which officers attempt to detain a potentially armed suspect after responding to a 911 call. After more than five minutes of negotiation, the man was shot and killed: https://www.youtube.com/watch?v=I5_tR_OhqMc&feature=youtu.be. In a statement (available at https://www.longmontcolorado.gov/Home/Components/News/News/9498/3) accompanying its decision not to pursue charges against the officers involved, the grand jury noted that "seven out of eight police officers who were present that night, including Master Police Officer Mike Kimbley [who shot and killed the suspect], have received advanced training in de-escalation and responding to people struggling with their mental illness."

61 *See* Rizer & Mooney, *supra* note 2, at 121.

62 Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 1 (2017), https://www.yalelawjournal.org/article/how-qualified-immunity-fails.

63 *Id.* at 2.

64 Tina Moore et al., *New database allows New Yorkers to view lawsuits filed against NYPD*, N.Y. Post (Mar. 7, 2019), https://nypost.com/2019/03/07/new-database-allows-new-yorkers-to-view-lawsuits-filed-against-nypd/.

65 *See* CapStat, *What is this data?*, https://www.capstat.nyc/about/what/.

66 *See* CapStat, *Lawsuits Against New York City Police Officers*, https://www.capstat.nyc/lawsuits/?page=80&causes_of_action__value=&charge_group__value=&penal_charges__value=&charge_outcomes__value=&stop_location__value=&county__value=&plaintiff_race__value=&plaintiff_gender__value=&attorney_fees=&outcome=&settlement_amount=&tags__value=&incident_date=&force_details__value=&sort=-settlement_amount (showing 9 verdicts for the defense, 18 grants of summary judgement to the defense, 31 dismissals with prejudice, and 16 dismissals without prejudice).

67 *Id.*

circumstances," municipal liability could attach under § 1983 when a police department failed to properly train its employees.[68] This particular example is worth noting because Rizer and Mooney note in their wonderful case study of how departmental policies evolved alongside the expansion and professionalization of policing in Miami-Dade that "police use-of-force policy in the 1980s remained largely similar [particularly in its simplicity] to that of the 1960s," but by the mid-1990s, "the Miami-Dade Police Department manual dedicated ten pages to an in-depth articulation of the policy, rules, and standard operating procedures around use-of-force."[69] Given the timing of that change in relation to the Court's decision in *City of Canton*, it's possible, and perhaps even probable, that the Court's decision shaped the improvement of previously inadequate policy surrounding the use of deadly force.[70] The Court's police training jurisprudence also led the National Institute of Justice, in May of 1990, to urge police departments to develop more robust pursuit policies, specifically citing *City of Canton*.[71]

V. Conclusion

The debate about the proper scope of police power and whether the hundreds of thousands of law enforcement officers serving American communities operate within that scope is important and should be ongoing. Police in the United States wield an enormous amount of power, which, as the old adage goes, comes with a great many responsibilities. Those of us operating in the public policy space can play an integral role in helping to ensure that those responsibilities are carried out, and that the ideals they embody are lived up to. Through their work, Rizer and Mooney admirably pursue those noble goals. Nevertheless, their article suffers from one key flaw in that both its diagnosis of a police violence problem, and its prescriptions to address that problem go beyond what the available data support.

Viewed in their proper context, the data on police use of force are incongruous with the characterization of police as having gone off the proverbial rails in the violence department. To the contrary, those data reveal a great deal of both professionalism and restraint. Moreover, there is essentially no empirical support for the asserted connection between police militarization (attitudinal or otherwise) and use of force. There may be some anecdotal evidence for the rise of a more militarized police subculture since the 1970s; but that rise corresponds with a sharp *decrease* in overall police use of force. And the best empirical assessments show that the acquisition of military equipment has *not* made police more likely to abuse those with whom they interact.

Though there may not be enough police violence to support the existence of an institutional problem, there is always room for improvement through training. Police departments and professional associations should continue to identify and develop training programs that will improve both enforcement outcomes *and* community relations. However, there is little evidence that expanding de-escalation training can produce meaningful, if any, reductions in uses of force (which can fray police-community relations). This does not mean police departments should necessarily abandon such training initiatives; but it should temper our expectations of how big an impact such programs can have. The same goes for limiting or eliminating qualified immunity for police officers—the benefits of which seem overstated by critics in light of how rarely it functions as a bar to recovery.

All that said, Rizer and Mooney do identify a real problem in the deterioration of police-community relations and the legitimacy of police in the eyes of the public. Furthermore, they are correct to connect that problem to controversial uses of force by police. Reducing unnecessary and excessive uses of force—which we've seen throughout the U.S. for decades—is undoubtedly part of the solution. But because the level of unjustifiable police use of force has been so overstated, even meaningful progress on that front is bound to underwhelm. Perhaps one solution to *that* problem is to reorient the public debate about policing around a more realistic, properly contextualized assessment of the available data.

68 489 U.S. 378 (1989).

69 Rizer & Mooney, *supra* note 2, at 121.

70 *See id.* at 489 (stating that "it may happen that, in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need," explaining in footnote 10: "For example, city policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to accomplish this task. Thus, *the need to train officers in the constitutional limitations on the use of deadly force*, see *Tennessee v. Garner*, 471 U. S. 1 (1985), *can be said to be 'so obvious' that failure to do so could properly be characterized as 'deliberate indifference'* to constitutional rights.")(emphases added).

71 *See* Hugh Nugent et al., *Restrictive Policies for High-Speed Police Pursuits*, Nat'l Inst. of Just. at iv (May 1990), https://www.ncjrs.gov/pdffiles1/Digitization/122025NCJRS.pdf.

APPENDIX A

Jurisdiction	Fatal Shootings	Nonfatal Shootings	Total Shootings
Albuquerque	35	32	67
Atlanta	10	33	43
Austin	27	19	46
Baltimore	31	56	87
Baltimore County	14	21	35
Boston	10	4	14
Charlotte-Mecklenburg	15	32	47
Chicago	94	465	559
Cincinnati	15	19	34
Cleveland	15	50	65
Columbus	44	88	132
Dallas	43	78	121
Dekalb County	18	49	67
Denver	25	40	65
Detroit	NR	NR	NR
El Paso	11	10	21
Fairfax County	6	8	14
Fort Worth	21	25	46
Honolulu	9	15	24
Jacksonville	33	33	66
Kansas City	29	55	84
Las Vegas	46	70	116
Los Angeles	136	180	316
Louisville	8	19	27
Memphis	26	50	76
Miami-Dade	43	59	102
Miami	14	29	43
Milwaukee	14	35	49
Nashville	11	28	39
New Orleans	13	49	62
New York	69	203	272
Newark	19	56	75
Philadelphia	60	232	292
Phoenix	81	75	156
Portland	16	14	30
Prince George's County	17	45	62
San Antonio	41	51	92
San Diego	25	28	53
San Francisco	22	36	58
San Jose	16	27	43
Seattle	17	19	36
St. Louis	20	123	143
Tampa	7	29	36
Tucson	30	20	50
Washington, D.C.	28	43	71
TOTALS:	1,284 (**32.6% of GRAND TOTAL**)	2,652 (**67.4% of GRAND TOTAL**)	GRAND TOTAL: 3,936

SOURCE: Author's count, based on data contained in VICE News database on police shootings using data provided by 50 largest police departments (available at: https://news.vice.com/en_us/article/a3jjpa/nonfatal-police-shootings-data).

Ensuring Due Process at the Surface Transportation Board

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Other Views:

• Jerry Ellig, *STB's Market Dominance and Final Offer Rate Review*, GW Regulatory Studies Center (Nov. 6, 2019), https://regulatorystudies.columbian.gwu.edu/stbs-market-dominance-and-final-offer-rate-review (public interest comment on STB's proposed rules).

• Randy Gordon, *STB launches rulemakings to reform rail rate challenge process*, National Grain & Feed Association (Sept. 13, 2019), https://www.ngfa.org/newsletter/stb-launches-rulemakings-to-reform-rail-rate-challenge-process/ (newsletter from National Grain and Feed Association announcing new STB *NPRM*).

• Rate Reform Task Force, *Report to the Surface Transportation Board* (Apr. 25, 2019), https://prod.stb.gov/wp-content/uploads/Rate-Reform-Task-Force-Report-April-2019.pdf (report recommending changes to STB regulations to increase shippers' bargaining power relative to railroads without jeopardizing railroad revenue adequacy).

Starting at the turn of the last century, the United States began to experiment with the concept of "public utility" regulation. The bargain went something like this: in exchange for a government-sanctioned monopoly, the "public utility" would have to provide service at rates set by the government on a non-discriminatory basis. Over the years, enlightened minds realized that even a little competition better serves consumers than does bureaucracy. An era of deregulatory activity ensued. Industries once thought inapt for competition (e.g., telecommunications and airlines) now enjoy significant rivalry. Prices were surrendered to the market and quality improved.[1]

Yet despite this deregulatory progress, there remain a few pockets of American industry where traditional public utility price regulation is still required by federal statute. Given the resources required to hold a formal rate case, several regulatory agencies have sought ways to streamline the process, both for the regulated and the regulator alike. Although such streamlining efforts are laudable in concept, overzealous efforts threaten the constitutional due process rights guaranteed to regulated firms under the Fifth Amendment in the name of regulatory reform.[2] And when the government affirmatively curtails due process, we need to sound (and heed) the alarm bells.[3]

Take, for instance, the Surface Transportation Board's ("STB") recent *Notice of Proposed Rulemaking* to streamline the process used to formulate price regulation of freight rail carriers.[4] Despite good intentions, the STB's proposed rules raise a host of troubling due process concerns. To understand why, this article first presents a brief overview of basic ratemaking principles. Next, it looks specifically at an assortment of provisions contained in the STB's *NPRM* and highlights how such proposed rules violate these basic ratemaking principles. Conclusions and policy recommendations are at the end.

1 *See, e.g.*, Orloff v. FCC, 352 F.3d 415, 420 (D.C. Cir. 2003), *cert. denied,* 542 U.S. 937 (2004) (Once a service has been de-tariffed, "[r]ates are determined by the market, not the [government], as are the level of profits.").

2 According to the Fifth Amendment to the U.S. Constitution, "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

3 *C.f.,* Association of American Railroads v. United States Department of Transportation, 821 F.3d 19 (D.C. Cir. 2016).

4 *Expanding Access to Rate Relief: Final Offer Rate Review,* Notice of Proposed Rulemaking, Docket No. EP 755, Docket No. EP 665 (Sub-No. 2), Surface Transportation Board (Decided: September 11, 2019), *available at* https://www.stb.gov/decisions/ReadingRoom.nsf/UNID/1D5C55A4466E4E4785258473004DC82D/$file/47104.pdf, 84 Fed. Reg. 48872 (published September 17, 2019).

I. Basic Principles of Ratemaking

Courts have long recognized that ratemaking is "far from an exact science."[5] Still, if the government wants to dictate the rates, terms and conditions under which a private firm may provide service, then there are some basic principles which it must observe.

The first principle is that if the government wants to dictate how much a firm can charge, then the government must not run afoul of the Takings Clause of in the Fifth Amendment.[6] In particular, the government may not set a rate so low as to effect a *confiscatory* (i.e., below-cost) rate.[7] As the Supreme Court held in its seminal *Permian Area Rate Cases* ruling, the goal of ratemaking is to arrive at a rate which "may reasonably be expected to maintain financial integrity, attract necessary capital, and fairly compensate investors for the risks they have assumed, and yet provide appropriate protection to the relevant public interest, both existing and foreseeable."[8] In other words, a regulatory agency must set a rate that exceeds cost, but ideally not by too much.

The second (and related) principle is that in setting a rate, the government must also afford the regulated firm the procedural due process protections guaranteed by the Fifth Amendment. For instance, prior to commencing any adjudication, the government must articulate the cost methodology it intends to use to set the rate. While the government has great flexibility to choose a methodology (e.g., historical cost, forward-looking cost, marginal cost, average cost, Total Element Long Run Incremental Cost), due process requires the government to lay out the rules of the road and not to move the goalposts mid-game.[9] Similarly, the government must provide the firms it regulates an opportunity for "the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit."[10] Finally, the government has a duty to be analytically rigorous; courts have long held that an administrative agency must show its "whys and wherefores" to avoid a finding that its actions were arbitrary and capricious.[11]

What does this all mean in layman's terms? While regulatory agencies have great latitude in the rate-setting process, they cannot simply pick a rate out of thin air. Regulatory agencies must demonstrate that any rate imposed has some relationship to cost and that the regulated entity's due process rights were respected as this rate was established. A desire to "streamline" the ratemaking process does not give the regulatory agency a green light to take shortcuts with the Constitution.[12]

II. A Case Study: The STB's "Final Offer Rate Review" NPRM

There is a long history of railroad regulation in the United States, including a brief period of nationalization.[13] Regulation nearly destroyed the industry, forcing Congress in 1980 to pass the Staggers Act to regulate the regulator.[14] Still, the ratemaking process for railroads remained arcane. Starting in the mid-1990s, Congress directed the STB to "establish a simplified and expedited method for determining the reasonableness of challenged rail rates in those cases in which a full stand-alone cost [(SAC)] presentation is too costly, given the value of the case."[15] The STB adopted what it thought was a simplified methodology—the *Three-Benchmark Test*—to determine the reasonableness of a challenged rate using three benchmark figures.[16]

Despite the effort, a decade passed without any complainant bringing a case under that methodology.[17] In 2007, the STB tacked on another simplified methodology—the *Simplified Stand-Alone Cost* ("Simplified-SAC") test. This method sought to determine whether a captive shipper cross-subsidizes other parts of the railroad's network. Then, in 2013, the STB increased the relief available under the Three-Benchmark Test methodology and removed the relief limit on the Simplified-SAC methodology,

5 *See, e.g.,* Federal Power Commission v. Conway Corp., 426 U.S. 271, 278 (1976*);* WorldCom, Inc. v. FCC, 238 F.3d 449 (D.C. Cir. 2001); Southwest Bell Telephone Co. v. FCC, 168 F.3d 1344, 1352 (D.C. Cir. 1999); Time Warner Entm't Co. v. FCC, 56 F.3d 151, 163 (D.C. Cir. 1995); United States v. FCC, 707 F.2d 610, 618 (D.C. Cir. 1983).

6 *Supra* note 2.

7 *See*, *e.g.*, Farmers Union Cent. Exch. v. FERC, 734 F.2d 1486, 1502-03 (D.C. Cir. 1984), *cert denied sub nom.*, 469 U.S. 1034 (1984).

8 Permian Basin Area Rate Cases, 390 U.S. 747, 792 (1968).

9 *See generally* AT&T v. Iowa Utilities Bd., 525 U.S. 366 (1999); Verizon Comm'ns Inc. v. FCC, 535 U.S. 467 (2002) (finding FCC had provided sufficient detail in establishing TELRIC as suitable ratemaking methodology for unbundled network elements); FCC v. Fox Television Stations, Inc., 567 U.S. 239, 253 (2012) (A regulation must inform "regulated parties what is required of them so they may act accordingly.").

10 *See, e.g.,* Administrative Procedure Act, 5 U.S.C. § 554(c).

11 *See, e.g.,* CSX Transp., Inc. v. STB, 584 F.3d 1076 (D.C. Cir. 2009) (vacating a portion of a STB rule to allow the Board to more fully explain its reasoning); American Municipal Power-Ohio, Inc., v. FERC, 863 F.2d 70, 73 (D.C. Cir. 1988) (an "agency must make clear the 'basic data and the whys and wherefores' of its conclusions.'").

12 *See* L.J. Spiwak, USTelecom *and its Aftermath,* 71 Fed. Comm. L.J. 39 (2019).

13 *U.S. government takes over control of nation's railroads*, This Day in History, History.com, https://www.history.com/this-day-in-history/u-s-government-takes-over-control-of-nations-railroads.

14 *See, e.g.,* D.W. Caves, L.R. Christensen, & J.A. Swanson, *The High Cost of Regulating U.S. Railroads*, 5 Regulation (1981), *available at* https://www.lrca.com/wp-content/uploads/2014/10/Caves_Christensen_Swanson_High_Cost_of_Regulating_US_Railroads.pdf; B.K. Eakin, A.T. Bozzo, M.E. Meitzen, & P.E. Schoech, *Railroad Performance Under the Staggers Act*, Regulation (Winter 2010-2011), *available at* https://www.lrca.com/wp-content/uploads/2014/10/Eakin_Bozzo_Meitzen_Schoech_Railroad_Performance_Under_the_Staggers_Act.pdf; R.B. Ekelund Jr. & R.F. Hebert, *Railroad Reregulation: Is the C.U.R.E Cure Worse Than the Disease?*, Cato Institute Policy Analysis No. 98 (January 20, 1988).

15 ICC Termination Act of 1995 (ICCTA), Pub. L. No. 104-88, 109 Stat. 803, 810. *See also* 49 U.S.C. § 10101(15) (it is the policy of the United States Government "to provide for the expeditious handling and resolution of all proceedings required or permitted to be brought under this part.").

16 Rate Guidelines—Non-Coal Proceedings, 1 S.T.B. 1004 (1996), *pet. to reopen denied,* 2 S.T.B. 619 (1997), *appeal dismissed sub nom.* Ass'n of American Railroads v. STB*,* 146 F.3d 942 (D.C. Cir. 1998).

17 *NPRM, supra* note 4, at 2-3 (citations omitted).

among other things.[18] Once again, notwithstanding the effort, only a few cases were ever brought before the STB.[19]

Apparently, the STB wants to regulate rates. Dissatisfied with the low turnout of rate challenges against freight rail carriers, the STB decided to find out why. After review, shippers informed the STB that there were two root causes: (1) the litigation costs required to bring a case under the Board's existing rate reasonableness methodologies exceeded the value of the case (especially for smaller cases); and (2) the Board's current options did not permit an expeditious resolution.[20]

To encourage more rate challenges, in September 2019 the STB released an *NPRM* to institute a new process called *Final Offer Rate Review*. Loosely basing this process on the arbitration regime used in Canada, the STB is proposing a form of "baseball-style" arbitration upon the freight rail industry. Put simply, this scheme requires the complainant and the defense to submit a proposed rate and the STB to choose one without modification and without an administrative hearing. The STB proposed this novel regulatory approach despite recognizing that the agency "may not require arbitration of rate disputes under current law."[21] To get around the statute, the STB argued that its proposal is technically not a formal arbitration because "*the Board* would make the determination of rate reasonableness" rather than a third-party arbiter.[22]

The proposed *Final Offer Rate Review* paradigm is comprised of four steps. First, as required by statute, the STB must determine whether the defendant rail carrier has market dominance over the transportation to which the rate applies.[23] As is standard, absent evidence of market dominance, there is no justification for government intervention into the pricing decisions of firms.[24]

Second, following discovery, parties would simultaneously submit their Final Offers, including an analysis addressing the reasonableness of the challenged rate and support for the rate in the party's offer. Each party's Final Offer is supposed to reflect what it considers to be the maximum reasonable rate. Each party submitting an offer has the liberty to choose how to present and support its offer, including the methodology it uses to determine the rate.[25]

Third, after receipt of the Final Offers, the STB would then choose between the competing offers using a variety of factors, including "appropriate economic principles." As with the STB's other rate reasonableness procedures, the agency stated that would "consider" the defendant railroad's need for differential pricing to permit it to collect adequate revenues as mandated by statute.[26] Still, according the *NPRM*, the STB's choice between competing filings "would be an 'either/or' selection, with no modifications by the Board."[27] In the STB's view, its proposed "approach would work as intended only if the parties know that the agency would not attempt to find a compromise position. The incentives created by a final offer selection procedure could not be preserved if the Board retained the discretion to formulate its own 'offer.'"[28]

Fourth and finally, if the STB finds that the defendant carrier has market dominance, finds the challenged rate unreasonable, and chooses the complainant's offer (or the defendant's offer, if it is below the challenged rate), then the *NPRM* provides that the STB could award relief based on the difference between the challenged rate and the rate in that offer.[29]

III. Due Process Concerns Raised by the STB's *NPRM*

Given the basic principles of ratemaking described above, the due process concerns raised by the STB's *Final Offer Rate Review* NPRM are readily apparent. For illustrative purposes, a few egregious examples are highlighted below.

Let's start with process. Under the Administrative Procedure Act ("APA"), a complainant bears the burden of proof.[30] Yet by requiring a freight rail operator to present its own best Final Offer, the STB is inappropriately shifting the burden away from the complainant and onto the carrier. The STB cannot set this important due process requirement aside by reducing the ratemaking process to a binary choice between two independently produced Final Offers.

Also, federal law makes clear that the STB may prescribe a maximum rate only after a "full hearing."[31] Given the nature of baseball-style arbitration, the STB's proposed *Final Offer* rules thus raises an obvious question: how can the STB have a "full hearing" when it is faced with only a binary choice between two independently produced "Final Offers"? The short answer: it can't.

This requirement for a "full hearing" is more than just a procedural nuisance to be side-stepped. The scheme proposed by the STB raises the real risk that it could accept a Final Offer which produces a confiscatory rate in violation of the Fifth Amendment. Plainly, a shipper has the incentive to propose the lowest rate possible and may choose its methodology accordingly. So, let's assume arguendo that a shipper is particularly zealous and proposes a rate which borders on (if not constitutes) a price that is confiscatory. Under the plain terms of the STB's proposed

18 *See* Rate Regulation Reforms, EP 715 (STB served July 18, 2013), remanded in part sub nom. CSX Transp., Inc. v. STB, 754 F.3d 1056 (D.C. Cir. 2014).

19 *NPRM, supra* note 4, at 3.

20 *Id.* As to this later point—and with no small bit of lost irony—the STB argued that speed is important because market-based negotiated contract rates may not be challenged before the STB and, as such, "some complainants shift from contract rates to tariff rates before bringing a rate case" even though "tariff rates may be higher than prior contract rates." *Id.* at 3-4.

21 *Id.* at 5.

22 *Id.* (emphasis in original).

23 *See* 49 U.S.C. § 10707(c).

24 *See generally* A.E. Kahn, The Economics of Regulation (1970); W.K. Viscusi, J.M. Vernon, & J.E. Harrington, Jr., Economics of Regulation and Antitrust (1995).

25 *NPRM, supra* note 4, at 10.

26 *Id.* at 11.

27 *Id.* at 13.

28 *Id.* (citations omitted).

29 *Id.* at 14.

30 *Id.* at 12 (citing 5 U.S.C. § 556(d)).

31 *See* 49 U.S.C. § 10704(a)(a).

Final Offer mechanism, the lack of a "full hearing" means that a freight rail operator has no ability to challenge the shipper's proposed rate directly; its recourse is limited only to presenting its own "Final Offer" (which the STB is free to accept or reject) and then challenging the STB's decision in court.

Which brings us to the issue of ratemaking methodology (or lack thereof). Under the explicit language of the *NPRM*, the STB permits the "parties to submit final offers using their preferred methodologies, including revised versions of the Board's existing rate review methodologies or new methodologies altogether."[32] But as noted above, due process requires an administrative agency to articulate the methodology it intends to use to evaluate the reasonableness of a rate *prior* to any adjudication. The STB apparently believes that it is not bound by this fundamental requirement. The STB's refusal to commit to a single ratemaking methodology prior to adjudicating a dispute is therefore a prima facie case of arbitrary and capricious decision-making.[33]

The STB also apparently believes that skirting due process by permitting parties to choose their own (and possibly widely inconsistent) ratemaking methodologies will "allow for innovation with respect to rate review methodologies" and create "precedent through an adversarial process."[34] What adversarial process? The STB is choosing between two offers. And by the *NPRM's* own terms, each individual arbitration stands on the two respective offers provided based on the particular facts—and individual choice of ratemaking methodology—of each case. Thus, the STB's proposal cannot develop precedent; it inherently evades precedent.[35]

Finally, the STB pays only lip service to a key element of modern railroad price regulation—the concept of "revenue adequacy."[36] After regulating the rail industry nearly to death, Congress began to formulate a statutory response to the financial woes of the industry with the Railroad Revitalization and Regulatory Reform Act of 1976. This legislative effort culminated in the Staggers Act, the purpose of which was to "provide for the restoration, maintenance, and improvement of the physical facilities and financial stability of the rail system in the United States."[37] To curtail regulatory excess, the Staggers Act formally established that regulatory activity must "allow[] rail carriers to earn adequate revenues" as a national policy.[38]

The required shackles on the regulator dictated by the Staggers Act proved somewhat effective. Each year, the STB is required by statute to "determine which rail carriers are earning adequate revenues," a decision based on a comparison of the return on investments to an estimate of the cost of capital.[39] In recent years, nearly four decades since the Staggers Act was enacted, some firms in the rail industry still struggle to earn a competitive return on their investments. Only since 2012 has the industry *average* return on investment consistently met the STB's estimate of the cost of capital. But some rail companies do not meet revenue adequacy—a deficit verified annually by the STB itself—and the situation appears tenuous for those railroads that do.[40]

A casual regard for revenue adequacy and a return to aggressive rate regulation poses risks. Empirical research demonstrates that there are significant, causal relationships between the financial health of the rail industry and its investment behavior.[41] The industry has recovered to some semblance of health in the post-Staggers world. An attempt to minimize the statutory policy to respect industry health by imposing a form of baseball-style arbitration represents a serious dereliction of duty at the STB.

IV. Conclusion

When Congress dictates that an administrative agency should set the rates, terms, and conditions of service of a private firm, the ratemaking provisions contained in an agency's enabling statute are not solely designed to govern the conduct of the regulated firm (the agency's rules serve that function), but also to govern the conduct of the *regulator*.[42] Unfortunately, the STB has a long history of not fully understanding this basic concept,[43] and the proposed *Final Offer Rate Review* NPRM suggests little has changed. Rather than prioritize the financial health of the industry, which is uncertain by the STB's own analysis, the agency

32 *NPRM, supra* note 4, at 11.

33 *Fox Television,* 567 U.S. at 253 (A regulation must be capable of sufficiently predictable application "so that those enforcing the law do not act in an arbitrary or discriminatory way."); *cf.*, Executive Order on Regulatory Relief to Support Economic Recovery (May 19, 2020) at Section 6(i), *available at* https://www.whitehouse.gov/presidential-actions/executive-order-regulatory-relief-support-economic-recovery ("Administrative enforcement should be free of unfair surprise.").

34 *NPRM, supra* note 4, at 11.

35 *C.f.,* T.R. Beard, G.S. Ford, L.J. Spiwak, & M.L. Stern, *Regulating, Joint Bargaining, and the Demise of Precedent*, Managerial and Decision Economics (27 June 2018); *see also* Direct Marketing Association v. Brohl, 814 F.3d 1129 (10th Cir.), *cert. denied,* 137 S. Ct. 591 (2016) (Gorsuch, J.) (Agencies must "attach power to precedent" so that due process does not "surrender[] similarly situated persons to widely different fates at the hands of unrestrained" bureaucrats.).

36 *NPRM, supra* note 4, at 10-11 ("the Board would take into account the policy "to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail,"' the policy 'to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital," and the policy 'to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Board.'").

37 Section 3, Staggers Rail Act of 1980, Pub. L. 96-448 (October 14, 1980), 49 U.S.C. § 10101a (note).

38 49 U.S.C. § 10101a(3).

39 *See* 49 U.S.C. § 10704(a)(3).

40 The annual reports are available at https://www.stb.gov/decisions/readingroom.nsf/WebServiceDate?openform.

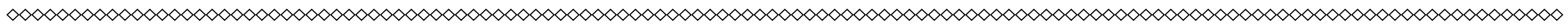
41 G.S. Ford, *Infrastructure Investment in the Railroad Industry: An Econometric Analysis,* Phoenix Center Policy Perspective No. 19-07 (December 9, 2019), *available at* https://www.phoenix-center.org/perspectives/Perspective19-07Final.pdf.

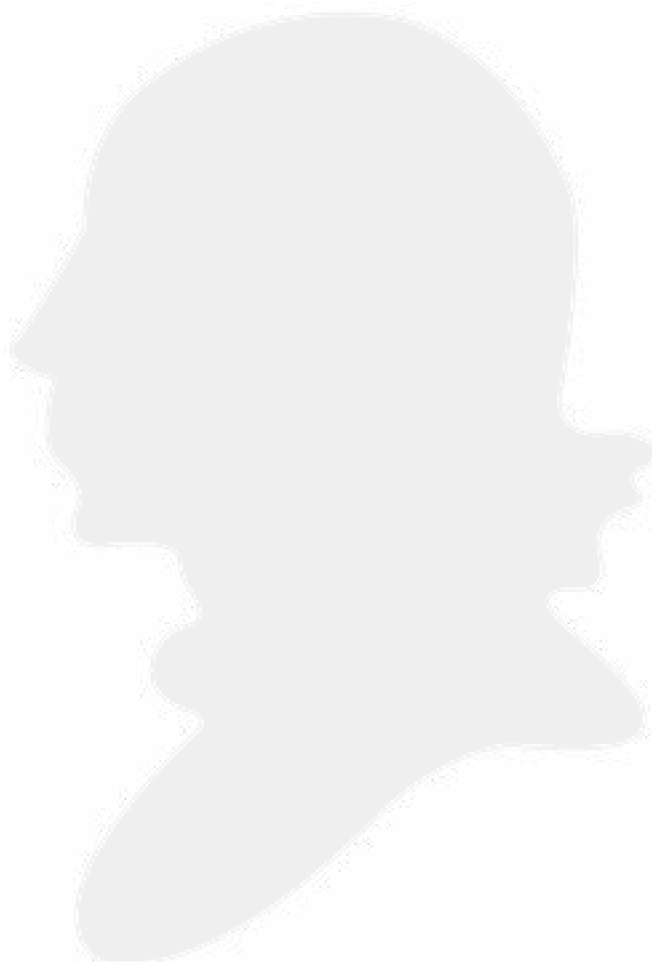
42 *See* Spiwak, USTelecom *and its Aftermath*, *supra* note 12.

43 *Supra* note 14.

devotes its attention to ways in which to return to an aggressive regulatory agenda—history be damned.

Regulatory "streamlining" may have benefits. Improving administrative efficiency does not, however, permit an agency to render moot the due process protections guaranteed to the firms it regulates. Before the STB enacts its *Final Offer Rate Review* paradigm into law, a more careful legal analysis of its efforts is required. Contrary to the STB's current thinking, the Constitution may not be swept under the rug.





Seeking Success: Reforming America's Community Supervision System

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Criminal Law & Procedure Practice Group

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Other Views:

• John F. Pfaff, *The War on Drugs and Prison Growth: Limited Importance, and Limited Legislative Options*, 52 Harv. J. Legis. 173 (2015), *available at* https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1650&context=faculty_scholarship.

• Janette Sheil, *Federal Supervised Release for Drug Use: The Rest of the Story* (Dec. 2018), https://www.uscourts.gov/sites/default/files/83_1_3_0.pdf.

• Leonard Sipes, *Is Probation Set Up To Fail?*, Law Enforcement Today (Feb. 16, 2018), https://www.lawenforcementtoday.com/probation-set-fail/.

Criminal justice reform is having a moment. The protests after the death of George Floyd, in police custody in Minneapolis, focused mostly on aggressive policing but also highlighted how policing tactics contribute to mass incarceration. The First Step Act, signed into law in December 2018, revised mandatory minimum sentences, provided avenues for early release for some drug offenders, and required the federal Bureau of Prisons to undertake reforms designed to decrease recidivism. In states—which incarcerate the vast majority of America's 2.3 million prisoners—sentencing and prison reform efforts have moved forward, albeit in fits and starts. In general, there is a growing consensus that America incarcerates too many people for too long, which has resulted in growing efforts to reform sentencing and reduce prison terms.

Many legislators looking to reduce the ranks of the incarcerated turn their attention to community supervision, where offenders serve all or part of their sentence in the community, subject to monitoring and other conditions. Though the number of supervisees has fallen in recent years, this population still dwarfs the number of persons in prisons and jails. Yet community supervision has attracted relatively little attention from criminal justice reformers and policy makers, compared to sentencing and policing reforms.

As former federal prosecutors, we believe that the systems of community supervision in the United States need reform just as much as other aspects of the criminal justice system. In fact, considering the massive number of people involved in these systems, the need for reform may be even greater. The goal of community supervision is to reduce recidivism and reintegrate those who have been convicted back into society, helping them to break cycles of addiction, access employment, and develop pro-social habits and mindsets. Yet community supervision as currently practiced in the United States fails quite spectacularly at these goals. Originally conceived as a flexible and low-cost alternative to incarceration, community supervision has become an extension of the carceral state, with far too many low-risk offenders subjected to overly harsh conditions of supervision for far longer than is necessary. As a result, too many supervisees end up back in jails and prisons for violations of supervision that present little or no risk to public safety. Meanwhile, supervision officers have less time and capacity to deal with higher-risk supervisees, who need more intensive monitoring and attention. Recidivism among supervisees is high, and the costs of these failures continues to climb, both directly (in the costs of re-incarceration) and indirectly (in terms of wasted human potential). The results of this broken system—re-incarceration and increased crime rates—end up back on the plates of prosecutors, who nonetheless have shown little appetite for reforming supervision. We think they should be more open to smart, evidence-based reforms that can reduce recidivism and make our supervision system work more efficiently and effectively.

I. The Systems

"Community supervision" is a generic term for probation and parole. But these are different systems, and it is critical to note their differences.

Probation is a form of community supervision that offenders often serve in lieu of or in addition to a prison or jail sentence, often for low-level offenses. At the court's discretion, and on the basis of a showing that incarceration is not warranted, probationers are permitted to serve out some or all of their sentences in the community. They are supervised and monitored by probation officers, who ensure their compliance with conditions of supervision.

Most states impose "standard" conditions on probationers that apply across the board—usually including attending school regularly or maintaining employment, avoiding criminal activity or association with felons, testing for drugs and alcohol, checking in periodically with the probation office, and remaining in the state or district. Other "special" conditions, which are imposed by the court in particular cases, generally relate to the offense and are meant to preserve public safety. Common special conditions include drug, alcohol, or psychological treatment; no-contact orders with victims; restrictions on internet or electronic media use; prohibitions on certain forms of work or employment; home arrest; or electronic monitoring. If a person violates a standard or special condition, a court may revoke that person's probation and impose a community sanction, jail time, or even a term of incarceration.

Parole is granted after a defendant has already served part of their sentence and the delegated body—usually a parole board—agrees that rehabilitative and public safety factors support early release into the community. Like those on probation, individuals on parole will likely meet regularly with supervision officers and be subject to standard and special conditions. Parole usually lasts for the remainder of an offender's unserved sentence. In recent decades, the federal prison system and some states—notably Florida—have abolished parole in favor of early release after a fixed percentage of a sentence (usually 85 percent) has been served with no infractions.

II. The Failures of Community Supervision

The Supreme Court has said the purpose of community supervision is to "help individuals reintegrate into society as constructive individuals as soon as they are able."[1] But our current system, which supervises too many low-risk people too strictly and for too long, is at cross-purposes with that goal. Community supervision has grown dramatically in recent decades as part of a deliberate state strategy to reduce prison crowding and save money. But there is little evidence that supervision as currently practiced actually works to improve criminal justice outcomes by reducing recidivism and promoting reintegration into society of those who have been convicted of crimes. And increasingly, the failures of the supervision system are putting financial pressure on states as supervisees cycle back into prison for "technical" violations that have little impact on public safety.

Each year, millions of Americans are put on community supervision as probationers or parolees. Currently, about 4.5 million adults—2 percent of the adult population—are under supervision.[2] But the failure rate of this system is astounding. About a third of supervisees end up back in prison at some point.[3] Nationwide, about 45 percent of prison admissions are the result of supervision failures; in 20 states, more than half are.[4] These supervision failures are costing taxpayers more than $9 billion annually.[5]

What's more, well more than half of these prison admissions from supervision are for "technical" violations of supervision conditions—conduct that does not constitute a new criminal offense—such as failing to report in, adhere to a curfew, or remain in the jurisdiction.[6] The cost of sending supervisees back to prison for missing an appointment, staying out past a curfew, failing a drug test, or committing another technical violation adds up to more than $6.5 billion annually.[7] That's about 5 percent of the amount that all states spend in total on law enforcement—all salaries, benefits, equipment, and capital outlays combined.[8]

A leading meta-analysis found that, as currently practiced, supervision systems have essentially no impact on reducing recidivism.[9] And we have no data at all on whether supervision helps people reintegrate into society, such as by helping them to access substance abuse treatment or find meaningful long-term employment. As currently practiced, supervision is largely a box-checking exercise where one box—did the supervisee go back to prison?—is left unchecked one third of the time or more.

Why is community supervision as currently practiced so often a failure? The surprising answer is that supervision is at once both over- and under-inclusive, catching too many low-risk people in its net for too long under too-harsh conditions, while failing to engage in the kind of intensive supervision that higher-risk supervisees need to become successful. In almost all jurisdictions, the current supervision model features long supervision sentences, long lists of standard conditions, and frequent testing and

1 Morrissey v. Brewer, 408 U.S. 471 (1972).

2 Danielle Kaeble, *Probation and Parole in the United States 2016*, Bureau of Justice Statistics, U.S. Dep't of Justice (April 2018), https://www.bjs.gov/content/pub/pdf/ppus16.pdf. The number of supervisees reached its peak in 2007 at about 5.1 million.

3 Pew Charitable Trusts, *Probation and Parole Systems Marked by High Stakes, Missed Opportunity* (Sept. 2018), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/09/probation-and-parole-systems-marked-by-high-stakes-missed-opportunities.

4 *Confined and Costly: How Supervision Violations Are Filling Prisons and Burdening Budgets*, Justice Ctr., Council of State Gov'ts (Oct. 2019), https://csgjusticecenter.org/publications/confined-costly/.

5 *Id.*

6 *Id.*

7 *Id.* This figure does not include the likely substantial costs of *jailing* people for supervision violations, as opposed to sending them to prison. *Id.*

8 *Police and Corrections Expenditures*, Urban Inst. (2019), https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/police-and-corrections-expenditures.

9 James Bonta, Tanya Rugge, & Guy Bourgon, *Exploring the Black Box of Community Supervision*, 47 J. of Offender Rehab. 248 (2010).

reporting for almost all supervisees. Low-risk supervisees are over-monitored and subject to overly harsh conditions that impede their reintegration back into society. At the same time, the massive number of cases means that parole and probation officers are spread too thin to be effective in supervising higher-risk individuals. Reforming the system to divert low-level offenders and move people out from under supervision more quickly would free time for officials to focus on high-risk supervisees and repeat violators, which would improve public safety.

The inefficiencies in our current supervision systems come in three flavors. First, the current model of supervision often treats supervisees as though they are all alike or divides them into overly broad categories. Many jurisdictions have imposed a blanket "tough on crime" approach, in the mistaken belief that stringent supervision conditions and intensive supervision for compliance will yield better outcomes. In fact, rather than preventing criminal behavior, research strongly suggests that overly harsh supervision can actually *prompt* it by limiting a person's ability to find housing, obtain employment, and rebuild community connections.[10] The office that administers federal probation programs notes in its program manual that "excessive correctional intervention for low-risk defendants may increase the probability of recidivism by disrupting prosocial activities and exposing defendants to anti-social associates."[11] Meanwhile, reducing the number of probation officer contacts for low-risk offenders has been shown to have no effect at all on recidivism, re-arrest rates, or public safety.[12]

By contrast, we know that repeat offenders and supervisees with lower educational levels, lower levels of familial support, and fewer social ties to the community will fail supervision at much higher rates than people with jobs, education, and deep ties to their community. Intensive supervision of these high-risk persons can reduce recidivism by up to a third.[13] Calibrating supervision to address a supervisee's "criminogenic needs," or the social and lifestyle factors that need to be addressed to reduce the chance of recidivism (such as housing, employment, anti-social attitudes, or addiction or mental health treatment), is a critical task, one that often goes overlooked in the rush to impose blanket supervision conditions.

Second, supervision terms are far too long across the board, which strains resources and unnecessarily sets supervisees up for failure. Probation and parole terms are often five years or longer. In Georgia (which has the highest supervision rate in the country, at 1 in every 18 adults), nearly three-quarters of all felony probationers have sentences that are longer than five years, and 37 percent have sentences that exceed 10 years.[14] Yet the vast majority of supervision failures occur during the supervisee's first or second year, and there is no evidence that extending supervision terms much beyond that period reduces recidivism.[15] In fact, after two years, re-arrest rates plummet.[16] Continued supervision after this period not only has less potential to depress criminality, it deprives people of their full liberty unnecessarily while straining corrections resources—all for no benefit.

Third, the explosive growth of supervision in the United States means that probation and parole officers simply cannot do their jobs effectively. Caseloads regularly reach 100, 200, or even more persons per officer.[17] The American Probation and Parole Association recommends that caseloads per officer not exceed about 20 high-risk, 50 moderate-risk, or 200 low-risk supervisees.[18] But in Georgia, parole and probation officers who manage low-risk offenders have an average caseload of 290 people, while officers monitoring a mix of standard and high-risk cases typically supervise an average of 130 people, nearly double the recommended amount.[19] In Louisiana, officers supervise about 123 cases at a time;[20] in Maryland, that number exceeds 200.[21] What's more, statewide averages can mask vast disparities among local departments. For example, in the populous Delaware County in suburban Philadelphia, caseloads have reached 318 per officer.[22]

The problem of overextended caseloads is more than just a numbers game. Research strongly suggests that "intensive" compliance monitoring that is not accompanied by assistance to help supervisees access education, employment, and treatment is

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10 Francis Cullen & Cheryl Johnson, Rehabilitation and Treatment Programs, in Crime and Public Policy 293–344 (James Q. Wilson & Joan Petersilia eds. 2011).

11 *Overview of Probation and Supervised Release Conditions*, Prob. & Pretrial Servs. Office, Admin. Office of the U.S. Courts (Nov. 2016), https://www.uscourts.gov/sites/default/files/overview_of_probation_and_supervised_release_conditions_0.pdf.

12 Thomas H. Cohen et al., *The Supervision of Low-Risk Federal Offenders: How the Low-Risk Policy Has Changed Federal Supervision Practices Without Compromising Community Safety*, 80 Fed. Prob. 3 (2016).

13 Sarah Kuck Jalbert et al., *Testing Probation Outcomes in an Evidence-Based Practice Setting: Reduced Caseload Size and Intensive Supervision Effectiveness*, 49 J. of Offender Rehab. 233 (2010).

14 Ga. Dep't of Supervision, *2017 Annual Report*, https://dcs.georgia.gov/sites/dcs.georgia.gov/files/related_files/document/2017%20DCS%20Annual%20Report%20-%20Final%20%281%29.pdf.

15 James Austin, *Reducing America's Correctional Populations: A Strategic Plan*, 12 Justice Research Pol'y 9 (2010); *see also* Minn. Sentencing Guidelines, *Probation Revocations* 2 (Nov. 2016) (finding that most probation revocations occur within the first two years); Scott Belshaw, *Are All Probation Revocations Treated Equal? An Examination of Felony Probation Revocations in a Large Texas County*, 7 Int'l J. of Punishment & Sentencing 67 (2011) (noting that in Texas, average time to revocation was 2.5 years into the sentence).

16 Austin, *supra* note 15.

17 Sarah Kuck Jalbert & William Rhodes, *Reduced Caseloads Improve Probation Outcomes*, 35 J. of Crime & Justice 221 (2012).

18 Caseload Standards for Probation and Parole, American Probation and Parole Association (Sept. 2006), https://www.appa-net.org/eweb/docs/APPA/stances/ip_CSPP.pdf.

19 Jalbert & Rhodes, *supra* note 17.

20 *Louisiana's Justice Reinvestment Reforms 2019 Annual Performance Report*, La. Dep't of Corrections (June 2019), http://gov.louisiana.gov/assets/docs/CJR/2019-JRI-Performance-Annual-Report-Final.pdf.

21 *The Release Valve: Parole in Maryland*, Justice Policy Inst. (Feb. 2009), http://www.justicepolicy.org/uploads/justicepolicy/documents/maryland_parole.pdf.

22 *County Adult Probation and Parole Annual Statistical Report 2017*, Pa. Bd. of Probation & Parole (Mar. 2018), https://www.pbpp.pa.gov/Information/Documents/CAPP%20Reports/2017%20County%20Adult%20Probation%20and%20Parole.pdf.

counterproductive, actually driving up re-arrest rates.[23] Reducing the use of supervision for misdemeanors, shortening supervision terms, and discharging those who have demonstrated that they can remain compliant allows officers to focus on problem cases and direct supervisees to services that can help them put their lives in order, which yields dividends in terms of both public safety and improved outcomes.

III. Reforming Supervision

Four broad reforms to supervision systems will reduce recidivism, help to reintegrate offenders, and increase public safety.

A. Adopt Supervision Techniques That Work

Effective community supervision uses techniques that have been shown to work to nudge supervisees toward complying with conditions and avoiding recidivism. Indeed, a federally funded study found that reliance on evidence-based approaches such as risk assessment, specialized case management for different kinds of offenders, and cognitive and behavioral therapy, as well as reduced caseloads "led to significant reductions in the risk of recidivism for medium and high-risk probationers" in two localities.[24]

One area where evidence should guide supervision is in using positive incentives for compliance, such as gradually relaxing supervision conditions or earning credit towards early termination of supervision. Studies show that providing positive incentives—rather than solely threatening punishment—increases the likelihood that community supervision will be successful.[25] A study of intensively supervised persons in Wyoming, almost all of whom committed some kind of technical violation of their probation (but few new offenses), found that individuals were far more likely to successfully complete probation if their supervision featured regular rewards for good behavior—in most cases rewards as simple as verbal praise, though also permission to attend special events or level down the intensity of supervision—in addition to punishments for non-compliant behavior.[26] Incentives are especially important to low-risk supervisees, who identify the opportunity for early termination of their supervision as a major incentive for compliance.[27]

The federal probation system has used another evidence-based technique to shift probation officers away from serving solely as compliance officers and toward applying a case management approach. The case management approach focuses on addressing "criminogenic" factors—such as housing instability, lack of education, negative mental processes, and poor interpersonal relations—that can prompt recidivism. To identify these factors, federal probation officers use a tool called the Post Conviction Risk Assessment to tailor supervision techniques to the specifics of a case and the responsiveness of the person under supervision. Over the past decade, the federal courts have provided probation offices with grant money to use this tool, driving the re-arrest rate among federal probationers down by more than 20 percent.[28]

Indeed, comprehensive risk and needs assessments are foundational to any smart supervision approach. Courts and supervision officers can use these assessments to craft effective packages of supervision conditions tailored to supervisees' risk levels and needs. For example, in Iowa, supervisees are classified by risk levels that are reassessed every six months.[29] These classifications drive the level of contact supervisees have with probation officers, ranging from no contact to contact twice a month.[30] This approach allows supervision officers to protect public safety without imposing overly-onerous conditions on supervisees.

Some states and localities have made great strides in using risk and needs assessment effectively. But even where risk assessment is practiced, supervision officers often fail to bridge the gap between the assessment and case management. One large study that tape-recorded and coded interactions between officers and their charges found that officers spent little time addressing the results of risk and needs assessments and instead focused on enforcing supervision conditions. In many communities, the authors found, "[a]ssessments are completed according to policy but much of the information from the assessment fails to make it into the Intervention Plan and even less is dealt with in the sessions" with supervisees.[31] In many instances, another author found, states and localities that claim to use risk assessments "fail to use them to adjust supervision commensurate with risk," seeing supervisees at the same rate every month and "generally concentrat[ing] on monitoring compliance with conditions of supervision, rather than on targeted, proactive efforts to reduce

23 Steve Aos, Mama Miller, & Elizabeth Drake, *Evidence-Based Adult Corrections Programs: What Works and What Does Not*, Wash. St. Inst. for Public Policy (2006), http://www.wsipp.wa.gov/ReportFile/924/Wsipp_Evidence-Based-Adult-Corrections-Programs-What-Works-and-What-Does-Not_Preliminary-Report.pdf.

24 Sarah Jalbert et al., *A Multi-Site Evaluation of Reduced Probation Caseload Size in an Evidence-Based Practice Setting*, Nat'l Criminal Justice Reference Serv. (2011), https://www.ncjrs.gov/pdffiles1/nij/grants/234596.pdf.

25 Jake Horowitz, *To Safely Cut Incarceration, States Rethink Responses to Supervision Violations*, Pew Charitable Trusts (2019), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2019/07/to-safely-cut-incarceration-states-rethink-responses-to-supervision-violations (see notes 14-20 and accompanying text).

26 Eric Wodahl et al., *Utilizing Behavioral Interventions to Improve Supervision Outcomes in Community-Based Corrections* (2011) (unpublished dissertation, University of Wyoming), https://pdfs.semanticscholar.org/2f7a/e30134d831fd445bf8d6b38313410276a821.pdf.

27 Joan Petersilia, *Employ Behavioral Contracting for "Earned Discharge" Parole*, 6 Criminology & Pub. Pol'y 807 (2007).

28 *Using Evidence-Based Strategies to Protect Communities*, Prob. & Pretrial Servs. Office, Admin. Office of the U.S. Courts (Aug. 2018), https://www.uscourts.gov/news/2018/08/02/using-evidence-based-strategies-protect-communities.

29 Iowa Fifth Judicial District Department of Correctional Services, Contact Standards, http://fifthdcs.com/FifthPolicy/index.cfm?policy=ContactStandards.

30 *Id.*

31 Bonta et al., *supra* note 9.

risk."[32] It also turns out that half of states fail to validate their risk assessment models by comparing the predictions to actual rates of recidivism and supervision failure.[33] Risk assessment that isn't calibrated to real-world outcomes isn't evidence-based.

One benefit of employing evidence-based approaches to supervision is that the savings generated by reducing re-incarceration can be reinvested into hiring officers to reduce caseloads and expanding approaches that prove to be effective, creating a "virtuous cycle" where the best approaches can scale up across jurisdictions. California tried this in 2010 by enacting SB 678. Under that law, counties that reduced probation revocations received 40 to 45 percent of the money saved, which they could reinvest in expanding evidence-based supervision programs. Probation revocations declined by 23 percent within the first year, saving the state $179 million, during a period of time in which state crime rates continued to fall across the board.[34] Likewise, after North Carolina modernized its supervision practices and reduced caseloads, it was able to hire 175 new supervision officers with the money it saved.[35] Instead of serving as a conveyor belt to prison, effective and efficient supervision can free up money to support rehabilitation and crime prevention.

B. Limit Revocations for Technical Violations

As noted above, one out of every two times a person under supervision gets sent back to prison, it's for a technical violation—a failure to comply with supervision conditions that is not itself a new crime. Common technical violations include missing appointments with supervision officers, missing curfew, leaving the state or district, or failing a drug or alcohol test. Many states leave the decision whether to revoke supervision and order a person's arrest for a technical violation to the discretion of supervision officers. In New York, a parole officer can order an arrest on the spot without affording the supervisee the chance to respond to charges.[36] Revocations of this kind cost states more than $6.5 billion per year. And there is little evidence that they reduce recidivism. Randomized studies of intensively supervised parolees, for example, find that jailing supervisees does not increase the likelihood that they will successfully complete supervision or reduce the time until their next violation.[37]

Some scholars and commentators argue that revocations and imprisonment for violating supervision rules are far less common than is supposed and are an important tool: failure to follow the rules speaks to a supervisee's attitude and willingness to conform his behavior to societal expectations.[38] And there is some evidence that revocations, even for technical violations, often occur when a supervisee has violated more than one supervision condition.[39] But the prevalence of what might be called "multi-factor" revocations surely has something to do with the multiplication of standard supervision conditions, which has made it increasingly difficult for even well-intentioned supervisees to comply. Some standard conditions, such as prohibitions on drinking alcohol, are imposed regardless of whether the condition is indicated by the supervisee's crime or history. Others, such as prohibitions on "associating with felons," are worded vaguely enough to bring innocuous or even pro-social behavior within their ambit, such as a son living with a parent who has a criminal record.

A better approach to technical violations would be to develop a graduated system of sanctions that increase in

32 Melissa Alexander & Bradley Whitley, *Driving Evidence-Based Supervision to the Next Level: Utilizing PCRA, "Drivers," and Effective Supervision Techniques*, 78 Fed. Prob. 2 (2014).

33 *Getting it Right: The Importance of Implementing Risk Assessment Successfully*, Council of State Gov'ts (2018), https://csgjusticecenter.org/wp-content/uploads/2019/01/CSG-Justice-Ctr-Risk-Assessment-Infographic-Updated-States.pdf.

34 *The Impact of California's Probation Performance Incentive Funding Program*, Pew Ctr. on the States (Feb. 2012), https://www.pewtrusts.org/en/research-and-analysis/reports/2012/02/22/the-impact-of-californias-probation-performance-incentive-funding-program.

35 David Guice, *Justice Reinvestment Performance Measures*, N.C. Dep't of Public Safety (Mar. 2019), https://www.ncdps.gov/document/justice-reinvestment-performance-measures.

36 Radley Balko, *New York's crushing parole system snags an activist, deacon and mentor*, Wash. Post, May 23, 2019.

37 E.J. Wodahl et al., *Responding to Probation and Parole Violations: Are Jail Sanctions More Effective Than Community-based Graduated Sanctions?*, 43 J. Criminal Justice 242 (2015), *available at* https://daneshyari.com/article/preview/882661.pdf.

38 *See, e.g.*, Leonard Sipes, *Is Probation Set Up To Fail?*, Law Enforcement Today (Feb. 16, 2018), *available at* https://www.lawenforcementtoday.com/probation-set-fail/ (arguing that "many (if not most) probationers have scores of technical violations, don't make full restitution, don't complete community service, fail drug or mental health treatment, don't meet family obligations, continue to use drugs, violate stay away orders and abuse women, yet 'successfully' complete probation"). A more substantive critique is found in John F. Pfaff, *The War on Drugs and Prison Growth: Limited Importance, and Limited Legislative Options*, 52 Harv. J. Legis. 173 (2015), *available at* https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1650&context=faculty_scholarship. Analyzing data from the Bureau of Justice Statistics' 2004 surveys of federal and state inmates, Pfaff argues that supervision revocations are a result of the burgeoning prison population, not a substantial cause of it. Further, he argues that "drug-related technical violations—failing a drug test, failing to take a drug test, or failing to report to treatment—play minimal roles in overall [prison] admissions, and even fairly minor roles within the pool of parole revocations." He also argues that the data indicates that persons whose supervision is revoked on "technical" grounds have often committed a more serious violent or property offense. We have little doubt that supervision officers sometimes, maybe even often, revoke supervision on technical grounds in lieu of trying to prove up a more serious offense. But the data Pfaff relies on have, he acknowledges, "irregularities" that make drawing definitive conclusions difficult. One serious issue with this data is that states and even individual supervision offices have differing definitions of what constitutes a "technical" violation, an issue that in the past decade has become even more complicated as marijuana decriminalization has changed the legal landscape in many states. This is the reason that the Council of State Governments report on supervision revocations cited in this article attempted to use a standard definition of "technical violation" in order to draw apples-to-apples comparisons across states. In addition, the data Pfaff relies on is based on a survey of inmates. This raises a question about the reliability of self-reported data concerning a somewhat complicated question (the distinction between a "technical" and "substantive" supervision violation).

39 *See, e.g.*, Janette Sheil et al., *Federal Supervised Release for Drug Use: The Rest of the Story* (Dec. 2018), https://www.uscourts.gov/sites/default/files/83_1_3_0.pdf. This study reviews data from a set of federal supervision revocations and finds that "nearly a third of the cases (28.66) reviewed had 5 factors present . . . 80 percent had at least 4 combinations of factors [while] very few cases (9) with only one or two of the factors."

severity, leading up to revocation. Maryland, for example, has an extensive sanctions matrix that delineates a detailed list of violations as minor, intermediate, or technical, with an escalating set of sanctions for each depending on an offender's risk level.[40] Sanctions range from "[p]ositive reinforcement for compliance with other conditions" to more drastic punishments, such as electronic monitoring, home arrest, and restrictions on travel. In California, which has a similar system, supervision officers even have the option to seek "flash incarceration" for willful, repeat violators, jailing them for up to 10 days to focus their attention on compliance.[41]

Limiting supervision revocations to serious or repeated violations that endanger public safety lays the foundation for constructive community supervision reform. It keeps offenders in the program, simplifies the rules supervisees need to understand to comply with supervision, and preserves state resources for evidence-based, rehabilitative programming. Restricting revocations to public safety-related violations provides the most direct link between the act committed and the punishment doled out.

C. Shorten Supervision Terms and Expand Good-Time Credit for Compliance

Finally, supervision terms should be no longer than necessary to rehabilitate and reintegrate people into society. Any longer simply wastes time, money, and human potential.

At the beginning of supervision, courts should impose the shortest appropriate sentence—generally three years or less. Many judges and prosecutors impose long supervision sentences, believing that the length of the sentence will give the criminal justice system leverage over supervisees, ensuring their continued good behavior. But as noted above, there is no evidence that long supervision sentences have a significant effect on recidivism: According to the U.S. Bureau of Justice Statistics, more than half of recidivist arrests occur within a year of release, and nearly 72 percent within two years. Arrest rates for released persons plummet to less than three percent in years four and five after release.[42] Data from Minnesota,[43] Wisconsin,[44] Iowa,[45] and the federal supervision system[46] replicate this pattern: significant supervision failure rates in years one and two, with steep drops in the years after those. What the data suggest is that people who are going to fail, fail quickly; continuing to subject people who have shown they can comply and are at little risk of recidivism is costly and intrusive, and may actually be counterproductive, especially for lower-level offenders. Supervision periods should have a relatively short maximum term limit, with the opportunity to terminate short of that cap when people under supervision have achieved the specific goals mapped out in their individualized case plans. This latter milestone ought to be marked by a special ceremony to highlight the event's significance. In short, reduced terms of supervision can focus resources where they make a difference—the first year of the supervision term and in cases of repeated, willful violators of supervisory conditions.

At the end of supervision, states should set up systems to allow for earned time for early discharge. Not surprisingly, no incentive is as compelling to supervisees as the opportunity to earn time toward completing supervision by complying with conditions. A 2007 study of parolees found that the chance to get off supervision early was "one of the strongest motivators" for compliance.[47]

Some states are trying earned-time programs, with notable success. For example, in 2012, Missouri established an "earned compliance credits" policy that allows supervisees to shorten their time on probation or parole by 30 days for every full calendar month that they comply with the supervision conditions, with the possibility of losing the earned time they have accrued towards a shortened sentence if they violate supervision conditions or are arrested. As a result, 36,000 probationers and parolees reduced their supervision terms by an average of 14 months, driving down the state's supervision rate by 18 percent and reducing caseloads without increases in recidivism or general crime rates.[48] The Missouri earned-credit law was limited to low-level offenses and only available to those who had already spent two years on supervision, but the program could be expanded to a broader range of low-risk offenders and implemented earlier—since, as the research shows, people who have successfully completed two years of probation are very unlikely to re-offend.[49] In 2019, a group of New York state senators introduced a bill, S1343, that

40 *Graduated Intervention and Sanctions Matrix*, Md. Dep't of Pub. Safety & Corr. Servs., https://www.dpscs.state.md.us/parole_and_probation/Graduated_Interventions_and%20_Sanctions_Matrix.pdf.

41 Heather Mackay, *The California Prison and Parole Law Handbook*, Prison Law Office, at 384, https://prisonlaw.com/wp-content/uploads/2019/01/Handbook-Chapter-11.pdf.

42 Matthew R. Durose et al., *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010* (April 2014), https://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf.

43 *Probation Revocations: Offenders Sentenced from 2001-2012 and Revoked to Prison*, Minnesota Sentencing Guidelines Commission (January 2015), http://sentencing.umn.edu/sites/sentencing.umn.edu/files/mn_2001-2012_probation_revocations.pdf.

44 Pamela Oliver, *Crimeless Revocations, Part 2* (Dec. 24, 2016), https://www.ssc.wisc.edu/soc/racepoliticsjustice/2016/12/24/crimeless-revocations-part-2/.

45 *Recidivism Among Iowa Probationers*, Iowa Division of Criminal and Juvenile Justice Planning (July 2005), https://humanrights.iowa.gov/sites/default/files/media/CJJP_Recidivism_Among_Iowa_Probationers.pdf.

46 James L. Johnson, *Federal Post-Conviction Supervision Outcomes: Arrests and Revocations* (June 2014), https://www.uscourts.gov/sites/default/files/78_1_1_0.pdf.

47 *50 State Report on Public Safety*, Council of State Gov'ts (2018), https://50statespublicsafety.us/part-2/strategy-3/action-item-2.

48 *Missouri Policy Shortens Probation and Parole Terms, Protects Public Safety*, Pew Charitable Trusts (Aug. 2016), https://www.pewtrusts.org/-/media/assets/2016/08/missouri_policy_shortens_probation_and_parole_terms_protects_public_safety.pdf.

49 *Supra* notes 42-46.

would create a similar earned-time credit system for probationers in that state.[50]

IV. The Prosecutor's Case for Reform

As former federal prosecutors, we can say that it's no secret that prosecutors have been largely hostile to a host of criminal justice reforms.[51] But calls for reform to supervision have mostly gone unremarked by this influential group. Based on our experience, most prosecutors likely see supervision and the attendant questions of effectiveness, recidivism, and reintegration as the work of supervision officers and courts.

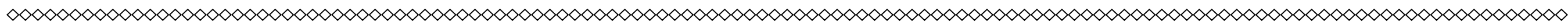
This seems short-sighted, if for reasons of efficiency alone. Though day-to-day supervision is handled by probation and parole officers, prosecutors are often called upon to participate in sanction and revocation hearings when violations occur. In 2017 alone, there were more than 137,000 re-incarcerations for supervision violations (not counting federal probation), almost all of which required some form of court hearing.[52] This figure suggests that prosecutors are spending substantial amounts of time on issues related to supervision failure. If this figure can be reduced without compromising public safety, the result would be better outcomes for supervisees and more time for prosecutors to focus on their primary job.

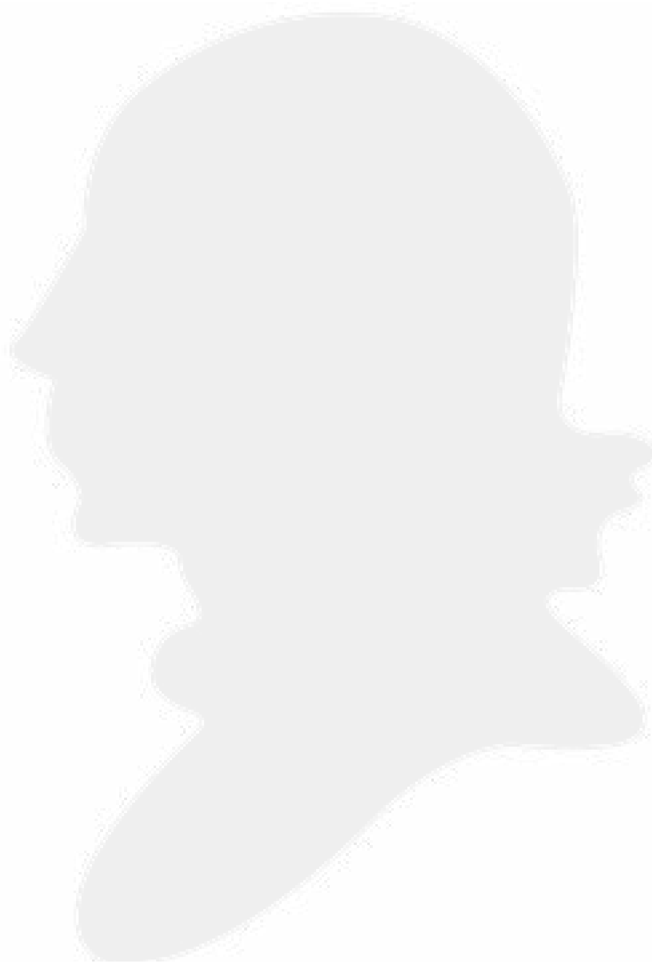
But the case for prosecutorial support for supervision reform runs deeper than simply avoiding work. Reintegrating defendants back into society and putting them on the road to sobriety, stable housing, and meaningful employment lowers the crime rate and increases public safety. These imperatives lie at the heart of the prosecutorial calling. Efficient, effective supervision systems can help millions achieve these goals. Everyone has a stake in improving the outcomes of probation and parole, and prosecutors most of all.

50 S1343-B, N.Y. State Legislative Service (2019), https://legislation.nysenate.gov/pdf/bills/2019/S1343B.

51 *See, e.g.*, Shon Hopwood, *The Misplaced Trust in the DOJ's Criminal Justice Policy Expertise*, 118 Mich. L. Rev. 1181 (2020) (describing the efforts of the professional group that represents federal prosecutors to block reforms such as the First Step Act).

52 Justice Ctr., *supra* note 4.





The Resolution of Too Big to Fail

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Note from the Editor:

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Other Views:

• Paul H. Kupiec, *Is Dodd Frank orderly liquidation authority necessary to fix too-big-to-fail?*, American Enterprise Institute (Oct. 22, 2015), https://www.aei.org/research-products/working-paper/is-dodd-frank-orderly-liquidation-authority-necessary-to-fix-too-big-to-fail/.

• Nicola Cetorelli & James Traina, *Resolving "Too Big to Fail,"* Federal Reserve Bank of New York Staff Reports (June 2018), https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr859.pdf.

• Satish Thosar & Bradley Schwandt, *Has 'Too Big To Fail' Been Solved? A Longitudinal Analysis of Major U.S. Banks*, J. Risk & Financial Management (Feb. 1, 2019), https://www.researchgate.net/publication/330813288_Has_'Too_Big_To_Fail'_Been_Solved_A_Longitudinal_Analysis_of_Major_US_Banks.

• Saule T. Omarova, *The "Too Big to Fail" Problem*, Minn. L. Rev. (June 13, 2019), https://minnesotalawreview.org/article/the-too-big-to-fail-problem/.

• *Ending Too Big to Fail*, Federal Reserve Bank of Minneapolis, https://www.minneapolisfed.org/policy/endingtbtf (last updated January 10, 2018).

No financial firm in the United States should be considered too big to fail (TBTF). That is the universal view of the American banking industry.[1]

Global leaders nominally agree. In 2009, amidst the churn of government actions related to the financial crisis, the global Group of 20 finance ministers and central bank governors directed the Financial Stability Board (FSB) to propose globally coordinated measures to address the matter. In the understanding of the FSB, "The TBTF problem arises when the threatened failure of a SIFI [systemically important financial institution]—given its size, interconnectedness, complexity, cross-border activity or lack of substitutability—puts pressure on public authorities to bail it out using public funds to avoid financial instability and economic damage."[2] In May 2019, the FSB launched an evaluation of ten years of "too-big-to-fail reforms."[3] Among the tasks it has set for itself is assessing whether implementation of the reforms encouraged since the last recession "are reducing the systemic and moral hazard risks associated with systemically important banks."[4] This is a serious inquiry, so it will be important to read the findings. A draft report was scheduled to be issued for public consultation in June 2020, with a final report planned for publication by the end of 2020.

Only so much candor can be expected from representatives of government agencies scoring their own homework, who will also be careful not to paint themselves into a corner out of which they may wish to step in the future. Yet credibility will be at stake in what the FSB reports. Current FSB Chairman Randal Quarles also happens to be the Federal Reserve's Vice Chairman for Supervision, in which position he has been carefully outspoken. If the report reflects his views, it will be worth the study.

This paper provides commentary within the context of the ongoing FSB assessment. It appreciates that rejection of TBTF is currently universal among U.S. policymakers and asks, where is the controversy? The theme of the paper is a recognition that apprehension persists that this policy consensus may be fragile, resting upon an ambivalent chronicle of regulatory rescues of troubled banks. The accumulation of new tools by statute and

1 That view is not universally held around the world, even if pledges of fidelity to ending TBTF are otherwise mouthed. With the possible exception of the United Kingdom, I am not confident of any government other than the United States that in practice rejects the notion of too big to fail. I am not comfortably sure that, in a pinch, the U.K. authorities would actually live up to their professed repudiation of TBTF. There is little historical pattern to demonstrate that they would.

2 Financial Stability Board, *Evaluation of too-big-to-fail reforms: Summary Terms of Reference* (May 23, 2019), https://www.fsb.org/wp-content/uploads/P230519.pdf.

3 Press Release, Financial Stability Board, FSB launches evaluation of too-big-to-fail reforms and invites feedback from stakeholders (May 23, 2019), https://www.fsb.org/wp-content/uploads/R230519.pdf.

4 *Id.*

regulation has made bank rescues unnecessary, but it does not make them impossible. The paper echoes the call for improving the utility of bankruptcy processes to address failed banks, which would justify and facilitate transformation of the recent consensus against rescues into a durable fabric of the regulatory culture.

Along the way, the paper asserts that there are no U.S. banks that are too big to fail, catalogs several of the more significant new regulatory tools, describes perceptions of past policymaker attitudes, and offers several vignettes of landmark regulatory bank rescues of recent decades. Some key lessons to be learned from the record are propounded.

In the meantime, daily events continue to test regulatory resolve. Today, Vice Chairman Quarles and all other U.S. policymakers renounce TBTF. However, during the Great Cessation,[5] policymakers have been willing to take actions approaching a TBTF policy for money market mutual funds. Perhaps there is comfort in that the agency of intervention was the Federal Reserve, explaining carefully that the policy was within its traditional role to use instruments intended to provide financial support to *solvent* firms facing *liquidity* issues, i.e. aiding firms to honor redemptions without having to defund performing assets and flood the market with asset sales.[6]

I. TBTF Is Incompatible with Markets

There are good reasons for credible repudiation of TBTF policies. The concept is incompatible with free markets, where business failure is as much a part of the market process as is success; allowing businesses—including banks—to fail transfers resources from hands of failure to more capable hands as reward for success. Moreover, markets ensure that neither condition is irremediable. Opportunity for new ventures should be just as available tomorrow as should be the chance of failure should current success turn sour.

Optimal allocation of resources as well as simple notions of fair play rely upon enterprises succeeding or failing based upon their performance. Bad actors, unsuccessful players, and inefficient operators are shown the door by the markets. Resources, on the other hand, are passed on to those more effective at meeting customers' needs, as defined by the actions and choices of customers themselves.

TBTF corrupts market discipline, which has repeatedly shown itself the quickest and firmest regulator of bank activities. Long before bank supervisors assess fines and penalties, a bank's customers and investors smell the scent of financial erosion and respond appropriately by shifting business and funds.

The availability of TBTF rescue policies can mask the realities of business conditions or hold out the hope that someone else can be made to carry undeserved losses. Bad practices are allowed to persist, ineffective actors continue in place, better-run firms face unfair competition from government-favored firms. Overall, assets in the economy become misallocated, and economic welfare diminishes.

II. Where Is the Controversy?

If TBTF is universally rejected in the U.S.—by industry, policymakers, and the general public—where is the controversy? It arises primarily from the question of whether those who say that they reject TBTF really mean it, or *will* really mean it when the chips are down and the cards are played. The most accurate riposte to this is that only time will tell. There is much that is said and much that has been done to make TBTF appear less likely and to seek to reassure the skeptical. Regulatory and legislative steps have been taken both to make TBTF more difficult and to facilitate resolution of failed firms;[7] one might say the latter approach seeks to replace too big to fail with *safe to fail*. As illustrated later in the paper, the U.S. has arguably done more in this line than have other nations home to large financial institutions.[8]

Are there any banks in the United States that, in conditions of insolvency, would be genuinely, practically too big to fail? I am aware of only one bank in United States history that might have been too big to fail: the second Bank of the United States. Chartered by Congress in 1816, that bank did not exactly fail; it just lost its national charter, causing the bank to contract its activities, leading to economic contraction felt throughout the nation. President Andrew Jackson vetoed legislative efforts to renew the charter on the approaching sunset of its twenty-year authority, scheduled for 1836. Franchised with a number of specific powers, congressional backing, and a national reach, the expiration of the national charter and retrenchment of the bank's activities precipitated the panic and deep recession of 1837.[9]

5 Jason Zweig, in a *Wall Street Journal* commentary, credits John Cammack with first offering this term for the sudden recession caused by the precipitate nationwide closing of economic activities in March 2020, responding to the coronavirus. Jason Zweig, *A Simple Investing Playbook for the 'Great Cessation*,' Wall St. J., March 24, 2020, https://www.wsj.com/articles/a-simple-investing-playbook-for-the-great-cessation-11585047600.

6 Board of Governors of the Federal Reserve System, Policy Tools: Money Market Mutual Fund Lending Facility, https://www.federalreserve.gov/monetarypolicy/mmlf.htm.

7 By "resolution," I refer to the process of moving a failed or failing financial firm into liquidation, combination with another firm or firms, or restoring it to operating health.

8 For this discussion, I am trying not to trip over the use of words that can mean different things in different contexts, such as "capital," "liquidity," "failure," and "insolvency." In this paper I invoke these terms as they are employed in bank management and supervision. This brings to mind what Sir Walter Scott wrote in his novel, *Count Robert of Paris*:

> . . . the masters of this idle science make it their business to substitute, in their argumentations, mere words instead of ideas; and as they never agree upon the precise meaning of the former, their disputes can never arrive at a fair or settled conclusion, since they do not agree in the language in which they express them. Their theories, as they call them, are built upon the sand, and the wind and tide shall prevail against them.

Sir Walter Scott, Count Robert of Paris, Vol. 1, 180 (1880). The *idea* that I seek to address is the notion that government agencies will or should rescue insolvent firms from failure. By insolvency, I have in mind the conditions presented by the nation's bankruptcy standards, with their deep history in case law and practice, which govern invocation of and recourse to the bankruptcy resolution process to address insolvency.

9 *See* Andrew T. Hill, *The Second Bank of the United States*, Federal Reserve History, December 5, 2015, https://www.federalreservehistory.org/essays/second_bank_of_the_us.

Two other financial institutions have demonstrated signs of being too big to fail: Fannie Mae and Freddie Mac. Neither of these government sponsored enterprises, however, is a bank. They share with the second Bank of the United States the condition of being chartered by Congress, with attendant market prestige and implicit federal government backing to feed their outsized share in the financial markets. Their insolvency was at the core of the housing bubble and its bursting in 2008, and the financial recession that followed.[10]

III. There Are No TBTF U.S. Banks Today

Of the nation's commercial banking firms, the largest is JPMorgan Chase (JPMC), which as of third quarter 2019 had $2.8 trillion in assets.[11] That is a very large bank (though not the largest in the world). In perspective, it is part of a very large economy.[12] U.S. financial assets in the same period totaled $105.3 trillion.[13] That makes JPMC's share of national financial assets about 2.7%. The share for other banks is proportionately less.

JPMC and other large banks got to be as large as they are because they provide services for which customers are willing to pay; the same is true of banks of all sizes. Should any large U.S. bank become distressed, it has business lines that other firms would be willing to buy for some price (at par or at a discount) or that should be folded because they have little value, i.e. few pay to use them. The idea that there must always be a bigger fish to swallow every other fish is as false in economies as it is in the sea. A large bank, healthy or troubled, can be sold piecemeal.

An example of that (albeit imperfect) can be seen in the case of the Dutch bank ABN Amro. In 2007, the bank did not fail, but it was auctioned, with pieces of its business sold to a collection of institutions, including Royal Bank of Scotland, Banco Santander, Fortis, and Bank of America. At the time, ABN Amro was one of the largest banks in Europe. It is true that the ABN Amro transaction almost immediately ran into the foul weather of the global financial recession of 2007-2009, but it demonstrates that large banks can attract a variety of interest for their variety of assets and business lines.[14]

For each troubled bank, more or less care needs to be taken for proper resolution, but I do not know of any whose failure cannot be resolved, whose valuable operations and customers could not be transferred to other hands. Those assets and operations for which there is little or no value can and should be recognized as loss; doing so imposes no further loss on the economy.

Laws and rules for resolving failed banks, as in bankruptcy procedures, are designed to be tailored to the realities of each case. The core purpose of the process is the preservation of value, within each particular context and with appropriate time and care applied. The result in the end should and can be that financial activity for customers and the economy goes on, losses are apportioned by law, and residual value is preserved and allocated with what fairness the statute allows. Can the processes be improved? Certainly they can, as with most legal standards. There has been much very good discussion and research, and proposals have been tabled to improve federal bankruptcy procedures as they affect banks.[15]

Congressional commentary at the time of the consideration of the Dodd-Frank Act frequently asserted a false paradigm: that any failed bank should be capable of resolution overnight, or at least over the weekend. This fed an impatient attitude that any bank whose failure could not be so quickly resolved was just too big. The seemingly instantaneous work of the Federal Deposit Insurance Corporation (FDIC) was regularly pointed to as a prototype. Such a view conjures up a false model, which shortchanges the hard work done by the FDIC and its resolution teams. What appears to happen within 24 hours is the labor of many days in advance and afterwards. The effort is focused on a seamless impact for *customers*, which may not be achieved completely. Insured bank depositors, though, have first priority, successfully served since the establishment of the FDIC; the continuation of their service without interruption is the most visible FDIC accomplishment. The needs and interests of uninsured depositors, bondholders, borrowers, creditors, and others are satisfied less immediately in the case of nearly every failed bank, requiring some time for final resolution.

IV. New Regulatory Tools

Since the 2007-2009 financial recession, U.S. financial supervisors have developed several new tools with which to manage failed bank resolutions, to convert too big to fail into safe to fail. Each tool would take volumes to discuss in detail, as each incorporates hundreds of pages in regulatory language and guidance. Moreover, inasmuch as the tools were developed in haste, and generally with little reference to other tools and regulations, regulatory leadership is currently engaged in a meticulous public review and reform. Efforts are focused on refining and simplifying as well as addressing concerns about how the various regulatory programs interact with each other. There is significant overlap and inconsistency among the regulations, excessive complexity, and mandates to solve the same problem in

10 Explained with great care and detail in Peter J. Wallison, Hidden in Plain Sight (2015). Today, Fannie and Freddie are wards of the state, held in conservatorship by the Federal Housing Finance Agency.

11 Zuhaib Gull & Zain Tariq, *Top 50 US banks & thrifts in Q3'19*, S&P Global Market Intelligence, November 27, 2019, https://www.spglobal.com/marketintelligence/en/news-insights/trending/UjUr4ZCvXWN_rUcLrpHcgw2.

12 U.S. gross domestic product (GDP) for that same quarter was $22.5 trillion. News Release, U.S. Department of Commerce, Bureau of Economic Analysis, Gross Domestic Product, Third quarter 2019 (third estimate); Corporate Profits, Third quarter 2019 (revised estimate) (Dec. 20, 2019), https://www.bea.gov/news/2019/gross-domestic-product-third-quarter-2019-third-estimate-corporate-profits-third-quarter. GDP is not, however, a measure of assets; it is a measure of economic value produced.

13 Quarterly Tables: S.6.q Financial Business, FRED Economic Data, Economic Research, Federal Reserve Bank of St. Louis, https://fred.stlouisfed.org/release/tables?rid=52&eid=812843&od=#.

14 *See* ABN AMRO-Fortis 2007-2010, ABN Amro Newsroom, https://www.abnamro.com/en/images/Documents/010_About_ABN_AMRO/History/ABN_AMRO_geschiedenis_Fortis_2007-2010.pdf.

15 *See, e.g.*, Bankruptcy Not Bailout: A Special Chapter 14 (Kenneth E. Scott & John B. Taylor, eds., 2012).

several ways. Even so, financial supervisors have a weighty toolbox to help manage failed bank resolutions.

The reexamination to make these tools more useful began before the 2016 presidential election. The Trump administration gave it added impetus. Pursuant to Executive Order 13772, signed by President Trump on February 3, 2017, the Treasury Department produced in June 2017 a detailed list of refine-and-reform recommendations.[16] The Treasury Secretary has little authority to write and revise financial services regulations, but he has the lead under the President for developing financial services policy. I can affirm based on my experience serving as Assistant Secretary for Financial Institutions that, free from concerns for bureaucratic turf, Treasury has significant influence in using its good offices to bring together the various financial services agencies to promote a coherent regulatory program. This role was recognized by Congress when it created the Financial Stability Oversight Council with the Treasury Secretary as chairman.[17]

The more prominent new regulatory implements available to financial agencies relating to a failed banking firm include strengthened capital requirements, liquidity standards, stress testing, swaps margin, and resolution planning requirements. Several of these tools have the dual purposes of forestalling bank failure and facilitating resolution nevertheless.

Capital requirements have been strengthened. There is a complex web of overlapping capital standards,[18] with both a risk-based component that models requirements in line with riskiness of assets, and a risk-blind component that calculates capital by total amount of assets without consideration of risk. The two approaches compensate for the model risk on the one hand and the blindness on the other. The result has been record levels of capital held by banks to absorb losses. Bank capital totaled $1.4 trillion prior to the last recession, and it had risen to $2.1 trillion[19] heading into the recession of the Great Cessation.

Banking firms are now subject to heightened liquidity standards. By regulation they are required to maintain a specific portion of assets that could be quickly converted into cash. Called the Liquidity Coverage Ratio (LCR), the rule imposes a complex formula for calculating how much in high quality liquid assets (HQLA) a bank must maintain to be able to weather extraordinary liquidity demands for up to 30 days. The purpose of the rule is a good one, identified with one of the perennial risks of banking: the difficulty of meeting short-term cash needs while providing borrowers with longer term loans. Shortcomings with the rule became apparent in September 2019, when bankers and regulators alike recognized that the LCR effectively sequesters HQLA, driving banks to keep HQLA unavailable for use in the markets.[20] The LCR strengthens *bank* liquidity, but at the cost of reduced *market* liquidity.

Bank supervisors have long evaluated a bank's ability to cope with potential future economic stress, in particular stress from sharp changes in interest rates. This is known as stress testing. Since 2009, larger banking firms have been subjected to more elaborate economic and financial stress scenarios to test bank performance, especially capital positions. Supervisors like stress testing for being more forward looking than capital regulation, which is largely based upon past and current conditions. Reliant upon guesses about the unknown future, stress tests guide regulators in the assignment of capital buffers for banks, which may facilitate early regulatory intervention in the case of a faltering institution.

The Commodity Futures Trading Commission, which under the Dodd-Frank Act was given authority over swaps derivatives, has promulgated rules requiring posting of financial margin for certain swaps transactions. The posted margin is a bit complicated, and it courts the risks that come from concentrating most swaps transactions within clearing houses. It does reduce the financial exposure of a troubled bank's counterparties, which helps resolve failing institutions.

The Dodd-Frank Act imposed a completely new practice on large banks whereby they are required to share with the Federal Reserve and the FDIC detailed plans for how their institutions could be resolved in case of failure. Termed a "resolution plan" in the statute, it is more commonly called a "living will."[21] The concept is praised by many, but it is not without criticism, since few firms, financial or otherwise, run their businesses as if they were going to fail. Managers run their firms to succeed. Banks and supervisors, however, have been learning from the exercise. For example, rules originally mandated that plans be updated

16 Steven T. Mnuchin & Craig S. Phillips, *A Financial System That Creates Economic Opportunities: Banks and Credit Unions* (Washington: U.S. Department of the Treasury, 2017), https://home.treasury.gov/sites/default/files/2018-07/A-Financial-System-that-Creates-Economic-Opportunities---Nonbank-Financi....pdf.

17 Dodd-Frank Wall Street Reform and Consumer Protection Act § 111, 12 U.S.C. § 5321 (2010).

18 Wharton's Richard J. Herring has counted 39 ways in which large banks are required to measure capital, noting that regulators really only look at 4 of them. Richard J. Herring, *The Evolving Complexity of Capital Regulation*, 53 J. Fin. Servs. Res. 183 (2018), https://doi.org/10.1007/s10693-018-0295-8. See also the January 2018 remarks by Randal K. Quarles, Vice Chairman for Supervision of the Federal Reserve Board, in which he identifies 24 "loss absorbency constraints" (the purpose of bank capital) faced by large banks. Vice Chairman Quarles observed, "While I do not know precisely the socially optimal number . . . I am reasonably certain that 24 is too many." Randal K. Quarles, *Early Observations on Improving the Effectiveness of Post-Crisis Regulation* (Jan. 19, 2018), *available at* https://www.federalreserve.gov/newsevents/speech/quarles20180119a.htm.

19 Federal Deposit Insurance Corporation, Quarterly Banking Profile: Fourth Quarter 2019, https://www.fdic.gov/bank/analytical/qbp/2019dec/qbp.pdf#page=1.

20 *See, e.g.*, Brian Wesbury and Robert Stein, *Repo Madness*, Advisor Perspectives, September 19, 2019, https://www.advisorperspectives.com/commentaries/2019/09/19/repo-madness; Wolf Richter, *Why Banks Didn't Lend to the Repo Market When Rates Blew Out: JPMorgan CEO Dimon*, Wolf Street, October 15, 2019, https://wolfstreet.com/2019/10/15/why-banks-didnt-lend-to-the-repo-market-when-rates-blew-out-jpmorgan-ceo-dimon/; Katanga Johnson & David Henry, *U.S. bankers seize on repo-market stress to push for softer liquidity rules*, Reuters, September 18, 2019, https://www.reuters.com/article/us-usa-fed-repo-banks/u-s-bankers-seize-on-repo-market-stress-to-push-for-softer-liquidity-rules-idUSKBN1W3288.

21 *See* Board of Governors of the Federal Reserve System, *Living Wills (or Resolution Plans)*, July 1, 2020, https://www.federalreserve.gov/supervisionreg/resolution-plans.htm (citing relevant provision in Dodd-Frank and implementing regulations).

annually, but neither regulators nor banks could keep up with the pace. Subsequently, regulators finalized amendments to the rules providing for biennial or triennial plan updates, with more frequent updates in the case of significant changes, such as merger and acquisition activities. Banks have also used the resolution planning to identify and trim off subsidiaries that had outlived their value. Although they are sure to be less than the intended roadmap for resolution that advocates advertise, the resolution plans may provide a useful inventory to assist agencies in supervising orderly resolutions.

V. Single Point of Entry (SPOE)

Drawing upon these and other authorities, the FDIC has developed a supervisory strategy for resolving large, complex banking *firms*. I emphasize firms, because the FDIC has long had authority and deep involvement with the resolution of *banks*. Its experience with resolution of *large* banks has been quite limited. Nearly all large banking firms, moreover, are financial holding companies of which the bank is a subsidiary accompanied by other bank or nonbank subsidiaries. Title II of the Dodd-Frank Act extended to the FDIC authority for resolving such financial firms should bankruptcy proceedings appear to be inadequate.

The FDIC developed a program pursuant to this authority, which it calls the Single Point of Entry strategy.[22] This approach is directed toward the parent holding company of a failing bank rather than to the bank itself. It allows regulators to avoid taking individual resolution actions for various parts of the firm (a multiple point of entry strategy). Under SPOE, resources available to the holding company would be transferred to failing bank subsidiaries and possibly other troubled constituent pieces of the holding company to keep them whole. Allowing these subsidiaries to continue operations would reduce the risk of disruptions to their customers and to the economy.[23]

To facilitate the SPOE strategy, the Federal Reserve promulgated regulations requiring certain large firms to maintain specific levels of total loss absorbing capacity (TLAC). The concept is that TLAC measures the abundance of resources that must be maintained available either to forestall failure or to assist in resolution, including the *conversion* of certain forms of debt instruments into resources available to cushion loss.[24]

While the SPOE strategy has never been tested—and may it ever remain so—it is a particularly promising approach for orderly resolution by the FDIC. It would allow for continued operation of essential functions, preserving function and value (as in bankruptcy) while resolution proceeds.

VI. Perceptions of Policymakers

Much of the foregoing has addressed the question of whether there are any TBTF banks in the U.S., touching both on the size of the institutions—a concern implied by the term *too big* to fail—and the ability to resolve large institutions such that they are *safe* to fail. This latter point, involving the agencies charged with managing bank failure, began with a survey of new resources available to the financial regulators. Yet there is more to be said.

The size of U.S. banks relative to the overall financial system, and the panoply of agency resources now available for resolution, can be marshalled into a powerful argument that there is no need to forebear resolution of any failing banking institution. The persistence of TBTF concern in the U.S. may then be a matter of perception, particularly public perception of regulatory willingness to use the available tools.

Whether there are grounds for such perception is a fair question, since regulatory attitudes toward bank failure in the United States, over many years, have been equivocal. Our bank regulators have not been alone in that posture. I recall attending a meeting with a senior official of the central bank of a European country that is home to large banks. When I raised the question of TBTF in his nation, he replied that bank failure was not part of their program. To be sure, I asked him again and received the same response affirming a TBTF supervisory posture. As I wrote at the outset of this paper, that question put to U.S. policymakers today would produce an unequivocal response: TBTF is not part of our program. What, however, has been the record in the past?

Continental Illinois National Bank and Trust Company is often pointed to as the first example of a failing U.S. large bank where regulators exercised forbearance[25] instead of closing a large bank. In 1984, all three federal bank regulators—the FDIC, the Office of the Comptroller of the Currency (OCC), and the Federal Reserve—approved extraordinary measures, including the protection of uninsured depositors and bondholders from loss, to keep the bank in operation.[26] The OCC was the bank's lead supervisor. In hearings before a subcommittee of the House Banking Committee, the following colloquy took place between Comptroller C.T. Conover and committee Chairman Fernand St Germain:

> Chairman St Germain. . . . can you ever foresee one of the 11 multinational money center banks failing? Can we ever afford to let any one of them fail?

22 Resolution of Systemically Important Financial Institutions: The Single Point of Entry Strategy, 78 Fed. Reg. 76,614-76,624 (Dec. 18, 2013), *available at* https://www.fdic.gov/news/board/2013/2013-12-10_notice_dis-b_fr.pdf.

23 For a good, yet concise, discussion of SPOE and MPOE, see Paul L. Lee, *A Paradigm's Progress: The Single Point of Entry in Bank Resolution Planning*, The CLS Blue Sky Blog (Jan. 18, 2017), https://clsbluesky.law.columbia.edu/2017/01/18/a-paradigms-progress-the-single-point-of-entry-in-bank-resolution-planning/.

24 For a discussion of the final TLAC rule see *Federal Reserve's Final Rule on Total Loss Absorbing Capacity and Eligible Long-Term Debt*, Davis Polk (Jan. 11, 2017), https://www.davispolk.com/files/2017-01-11_davis_polk_federal_reserves_final_rule_on_tlac.pdf.

25 By regulatory forbearance, I refer to regulators refraining from enforcing, at least for a time, certain regulatory standards, including refraining from applying particular requirements that would likely lead to closing an insolvent bank. For example, in the 1980s, the Federal Home Loan Bank Board, which supervised federally chartered savings associations, allowed a number of insolvent institutions to remain in operation because the Federal Savings and Loan Insurance Corporation did not have adequate resources to cover the insured deposits.

26 For a concise history of the Continental Illinois bank troubles, see Renee Hamilton, *Failure of Continental Illinois*, Federal Reserve History (Nov. 22, 2013), https://www.federalreservehistory.org/essays/failure_of_continental_illinois.

Mr. Conover. The answer to that, Mr. Chairman, is that we have got to find a way to. In order to have a viable system.

Chairman St Germain. The fact of the matter is, as a practical matter, neither you nor your successors are ever going to let a big bank the size of Continental Illinois fail.

Mr. Conover. Mr. Chairman, it isn't whether the bank fails or not. It is how it is handled subsequent to its failure that matters. And we have to find a way. I admit that we don't have a way right now. And so, since we don't have a way, your premise appears to be correct at the moment.

Chairman St Germain. That is one of the prime reasons for these hearings. We have quite a few, but one of our principal reasons is we have to make a decision. Do we allow, ever, a large bank to fail?

Mr. Conover. I think it is important that we find a way to do that.[27]

Today, several decades later, have the regulators found "a way to do that"? About five years after the Continental Illinois rescue, reflecting on the actions of the FDIC, William Isaac, who was FDIC Chairman at the time of the Continental problems, said:

> I wonder if we might not be better off today if we had decided to let Continental fail, because many of the large banks that I was concerned might fail have failed anyway. . . . And they are probably costing the FDIC more money by being allowed to continue several more years than they would have had they failed in 1984.[28]

Such reflections by a former regulator, who has since only reinforced his reputation for perspicacious review, suggest that the regulators had sufficient tools, even in the mid-'80s, to close a large bank. Comptroller Conover, in his testimony, opined that they did not, while explaining, however, that the issue was more one of *how to handle* a large failed bank "subsequent to its failure that matters." As discussed above, even the details and work involved with the closure of smaller banks take time and effort well after the weekend protection of insured depositors.

In their December 1990 study of the TBTF doctrine, Cleveland Federal Reserve Bank researchers Walker F. Todd and James B. Thompson concluded, "Politics, not pure economics, is now clearly the driving factor in preserving the doctrine . . . ."[29] All policymakers today—legislative and executive—have renounced the TBTF doctrine. An examination of a sample of bank rescues may demonstrate the challenges to policymakers in applying that renunciation.

VII. The Legacy of Bank Rescues

Since Dodd-Frank, we have seen little evidence contrary to the current U.S. attitude against TBTF, but there have also been few banks facing failure. What has been the longer-term legacy of actual rescues?

Continental Illinois National Bank and Trust Company, was the nation's seventh or eighth largest bank in 1984, and it was the largest rescue at the time. It was not the first bank rescued by regulatory action, but it was the first one justified by the large size of the institution rescued—the first implementation of what came to be called too *big* to fail. As noted above, regulators were clearly uneasy about the actions that they took to rescue the bank, but policymakers found agreement that better tools would be needed to ensure that banks are safe to fail.

In October 1981, the FDIC announced that it was working with Greenwich Savings Bank (located in New York City) to find a buyer for the bank, which was reeling from the effects of the national double-digit interest rate environment. At the same time, the FDIC announced that any sale of the bank would be orderly and protect *all* the bank's depositors (insured as well as uninsured) from loss. The FDIC was concerned not only about Greenwich; the agency was worried about the condition of several New York savings banks and the potential for contagion from the failure of one undermining public confidence in the others. Losses from the failure of those banks might strain FDIC resources and undermine confidence in the FDIC itself as it coped with meeting insurance obligations to depositors. In November, the FDIC announced that it had assisted the merger of Greenwich into Metropolitan Savings Bank. In doing so, the FDIC made use of its authority under Section 13(e) of the Federal Deposit Insurance Act (FDIA), allowing such action on the grounds of averting threatened losses to the insurance fund.[30] Greenwich, with assets of $2.5 billion, was then the FDIC's third largest bank collapse. The estimated cost to the FDIC of the transaction was $465 million.

From 1981 through 1985, the FDIC assisted in the mergers of 17 failing savings banks, with sizes ranging from the $55 million asset Mechanics Savings Bank in Elmira, New York to the $5.3 billion asset Bowery Savings Bank in New York City. Eleven of these savings banks were located in New York, and others were based in Minnesota, New Jersey, Washington, Pennsylvania, and Oregon.[31] In personal conversations with then former FDIC Chairman Isaac, he emphasized to me a point made more than a decade after the resolutions by the authors of the FDIC study:

27 *Inquiry Into Continental Illinois Corp. and Continental Illinois National Bank: Hearings Before the Subcommittee on Financial Institutions Supervision, Regulation, and Insurance of the Committee on Banking, Finance, and Urban Affairs, House of Representatives," Ninety-Eighth Congress, Second Session, September 18, 19 and October 4, 1984*, at 299-300, https://fraser.stlouisfed.org/title/inquiry-continental-illinois-corp-continental-illinois-national-bank-745?start_page=305.

28 Quoted in Walker F. Todd & James B. Thomson, *An Insider's View of the Political Economy of the Too Big to Fail Doctrine*, Working Paper 90-17, Federal Reserve Bank of Cleveland, at 1 (Dec. 1990), https://fraser.stlouisfed.org/title/working-paper-federal-reserve-bank-cleveland-4494/insider-s-view-political-economy-big-fail-doctrine-494544/fulltext.

29 *Id.* at 6. I would comment, however, that "pure economics" is integrally involved in politics. At Johns Hopkins University, where I received my university economics training, the department was called the Department of Political Economy. Economics involves the study of such things as the allocation of a nation's resources and production, inherently political questions.

30 For more information on Greenwich and the FDIC's action, see Federal Deposit Insurance Corporation, History of the Eighties—Lessons for the Future 211-34 (1997) (Chapter 6, "The Mutual Savings Bank Crisis"), *available at* https://www.fdic.gov/bank/historical/history/211_234.pdf.

31 *Id.* at 226.

the actions of the FDIC in managing the early 1980s savings bank crisis made sure that "this crisis was not compounded by a sense of public panic."[32]

Unity Bank and Trust Company was a minority-owned de novo institution located in the Roxbury-Dorchester area of Boston; it had $9.3 million in assets and was founded in 1968. In July 1971, the FDIC provided financial assistance to Unity Bank in the form of a $1.5 million five-year loan. As described by the FDIC in its 1971 annual report, the loan was "part of an assistance program under which additional financial aid, including approximately $500 thousand, was provided by a group of Massachusetts banks."[33] The FDIC provided the assistance pursuant to Section 13(c) of the FDIA, which authorized the FDIC "to provide financial assistance to an insured operating bank in danger of closing whenever, in the opinion of the Board of Directors, the continued operation of such a bank is essential to providing adequate banking service in the community."[34]

In April 1980, the three federal banking regulators (the FDIC, the OCC, and the Federal Reserve) approved open bank assistance for First Pennsylvania Bank, N.A. (First Penn). The bank, with $8 billion in assets, was the largest bank headquartered in Philadelphia, and the 23rd largest bank in the United States. The support consisted of five-year loans totaling $500 million: $325 million from the FDIC and $175 million from a group of banks. Added support came from a $1 billion line of credit via the Federal Reserve's discount window.[35] First Penn provided to the FDIC and the banks 20 million warrants for purchase of stock in the holding company at $3 per share. In November 1983, First Penn paid off its loans to the FDIC and repurchased half of the warrants held by the agency. In May 1985, the bank bought back the rest of the warrants held by the FDIC. The net cost to the FDIC for the assistance package was zero.[36] Irvine Sprague, then with the FDIC, offers an eye-witness vignette from the interagency discussion:

> I recall at one session, Fred Schultz, the Fed deputy chairman, argued in an ever rising voice, that there were no alternatives—we had to save the bank. He said, "Quit wasting time talking about anything else!" Paul Homan of the Comptroller's office was equally intense as he argued for any solution but a failure.[37]

The Troubled Asset Relief Program (TARP), which Congress enacted at the pleading of Treasury Secretary Henry Paulson after first voting it down, funded direct Treasury investment in the stock of some 707 financial firms. This was not the purpose of the program as explained to Congress. The original idea, abruptly changed by Secretary Paulson once the bill became law, was to use some $700 billion to purchase troubled loans held by banks, clearing the way for banks to make new loans to boost the economy. Paulson quickly realized that pricing the troubled loans would be a political minefield, inviting endless criticism that Treasury paid too little or too much—whatever it did—for the assets. Never before had so much money been appropriated with so little congressional guidance. Paulson decided to use the funds instead to buy direct investments in the capital of banks. The TARP assistance to banks, over the life of the program, totaled $245 billion, with a net positive return to Treasury of $24 billion (above repayment of principle, a positive 9.8% return on investment overall).[38]

While Treasury provided the funds, bank regulators screened the banks to be qualified for TARP investments. The initial investments were targeted for a group of nine large institutions (three of which did not begin 2008 as banking firms) whose leaders were invited to a special meeting at the Treasury with the Secretary and bank regulators. Not all of the invited institutions wanted or needed the investments, but all were persuaded to accept. Nearly five years later, former Senator Chris Dodd and former Congressman Barney Frank (former Chairmen of the Senate Banking and House Financial Services Committees) penned an op-ed piece in which they confirmed what was well known. "Secretary Paulson essentially had to compel several of the largest banks to accept Troubled Asset Relief Program money even though some did not need it or want it, lest the institutions that did require help be stigmatized."[39] That is, Treasury invested in healthy banks as well as troubled banks in order to camouflage which was which. I personally heard similar stories from numerous bankers, leaders of banks of all sizes.

In sum, 707 banks of all sizes and conditions received government capital boosts from TARP. With TARP, size did not govern, and good health did not disqualify. However popularly portrayed, the program was not a demonstration of a policy of TBTF, but rather an example of nervous policymakers trying to do something to appear to be working to ward off economic decline and minimize bank failures.[40]

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32 *Id.* at 231. For an insightful and well documented study of the 2008 financial crisis, which *did* become a panic, see William M. Isaac, Senseless Panic (2010).

33 Annual Report of the Federal Deposit Insurance Corporation 1971 6 (1972), *available at* https://www.fdic.gov/about/strategic/report/archives/fdic-ar-1971.pdf. For more background on this bank and the FDIC's rescue efforts, see Irvine H. Sprague, Bailout: An Insider's Account of Bank Failures and Rescues 35-52 (1986).

34 Annual Report, *supra* note 33, at 5.

35 Federal Deposit Insurance Corporation, *Managing the Crisis: The FDIC and RTC Experience—Chronological Overview*, Chapter 3: 1980 (1998), https://www.fdic.gov/bank/historical/managing/chronological/1980.html.

36 Federal Deposit Insurance Corporation, *Managing the Crisis: The FDIC and RTC Experience*, Vol. One: History, 158-59, *available at* https://www.fdic.gov/bank/historical/managing/documents/history-consolidated.pdf.

37 *See* Sprague, *supra* note 33, at 88-89.

38 U.S. Department of the Treasury, Troubled Asset Relief Program, Monthly Report to Congress—March 2020, https://www.treasury.gov/initiatives/financial-stability/reports/Documents/2020.03%20March%20Monthly%20Report%20to%20Congress.pdf.

39 Chris Dodd and Barney Frank, *Pulling the plug on failed banks*, Politico, July 28, 2013, https://www.politico.com/story/2013/07/dodd-frank-too-big-to-fail-criticism-094839.

40 William Isaac, comparing TARP with his own regulatory experience managing banking crisis, calls TARP "an ill-conceived program hastily slapped together by a panicked government." Isaac, *supra* note 32, at xvi.

VIII. Some Key Lessons

There is much to be learned from the legacy of our financial resolution experience. Recognizing these lessons will aid policymakers in developing and administering resolution policy.

- The record shows that size does not correlate well with bank rescues. Banks of all sizes have been considered eligible for regulatory mercy in place of market justice.
- You do not even need to be a bank to receive financial help from regulators. A wide variety of firms, depositors, and investors have received regulatory-guided funds.
- You also do not have to *need* assistance to be given assistance. TARP was replete with such examples (a problem not exclusive to financial regulation).
- We have also seen that worried policymakers can be susceptible to reaching for any tools available to them. They may also find creative ways around apparent limitations.
- If we wish to increase the realm for market discipline of troubled banks, we should recognize that the policy issue is not with the banks themselves, but with policymakers who may be apprehensive or otherwise reluctant to let financial firms fail. Such reluctance, which is government policy in other parts of the world, has been foresworn by current U.S. policymakers. That attitude of policymakers can be supported—in hopes that it will be sustained in times of tension—by regularly reviewing and refining the tools available to resolve failing institutions, to make the tools more usable and effective and resolution more predictable.
- We should disabuse ourselves of the idea that bank resolution (beyond protection of insured depositors) happens overnight or over the weekend. What appears to be forbearance may be the normal process of resolution applied in an orderly fashion to limit market disruption and preserve customer confidence. An important element of good resolution policy, as with bankruptcy management, is to preserve value where possible.

IX. Now What?

Following the experience of bank rescues in the 1980s, Congress made changes in the law to restrict regulatory forbearance. The FDIC was limited to failed bank resolutions that imposed the "least cost" on the insurance fund, making open bank assistance much more difficult. Simple leverage capital standards were made secondary to risk-based capital measures. A "prompt corrective action" regime was imposed on regulatory agencies to encourage earlier intervention and reduce FDIC resolution costs.

Similarly, after TARP and related policies of 2008-2009, the Dodd-Frank Act put into law elaborate programs intended to reduce the likelihood of bank failure and reduce the cost of resolution, particularly for larger firms. Several of these are discussed above in Section IV.

The question can be raised, has Dodd-Frank made TBTF impossible, and, if so, is the job done? With respect to bank resolutions, Dodd-Frank follows two themes. On one hand, it retains the primacy of formal bankruptcy for resolution. Yet on the other hand, the backup orderly resolution structure is too easy to invoke when there is consensus among federal financial policymakers that bankruptcy would be inadequate. Because policymakers have been prone to engage in groupthink in times of financial stress, the primacy of bankruptcy may too readily be overridden. It needs to be reinforced: the regulatory resolution authority's role must be seen as *secondary* and not preferred.

The new tools and statutory policies make TBTF unnecessary, but they do not make it impossible. Fundamental elements of bank supervision are judgment and flexibility. As long as they remain indispensable to bank supervision, there will also remain the possibility that judgment will use that flexibility to rescue rather than resolve a failing bank. The actual resolution cases cited above suggest that this may not always be inappropriate. Arguable defenses could be made, for example, of the First Penn case and for at least some of the savings bank actions.

Whatever proclivity may remain for stressed regulators to reach for the panic button in times of stress must be effectively cabined. Given the work that Congress has done by statute in this regard, the most important remaining work may be done in the realm of regulatory culture.

The legal structure of Title II of the Dodd-Frank Act rests upon an understanding that bankruptcy has precedence, but the emphasis appears to be on how to avoid it. Changing that statutory attitude will likely require further legislation. Fortunately, much groundwork has been laid to design improvements to the function of bankruptcy procedures for bank resolution such that little credibility would attach to arguments for recourse to Title II of Dodd-Frank. Those improvements need to find their way into law and practice. To quote Comptroller Conover, "I think it is important that we find a way to do that."

Unleashed and Unbound: Living Textualism in *Bostock v. Clayton County*

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Other Views:

• Jack M. Balkin, Living Originalism (2011), *available at* https://www.hup.harvard.edu/catalog.php?isbn=9780674416925.

• Katie Eyer, *Symposium: Progressive textualism and LGBTQ rights*, SCOTUSblog, June 16, 2020, https://www.scotusblog.com/2020/06/symposium-progressive-textualism-and-lgbtq-rights/.

• Ian Millhiser, *The Supreme Court's landmark LGBTQ rights decision, explained in 5 simple sentences*, Vox, June 15, 2020, https://www.vox.com/2020/6/15/21291515/supreme-court-bostock-clayton-county-lgbtq-neil-gorsuch.

In *Bostock v. Clayton County, Georgia*, the Supreme Court held that Title VII of the Civil Rights Act of 1964 prohibits—and has always prohibited—discrimination by employers on the basis of homosexuality or of what the Court called transgender status.[1] The statute forbids employers to intentionally discriminate against any individual "because of such individual's . . . sex."[2] The Court concluded that discrimination on the basis of homosexuality or of being transgender violates the unambiguous text of the statute.

The decision was immediately controversial, especially among critics who see it as part of a campaign by elements of the elite legal establishment to impose a cultural agenda that Congress has failed to enact. The result in this case would not have been much of a surprise in the period during which Justice Anthony Kennedy held the controlling vote on issues dealing with sex, and especially with homosexuality.[3] But the 6-3 majority opinion in *Bostock* was written by Justice Neil Gorsuch and joined by Chief Justice John Roberts. The majority opinion has virtually no policy analysis or political rhetoric, and it lacks the kind of inflated pseudo-philosophic pontification that Kennedy favored. Instead, the *Bostock* opinion presents itself as nothing more than a straightforward application of the legally binding text of the statute. Gorsuch conspicuously casts himself as the true intellectual successor to the man whom he literally succeeded: the high priest of statutory textualism, Justice Antonin Scalia.[4]

Bostock invites unconfirmable speculation, even cynical speculation, about the motives of Gorsuch and the other members of the majority. I propose instead to take the Court's opinion seriously, looking for its underlying assumptions and its legal implications. The opinion's analytical approach resembles a theory known as "living originalism." During the last decade, this approach to constitutional interpretation has been gaining steam in the legal academy. *Bostock* seems implicitly to extend that approach beyond the academy, beyond the field of constitutional

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1 140 S. Ct. 1731 (2020).

2 42 U.S.C. §2000-e2(a):

> It shall be an unlawful employment practice for an employer—
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> >
> > (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

3 *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584 (2015); Lawrence v. Texas, 539 U.S. 558 (2003); Romer v. Evans, 517 U.S. 620 (1996). *Cf.* Planned Parenthood v. Casey, 505 U.S. 833 (1992).

4 *See* 140 S. Ct. at 1748, 1749.

law, and even beyond the limits recognized by its academic adherents.[5]

Bostock presents itself as something quite different, namely a particularly uncompromising version of what one might call static or non-living originalism. Taken on its own terms, the opinion is analytically flawed and the case was wrongly decided. But whatever one thinks of *Bostock*'s resolution of the precise issue in the case, it lays the groundwork for the Court to correct one of its most egregiously mistaken lines of case law.

The text of Title VII that Congress enacted in 1964 unambiguously forbids employers to discriminate on the basis of race or sex, yet the Court has upheld quotas and preferences explicitly based on the race or sex of people in favored groups. In 1991, Congress adopted a new provision outlawing employment practices in which race or sex is a motivating factor, even if not the only factor. The courts should have recognized that the 1991 amendment reaffirmed Title VII's ban on race- and sex-based preferences. They have not done so, but *Bostock* now requires the enforcement of Title VII's ban on these employment practices.

I. Living Originalism

As an academic theory, originalism arose in opposition to a modern jurisprudence—often called "living constitutionalism"—that seeks to make constitutional law ever more consistent with what Chief Justice Earl Warren called "the evolving standards of decency that mark the progress of a maturing society."[6] Living constitutionalism liberates the Court from the text, history, and original purpose of the Constitution's written provisions, as well as from precedents established when our society was putatively less mature.

The seminal decision was probably *Brown v. Board of Education*, in which the Court held that segregated public schools violate the Fourteenth Amendment.[7] Rather than develop a legally plausible argument for this appealing conclusion, as academic commentators later did,[8] the Court's unanimous opinion was based entirely on speculation about segregation's psychological effects, along with a bit of bogus social science. Although or because it contained barely a whiff of legal analysis, *Brown* has been a sensational political success. Had the Court confined itself to using this jurisprudential approach as a weapon against Jim Crow, it might never have provoked lasting opposition. But that's not what happened. In subsequent cases, the Court aggressively expanded legal protections for criminal suspects, defendants, and convicts.[9] This happened at a time when violent crime was dramatically increasing, which generated significant political dissatisfaction. Dissatisfaction turned into a durable political fury when the Justices used living constitutionalism to invent a constitutional right to abortion,[10] which many millions of Americans regard as murder.

In response to these developments, a few academic commentators and judges began defending originalism as an alternative to the free-wheeling exercise of judicial review that became prominent in the Warren and Burger Courts.[11] Academic defenders of living constitutionalism then attacked originalism on various grounds.[12] Originalists responded,[13] and a robust and complex debate ensued during the following decades. Notwithstanding subtle variations within both camps, they seemed to be mutually exclusive. Originalists advocated sticking to the text of the written Constitution and interpreting vague or ambiguous provisions in light of the enactors' purposes. Advocates of a "living Constitution" held that the original meaning was frequently unknowable, and in many cases should not be controlling even when it can be reliably identified.

Several years ago, Professor Jack Balkin purported to eliminate the opposition between these approaches by arguing that living constitutionalism *is* originalism. According to his theory, the text of the Constitution, understood as its semantic content, is binding on judges, but that only means that an interpretation must be one that the words of the text "can bear"; apart from that narrow constraint, judges should be free to adopt whatever interpretation will produce what the judge thinks will give the nation the best possible Constitution.[14] Evolving standards of decency, justice, wisdom, and sound policy—visible to judges if not to the people's elected representatives—thus provide a trump card that will always be at hand when the Constitution's text contains so much as a hint of ambiguity or vagueness. And a determined interpreter will almost always be able to find such hints.

The genius of Balkin's theory arises in part from the fact that shrewd judges will not need to play the trump card very often. In most cases, they can reach their favored outcomes by applying or

5 I am not asserting that anyone on the Court consciously saw the *Bostock* opinion as an extension of the academic theory, or that its academic proponents believe the theory should necessarily be applied to statutory construction cases. But I think "living originalism" offers a heuristic that is useful for understanding what the Court did in *Bostock*.

6 Trop v. Dulles, 356 U.S. 86, 101 (1958).

7 347 U.S. 483 (1954).

8 *See, e.g.*, Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947 (1995).

9 Most of the criminal procedure provisions in the Bill of Rights, for example, were made applicable for the first time to the states. And some of them were expansively interpreted. *See*, *e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); Gideon v. Wainwright, 372 U.S. 335 (1963).

10 *See* Roe v. Wade, 410 U.S. 113 (1973).

11 *See*, *e.g.*, Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1 (1971); William H. Rehnquist, *The Notion of a Living Constitution*, 54 Tex. L. Rev. 693 (1976).

12 *See*, *e.g.*, Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. Rev. 204 (1980); Richard B. Saphire, *Making Noninterpretivism Respectable: Michael J. Perry's Contributions to Constitutional Theory*, 81 Mich. L. Rev. 782 (1983).

13 *See*, *e.g.*, Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849 (1989).

14 Jack M. Balkin, Living Originalism 254, 267-68 (2011). Some legal theorists, including Balkin, have begun to call the identification of a text's semantic content "interpretation," and choices about how to interpret textual ambiguity and vagueness "construction." *See*, *e.g.*, Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 Fordham L. Rev. 453 (2013). Nothing in my argument depends on accepting or rejecting this terminological innovation. For a short discussion of the role it plays in living originalism, see Nelson Lund, *Living Originalism: The Magical Mystery Tour*, 3 Tex. A&M L. Rev. 31, 33-34 (2015).

colorably interpreting precedent. In many other cases, they can apply traditionally originalist methods to build a respectable case for the result they want to reach. In others, political prudence may dictate restraint. But the card is always waiting to be used, and it is in a sense the quintessence of living originalism.

In order to see how radical Balkin's theory is, consider two examples, both of which are based on this provision of the Fourteenth Amendment: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[15]

According to Balkin, the original meaning of the Fourteenth Amendment protects a right to abortion, which happens to be the same right that living constitutionalism created in the *Roe/Casey* line of cases.[16] The overwhelming majority of states restricted abortion in 1868, and the subject never came up in debates about the Amendment. But the words "equal protection of the laws" could conceivably mean that governments must guarantee "equal citizenship," and a judge could believe that restrictions on abortion deprive women of equal citizenship. That reading may be adopted as the original meaning of the Amendment, whether or not anyone believed at the time that equal protection of the laws means equal citizenship.[17] Q.E.D.

Living originalism could just as easily be used to get a completely different result. The word "person" will easily bear an interpretation that includes unborn children (and will certainly do so at least as easily as a meaning that includes corporations). These children are a politically powerless minority, and laws allowing them to be killed for the convenience of adults literally deprive them of the equal protection of the laws. This conclusion follows much more readily from the text than Balkin's claim that abortion restrictions undermine the equal citizenship of women, who are an electoral majority. Therefore, laws *permitting* abortion are unconstitutional. Q.E.D.

As this example suggests, living originalism can use the Equal Protection of the Laws Clause to reach almost any conceivable result, and few conclusions will follow by necessity from the actual original meaning of the constitutional text.

As applied by Balkin himself, living originalism consistently produces results agreeable to the political left. But it has been widely accepted as a legitimate form of originalism by theorists who do not necessarily share those political views. And it has been endorsed and applied even by someone as conservative as Professor Steven Calabresi.[18] Calabresi has concluded, for example, that the original meaning of the Fourteenth Amendment protects a right to same-sex marriage. The core argument is straightforward:

> State laws that ban same-sex marriage *formally* discriminate on the basis of sex in the same way that State laws that banned interracial marriage discriminated on the basis of race. Same-sex marriage laws allow a man to marry a woman, but not another man. This is, again as a *formal* matter, sex discrimination—plain and simple.[19]

Of course, the matter is not quite so plain and simple. In a different and more obvious sense, traditional marriage laws do not discriminate as a *formal* matter against either men or women on the basis of their sex: all members of both sexes are forbidden to marry a person of their own sex. But as with the abortion example, it is true that the bare words of the Equal Protection of the Laws Clause can accommodate multiple interpretations, including the one that Calabresi chooses. Because all laws treat some people differently than others, and thus unequally, *any* law could be declared unconstitutional without adopting a linguistically impossible interpretation of the Fourteenth Amendment.

Applying the theory of living originalism, a judge or other interpreter decides which laws violate the Constitution by reference to principles or policies that are congenial to the interpreter. Accordingly, Calabresi approves of laws that he thinks are for the general good of the whole people, apparently including laws against polygamy, which he thinks "arguably leads to sex discrimination."[20] Of course, billions of people for thousands of years have believed that traditional marriage laws promote the general good, and polygamy has been practiced in many cultures, including that of the Biblical patriarchs. Living originalism makes it easy to declare either practice unconstitutional. Or both. Or neither.[21]

II. Living Textualism

The *Bostock* majority opinion consists essentially of a two-step argument. Step one is to find an interpretation of the phrase "because of an individual's sex" that the words can bear. Justice Gorsuch assumes, though only arguendo, that "sex" has its ordinary meaning, which refers to the biological classes of male and female.[22] More significantly—indeed crucially—he says that the term "because of" incorporates into Title VII what he regards as the traditional standard of but-for causation, which "is established whenever a particular outcome would not have happened 'but for' the purported cause."[23]

15 U.S. Const. amend. XIV.

16 *See* Jack M. Balkin, *Abortion and Original Meaning*, 24 Const. Comment. 291, 313-25 (2007).

17 "[T]here could be other constitutional principles [i.e. other than "equal citizenship"] embodied by the Equal Protection Clause that no particular person living in 1868 intended but that we come to recognize through our country's historical experience." Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 Const. Comment. 427, 498 (2007).

18 *See, e.g.*, Steven G. Calabresi, *Two Cheers for Professor Balkin's Originalism*, 103 Nw. U. L. Rev. 663 (2009).

19 Steven G. Calabresi & Hannah M. Begley, *Originalism and Same-Sex Marriage*, 70 U. Miami L. Rev. 648, 700 (2016) (emphasis added). Calabresi and Begley also rely on legislative history to argue that the Fourteenth Amendment bans hereditary class legislation like the Hindu Caste system and European feudalism. *Id.* at 653. This interpretation is eminently defensible, as is its application to Jim Crow anti-miscegenation laws. Homosexuals, however, do not constitute a legally defined hereditary class like the Indian dalits, medieval serfs, or black Americans during Jim Crow, and there is no evidence that the public thought they did in 1868.

20 *Id.* at 691-92, 702.

21 For a more detailed discussion of Calabresi's arguments for the unconstitutionality of traditional marriage laws, see Lund, *Living Originalism*, *supra* note 14, at 37-43.

22 *See* 140 S. Ct. at 1739 ("[W]e proceed *on the assumption* that 'sex' [in 1964] signified what the employers suggest, referring only to biological distinctions between male and female.") (emphasis added).

23 *Id.* (citing Gross v. FBL Financial Serv., 557 U.S. 167, 176 (2009)).

Step two is to find a hypothetical that illustrates why an individual's sex is necessarily a but-for cause of every adverse employment decision resulting from a rule that discriminates against homosexual or transgender individuals. And that, Gorsuch thinks, is easily done. Assume, for example, that an employer has two employees, one of each sex, both of whom are sexually attracted to men. If the employer discriminates based on sexual orientation and discharges the male but not the female employee, the discharged employee would have kept his job but for his sex.[24] Ergo, Title VII was violated.

Gorsuch supplements this argument with a discussion of a few Supreme Court precedents and with responses to several arguments advanced by the employers in their briefs. But he insists that the argument I just summarized is conclusive.[25] The text is the law and that's that. Most importantly, evidence about the understanding of the text held by those who voted for the statute in 1964, or by the public that authorized those legislators to act, is simply irrelevant. Why? Because the text is so completely clear and unambiguous that it cannot possibly mean anything other than what Gorsuch says it means:

> The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration. Of course, some Members of this Court have consulted legislative history when interpreting *ambiguous* statutory language. But that has no bearing here. "Legislative history, for those who take it into account, is meant to clear up ambiguity, not create it." And as we have seen, no ambiguity exists about how Title VII's terms apply to the facts before us.[26]

Justice Samuel Alito's dissent (in which Justice Clarence Thomas joined) does not mince many words. The majority's claim that it is merely enforcing the terms of the statute is "preposterous."[27] The majority opinion is "like a pirate ship," flying the false flag of textualism.[28] The majority attempts to "pass off" its decision as the inevitable result of Justice Scalia's interpretive method, while actually doing what he excoriated, namely updating a statute to better reflect evolving values that Congress has not enacted.[29] "A more brazen abuse of our authority to interpret statutes is hard to recall."[30]

Alito's critique has two main components. First, the linchpin of the majority's argument is that the statutory language *unambiguously* forbids discrimination based on homosexuality or the characteristic of being transgender. A core principle of textualism does indeed hold that unambiguous statutory language should almost always be followed, without regard to what Gorsuch calls "extratextual considerations" such as the legislative history of the statute. But, Alito says, only through "breathtaking" arrogance can the majority claim that its reading of the language is unambiguously clear.[31] There is not a shred of evidence that anyone who voted for the statute perceived this supposedly unambiguous meaning, which the majority implies is a sign that the legislators were not "smart enough" to understand what it plainly says.[32] Every Court of Appeals until 2017 failed to perceive the same supposedly unambiguous meaning. And for 48 years, so did the statute's enforcement agency, the EEOC.[33]

The second component of Alito's response is that the majority's interpretation went undiscovered for half a century because it is unambiguously *wrong*. "Sex" does not mean "sexual orientation," nor does it mean "sexual identity." An employer can have and enforce a policy against employing homosexuals or transgender individuals without knowing the sex of the individuals adversely affected by the policy. That cannot possibly be intentional discrimination against an individual "because of such individual's sex."[34] And if the employer happens to know the sex of an individual adversely affected by the policy, that cannot transform intentional discrimination because of sexual orientation or because of being transgender into intentional discrimination because of the employee's sex. Thus, the majority is demonstrably wrong to claim that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[35]

Recall the majority's supposedly dispositive hypothetical. An employer has two employees, one of each sex, both of whom are sexually attracted to men. If the employer discharges the male for being attracted to men but not the female, the discharged employee would have kept his job but for his sex, and he has therefore *necessarily* been discriminated against because of his sex. But has he been *intentionally* discriminated against because of his sex? To show why not, Justice Alito offers a different hypothetical. Rather than assume just two employees, assume four: a heterosexual of each sex and a homosexual of each sex. When the employer enforces a policy against employing

24 *Id.* at 1741-42.

25 In his dissent, Justice Alito distinguishes the precedents. Whether one is persuaded by Alito's distinctions or not, the more important point is that the majority does not actually rely on those precedents. In the majority's view, the outcome of this case would be the same even if none of those precedents existed.

26 *Bostock*, 140 S. Ct. at 1749 (citations omitted).

27 *Id.* at 1755 (Alito, J., dissenting).

28 *Id.*

29 *Id.* at 1755-56.

30 *Id.* at 1755.

31 *Id.* at 1757.

32 *Id.* (quoting Hively v. Ivy Tech Community College, 853 F.3d 339, 357 (7th Cir. 2017) (Posner, J., concurring)).

33 *Id.* at 1757-58.

34 "At oral argument, the attorney representing the employees, a prominent professor of constitutional law, was asked if there would be discrimination because of sex if an employer with a blanket policy against hiring gays, lesbians, and transgender individuals implemented that policy without knowing the biological sex of any job applicants. Her candid answer was that this would 'not' be sex discrimination. And she was right." *Id.* at 1759 (footnote omitted).

35 *Id.* at 1758 (quoting the majority opinion).

homosexuals, it results in the discharge of the two employees whose descriptions are crossed out:

~~Man attracted to men~~
Woman attracted to men
~~Woman attracted to women~~
Man attracted to women

The discharged employees have something in common, but it is not their sex. Nor is it an attraction to men, or an attraction to women. Both individuals were discharged because of their homosexuality. Neither was discharged because of being a man or because of being a woman, or because of any characteristic of the sex to which they belong.[36]

Contrary to the majority's claim, Alito insists, its approach is not the textualism adopted by Justice Scalia, which holds that the words of a law "mean what they conveyed to reasonable people *at the time they were written*."[37] Alito piles up mountains of evidence confirming that the phrase "because of sex" would not have been understood in 1964 to include "because of sexual orientation or because of being transgender." In sum, "[e]ven if discrimination based on sexual orientation or gender identity could be squeezed into some arcane understanding of sex discrimination, the context in which Title VII was enacted would tell us that this is not what the statute's terms were understood to mean at the time."[38]

Justice Brett Kavanaugh's solo dissent makes a similar point in a somewhat different way. He observes that courts presumptively accept the ordinary meaning of a phrase in a statute as its legal meaning. The *Bostock* majority, he says, adopts "the literal meaning," i.e. but-for causation, thereby "latching on to a novel form of living literalism" to remake American law.[39] His conclusion resembles Alito's, but he missed the most significant part of the argument. Words and phrases frequently have *multiple* literal (i.e. non-metaphorical) meanings, and the crucial move in the majority's argument is the substitution of one arguably literal meaning of the term "because of" for the indubitably literal ordinary meaning.[40]

As the majority acknowledges, the meaning of the term "because of" is "by reason of" or "on account of."[41] That definition does not imply that but-for causation is either necessary or sufficient. In fact, Gorsuch never says that "because of" always encompasses any and every but-for cause, which would be patently false. On the contrary, he implicitly agrees that it does not when he admits that in "ordinary conversation," discrimination on the basis of homosexuality or transgender status would not be regarded as sex discrimination.[42]

Taking "because of" to mean "motivated by" is every bit as literal as Gorsuch's but-for causation interpretation. Nevertheless, Gorsuch says that "in the language of law" the term "because of X" can *only* mean "X was a but-for cause of."[43] *But the text of the statute says no such thing.* And Gorsuch points to nothing in the statute that implies or even suggests any such thing.[44] In addition, he simply waves away the part of Title VII's text specifying that liability is established when sex is a "motivating factor" for an employment practice, even if it is not a but-for cause.[45] An employer that dismisses an individual because of a policy motivated by disapproval of homosexuality or of transgender people or behavior is obviously not motivated by the individual's sex.

Note how far the majority has gone beyond the form of living originalism promoted by Professors Balkin and Calabresi. The professors stress that the text of the Constitution is often open to multiple interpretations that its words can bear. They then choose the interpretations they prefer and defend their choices with non-linguistic arguments based on factors such as the Constitution's historical background, the nation's evolving traditions, justice, prudence, or anything else that supports their choice. Gorsuch, on the other hand, rests the majority's decision solely on the bare words of the statutory text. In particular, he does not defend his conclusion on the ground that it is consistent with the purpose of Title VII. Justice Alito's dissent demonstrates that it would be almost impossible to do so with a straight face, but the important point here is that Gorsuch does not even try.[46]

In the end, the majority's core claim—that the statutory text is unambiguous—is indefensible. What *Bostock* implicitly suggests

36 *Id*. at 1763.

37 *Id*. at 1755 (Alito, J., dissenting) (quoting A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 16 (2012) (emphasis added by Alito)).

38 *Id*. at 1772.

39 *Id*. at 1824-25, 1836 (Kavanaugh, J., dissenting).

40 I say "arguably literal" though I seriously doubt that the literal meaning of "because of" includes all but-for causes, no matter how remote they may be. Would one really be speaking literally, for example, in saying that an employee was fired "because of the Big Bang" or "because of Christopher Columbus's voyage across the Atlantic Ocean" or "because of her parents' decision to marry and have a child"? But even assuming that the majority has adopted *a* literal interpretation of the statute, it certainly has not adopted what Kavanaugh calls *the* literal meaning.

41 *Bostock*, 140 S. Ct. at 1739 (majority opinion). Every dictionary I have consulted gives the same definition.

42 *Id*. at 1745.

43 *Id*. at 1739. *See also id*. at 1745 ("You can call the statute's but-for causation test what you will—expansive, legalistic, the dissents even dismiss it as wooden or literal. But it is the law.").

44 Instead, he offers citations to two cases, neither of which dealt with Title VII's anti-discrimination provisions. *Id*. at 1739 (citing Univ. Tex. Southwestern Med. Ctr. v. Nassar, 570 U.S. 338, 350 (2013) and *Gross*, 557 U.S. at 176). In any event, the cases merely construed those provisions to make but-for causation a necessary *minimum* element of a plaintiff's proof, so that a plaintiff would not be able to prevail simply by showing that the challenged practice was a motivating factor for an adverse employment decision. Neither case held that every but-for cause is always *sufficient* to establish legal causation.

45 *Id*. at 1739-40 (dismissing relevance of 42 U.S.C. § 2000e-2m).

46 One politically appealing argument that could be made in favor of the majority's ruling is based on an analogy with discrimination on the basis of interracial intimate relationships. Although the Court has not ruled that such discrimination would violate Title VII, Justice Alito assumes that it might. He rebuts the analogy by noting that history tells us that such discrimination is a core form of racial discrimination used in a system designed to subjugate one race of Americans as a class, whereas discrimination on the basis of homosexuality or of being transgender was never a part of a project to subjugate either men or women. *See Id*. at 1764-65 (Alito, J., dissenting). Even if one is not persuaded by Alito's

is that any interpretation of a statutory text that its words can bear is a legally sufficient basis for adopting that interpretation. No further explanation is needed, and evidence of any kind for a different interpretation, no matter how overwhelming the evidence is, may simply be ignored.

Living originalism has thus been unleashed from the academy and unbound from the rather minimal limitations that its academic promoters have acknowledged. The unacknowledged theory underlying the result in *Bostock* is that statutory language can simply be declared unambiguous so long as the imputed meaning is not linguistically impossible. This form of textualism thus operates as a super trump card.

III. The Road Ahead

A. Applying Bostock

In one of the majority's few efforts to put some limit on the reach of its decision, Justice Gorsuch declares (without textual support) that Title VII applies to traits or actions that are "inextricably bound up with sex," but not to traits or actions "related to sex in some vague sense or because discrimination on these bases has some disparate impact on one sex or another."[47] If there is one action in human life that is inextricably bound up with sex, it is sexual intercourse. It is therefore not surprising that people frequently refer to this as "sex," as in the phrase "having sex with one's spouse." Nor is it surprising that dictionaries recognize this as one of the word's literal meanings.[48] Now suppose that an executive is fired because she had consensual sex with a subordinate. Has the employer violated Title VII? The employee was certainly fired "because of" her sex. But for her sex, i.e. the sex she had with her subordinate, she would not have been fired.[49] As a linguistic matter, the text of the statute can bear this interpretation at least as easily as it can bear the interpretation of the statute adopted in *Bostock*.

The executive's legal claim would be rejected by the courts, of course, just as they may refuse, at least for a while, to apply *Bostock* to such practices as single-sex locker rooms and single-sex sporting competitions.[50] But on what grounds? Gorsuch himself suggests that the Court might, in another case, impute to the statute a meaning of "sex" that is different from the one applied in *Bostock*.[51] It is undoubtedly true that one of the meanings of "sex" is "sexual intercourse," and sexual intercourse is undoubtedly "inextricably bound up with sex" in the biological sense of the term. Thus, in order to avoid holding the executive liable, it would seem that courts will have no choice except to recur to what *Bostock* calls extratextual considerations. Why would that be justified in my hypothetical, but not in *Bostock* itself?

B. Implications for Race and Sex Preferences

As this example may suggest, *Bostock*'s form of textualism will be impossible to apply consistently across the full range of statutory construction cases that courts must decide. But there is one case in which the language of Title VII is truly unambiguous: When members of one race or one sex are given preferential treatment because of their race or sex, the employer has intentionally discriminated against other individuals because of their race or sex. Although the Supreme Court has authorized such discrimination, this is the easiest case that could possibly arise under *Bostock*'s form of textualism. The text of the statute unambiguously forbids such disparate treatment, and the Supreme Court has never pretended otherwise.

Today, the only legal obstacle to following the unambiguous text of the statute arises from the existence of longstanding precedents that upheld such quotas and preferences. That obstacle was removed by a 1991 amendment to Title VII. The courts have refused to recognize the implications of the amendment, but *Bostock* has now established a new precedent that demands the restoration of the law that Congress has twice enacted. To show why *Bostock* requires that the courts stop ignoring the law, we need to examine several somewhat complex and interrelated developments that have taken place since 1964.

With certain textually specified exceptions, Title VII by its terms forbids employers "to discriminate against any individual . . . because of such individual's race, color, religion, sex, or

rebuttal, it is significant that Gorsuch does not mention the analogy. Why would he, given that the majority considers all "extratextual considerations" irrelevant? *See id.* at 1749 (majority opinion).

47 *Id.* at 1742 (majority opinion). As Alito pointedly notes, the text of the statute forbids discrimination because of sex itself, not because of things "inextricably bound up with sex," such as sexual harassment or sexual assault. "Does the Court really think that Title VII prohibits discrimination on all these grounds? Is it unlawful for an employer to refuse to hire an employee with a record of sexual harassment in prior jobs? Or a record of sexual assault or violence?" *Id.* at 1761 (Alito, J., dissenting). There is no response to these questions in the majority opinion.

48 As Appendix A to Justice Alito's dissent documents, dictionaries from the era in which Title VII was adopted, as well as more recently, include sexual intercourse or terms including sexual intercourse (such as "phenomena of sexual instincts and their manifestations") among the literal meanings of the word "sex." One dictionary even gives "sexual activity, especially sexual intercourse" as the *first* of several literal meanings. American Heritage Dictionary 1605 (5th ed. 2011) (quoted in Alito's dissent, 140 S. Ct. at 1791).

49 Even under the ordinary meaning of "because of," the employer would be liable: the firing was motivated by the executive's sex, which she had had with her subordinate.

50 *Bostock* was careful to stress that the Court has not outlawed single-sex bathrooms and locker rooms, or required girls and women to compete against male athletes, or forbidden sex-based dress codes. 140 S. Ct. at 1753. What the Court really means is "not yet." Even that isn't quite true since one of the three cases decided in *Bostock* itself held an employer liable for discharging a male employee who decided to dress as a woman while at work. *See* EEOC v. R.G & G.R. Harris Funeral Homes, 884 F.3d 560, 566 (6th Cir. 2018), *aff'd Bostock*, 140 S. Ct. 1731. *Cf. Lawrence*, 539 U.S. at 604 (Scalia, J., dissenting) ("The Court today pretends . . . that we need not fear judicial imposition of homosexual marriage. . . . Do not believe it.").

As Justice Kavanaugh pointed out, Congress would likely have prohibited discrimination on the basis of sexual orientation in the relatively near future. 140 S. Ct. at 1836 (Kavanaugh J., dissenting). Perhaps legislation outlawing discrimination against transgender individuals would also have been enacted fairly soon. But such legislation would almost certainly have included politically popular exceptions that will be difficult, after *Bostock*, for judges to infer from Title VII as it is now written.

51 *See* 140 S. Ct. at 1739 ("[W]e proceed *on the assumption* that 'sex' [in 1964] signified what the employers suggest, referring only to biological distinctions between male and female." (emphasis added)).

national origin." The Supreme Court has never doubted that this language prohibits employers from intentionally discriminating against applicants or employees because they are black or white, or because they are male or female.[52]

In 1971, *Griggs v. Duke Power*[53] held that the statute also prohibits the *unintentional* discrimination that can arise when the qualifications for a given job are not randomly distributed among various racial groups. Chief Justice Warren Burger's opinion for a unanimous Court contains an astonishing number of factual misstatements and other errors.[54] These include a refusal to acknowledge the existence of a textual provision that expressly warns against interpretations that would require preferential treatment on account of racial imbalances in an employer's workforce.[55]

Burger ignored or misrepresented the text of the statute and rested the decision on three blatant ipse dixits. First, he assumed that the statute prohibits unintended disparate effects as well as intentional discrimination. Second, he claimed that the statute contains a massive unstated exception to this prohibition for practices that result in racial disparities smaller than some unspecified large magnitude. Third, he said that even if there is a sufficiently large disparate impact, the job qualifications set by the employer do not violate the statute if they have some unspecified kind of business justification. There is not so much as a hint of these exceptions in the statute, which is not surprising since the disparate impact rule to which they are exceptions is not itself in the statute. Nor was there any support for any of this in the legislative history. The Supreme Court just made the whole thing up. The Justices then spent many years trying, without much success, to clarify the doctrinal mess that *Griggs* had created.

Having radically *expanded* the reach of the statute by inventing a new theory of liability with no basis in the law, the Court went on to *narrow* the scope of the prohibition that Congress actually had enacted. This was not irrational. As Justice Harry Blackmun pointed out, the combination of the literal language of the statute and the *Griggs* decision put employers in a precarious position: potentially liable for past discrimination against blacks, they faced liability to whites for voluntary preferences adopted to mitigate the effects of such prior discrimination.[56] But this was not how the Court chose to justify its narrowing of the statutory ban on racial discrimination.

United Steel Workers v. Weber[57] involved a program, adopted in a collective-bargaining agreement, through which the employer decided to train some of its unskilled employees for higher paying skilled jobs at the company. Slots in the program were limited, and the openings were allocated by seniority, with one exception. Under pressure from the federal Department of Labor, the employer and the union agreed to impose a 50 percent quota for black workers. The plaintiff in the case was a white employee who would have been selected on the basis of his seniority but for the operation of the racial quota.

Writing for the majority, Justice William Brennan acknowledged at the outset that the quota violated what he called the statute's "literal" language, which forbids discrimination because of race.[58] Nevertheless, he maintained, the overt intentional racial discrimination entailed in this quota scheme was consistent with what he called the "spirit" of the statute.[59] Brennan purported to find evidence of this spirit in the legislative history. Then-Justice William Rehnquist's dissent systematically demolished the majority's arguments, but it is equally important to observe that all of the legislative history Brennan cited pertained to private employers and to what was called "the plight of the Negro in our economy."[60] That is, it was all about eliminating the economic barriers created by the notoriously widespread discrimination against blacks in the labor markets.

Eight years later, *Johnson v. Transportation Agency*[61] approved a preference given to a white woman by a public employer. Once again, Justice Brennan wrote the majority opinion. He purported to rely on *Weber*, although *Weber*'s holding had expressly extended only to what the Court had called "affirmative action plans designed to eliminate conspicuous *racial* imbalance in traditionally segregated job categories."[62] Because the holding in *Weber* was expressly limited to racially segregated job categories, the result in *Johnson* was not based on stare decisis, and Brennan did not say that it was. Instead, he maintained that because Congress had not overruled *Weber*, "we therefore may assume that our interpretation of [Title VII] was correct."[63] And what was that interpretation? Not the one actually adopted in *Weber*, but rather a much broader rubric under which the statute should be

52 *See, e.g.*, McDonald v. Santa Fe Trans. Co., 427 U.S. 273 (1976).

53 401 U.S. 424.

54 For a short discussion, see Nelson Lund, *The Law of Affirmative Action in and after the Civil Rights Act of 1991: Congress Invites Judicial Reform*, 6 Geo. Mason L. Rev. 87, 91-101 (1997). For more detail, see Michael Gold, Griggs' *Folly: An Essay on the Theory, Problems, and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 Indus. Rel. L.J. 429 (1985). For an analysis of the current state of the doctrine that has evolved from *Griggs*, see Gail L. Heriot, *Title VII Disparate Impact Liability Makes Almost Everything Presumptively Illegal* . . . , https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3482015.

55 42 U.S.C. § 2000e-2(j) ("Nothing contained in [Title VII] shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer . . . in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.").

56 United Steelworkers v. Weber, 443 U.S. 193, 209-16 (1979) (Blackmun, J., concurring).

57 *Id.*

58 *Id.* at 201.

59 *Id.* at 201-02.

60 *Id.* at 202 (quoting Senator Hubert Humphrey). As enacted in 1964, Title VII did not apply to governmental employers.

61 480 U.S. 616 (1987).

62 *Weber*, 443 U.S. at 209 (emphasis added).

63 480 U.S. at 629 n.7.

read to favor voluntary efforts to further what Brennan vaguely called "the objectives of the law."[64]

Justice Scalia's dissenting opinion skillfully refuted all of Brennan's arguments, much as Rehnquist had done in *Weber*. Scalia persuasively showed, for example, that "vindication by congressional inaction is a canard."[65] But I want to focus here on the fact that *Johnson*'s decision to reaffirm and extend *Weber* rested entirely on the proposition that Congress had tacitly endorsed *Weber*'s anti-textual interpretation by failing to overrule it. That means that *Weber* and *Johnson* would necessarily lose their precedential value if Congress were to remove the tacit endorsement that Brennan attributed to the legislature's post-*Weber* inaction. And that is just what the Civil Rights Act of 1991 did.

This statute resulted from a lengthy and bitter debate in Congress about a series of employment discrimination decisions from the Supreme Court in 1989.[66] Most of the controversy arose from efforts to codify a stringent and expansive disparate-impact rule that the Supreme Court had implicitly rejected in the line of cases that began with *Griggs*. Opponents objected that doing so would force employers to use racial preferences to avoid the statistical imbalances that could trigger disparate impact liability. In the end, Congress enacted a compromise disparate impact rule that was sufficiently ambiguous to allow both sides to claim victory in public.

But the statute made a number of other changes to Title VII as well. Most importantly for our purposes, Congress added the following new provision to the statute:

> Except as otherwise provided in [Title VII], an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.[67]

On its face, this section of the 1991 Act unambiguously overrules *Weber* and *Johnson*. Race and sex were indisputably motivating factors in both cases, as they are in every practice that grants preferences to certain racial groups or to members of one sex. Under *Bostock*'s approach to statutory interpretation—under which the unambiguous text of the law controls, regardless of external evidence of congressional intent or policy implications—preferences based on race or sex would necessarily be held to violate this provision.

One might try to escape this conclusion by appealing to a savings clause in the 1991 statute, which provides: "Nothing in the amendments made by this [Act] shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements, that are in accordance with the law."[68] This clause, however, cannot save the kinds of affirmative action at issue in *Weber* and *Johnson*. Under the traditional series-qualifier canon in statutory construction, the qualifying term "court-ordered" would apply to affirmative action and conciliation agreements, as well as to remedies. The canon fits because the statute expressly provides for only one defined form of "affirmative action," namely court-ordered equitable relief for individual victims of Title VII violations,[69] and because conciliation agreements are enforceable through court orders.[70]

One might try instead to invoke the rule of the last-antecedent,[71] so that the qualifying term "court-ordered" would apply only to remedies. But the statute contains no definition of affirmative action other than court-ordered equitable relief, so this interpretation would turn the savings clause into a vague reference to something that might or might not include preferences based on race or sex.

Even if one adopted that reading, however, the savings clause would still apply only to actions and programs that are "in accordance with the law." If *Weber* and *Johnson* were "the law," the 1991 statute would be hopelessly self-contradictory because it would mean that the statute should not be construed to mean what it unambiguously does mean: that race- and sex-based preferences are unlawful.[72] But the statute does not contradict itself. The savings clause cannot save *Weber* and *Johnson* because judicial opinions interpreting the law are themselves law only in a metaphorical sense. The text of Title VII, however, is literally the law, as *Bostock* forcefully emphasizes. Although lawyers sometimes adopt the colloquial shortcut of calling judicial

64 *Id*. at 640.

65 *Id*. at 671-72 (Scalia, J., dissenting).

66 For a more detailed discussion of the 1991 Act and its effect on *Weber* and *Johnson*, see Lund, *The Law of Affirmative Action*, *supra* note 54.

67 42 U.S.C. § 2000e-2m. The proviso at the beginning of this sentence refers to a number of exceptions to the general anti-discrimination rule that are expressly specified in the statutory text.

68 42 U.S.C. § 1981 note.

69 42 U.S.C. §2000e-5(g). The only other reference to "affirmative action" in the statute concerns the enforcement of affirmative action plans that the government has approved for its contractors. 42 U.S.C. §2000e-17. That provision does not authorize the use of preferences based on race or sex.

70 *See* Lockhart v. United States, 136 S. Ct. 958, 970 (2016) (Kagan, J., dissenting) ("'When there is a straightforward, parallel construction that involves all nouns or verbs in a series,' a modifier at the end of the list 'normally applies to the entire series.'") (quoting Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts (2012)). This canon applies equally to a modifier at the beginning of a series.

71 *See id*. ("'When the syntax involves something other than [such] a parallel series of nouns or verbs,' the modifier 'normally applies only to the nearest reasonable referent.'") (quoting Scalia & Garner, *supra* note 70); Barnhart v. Thomas, 540 U.S. 20, 26 (2003) (discussing "the grammatical 'rule of the last antecedent,' according to which a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows . . . .While this rule is not an absolute and can assuredly be overcome by other indicia of meaning, we have said that construing a statute in accord with the rule is 'quite sensible as a matter of grammar.'") (citations and case-specific references omitted). As with the series-qualifier canon, this principle applies equally to modifiers that precede a series.

72 Note that the savings clause is not a proviso that creates an exception to the general rule against intentional discrimination. It is instead a rule of construction, which warns against possible misinterpretations. To construe a warning against misinterpretations as a warning against the unambiguously plain meaning of a provision would render the statute self-contradictory.

opinions "law," these opinions cannot be a form of law superior to an actual statute. The text of the Constitution itself tells us that validly enacted federal statutes are "the supreme Law of the Land," and it nowhere so much as suggests that judges may set their own opinions up as a form of law superior to the supreme law of the land.[73]

Thus, the unambiguous text of the motivating-factor provision of the 1991 Act—which is not altered by the savings clause—bans race- and sex-based preferences even more clearly than the language in the 1964 Act did. Because *Bostock* was a case of first impression in the Supreme Court, Justice Gorsuch did not discuss the possibility of tension between his form of textualism and the Court's precedents. Nevertheless, *Bostock* provides strong support for rejecting *Johnson*'s acquiescence theory. Implicitly rejecting Brennan's claim that legislative inaction can constitute legislative endorsement, *Bostock* declares that "speculation about why a later Congress declined to adopt new legislation offers a 'particularly dangerous' basis on which to rest an interpretation of an existing law a different and earlier Congress did adopt."[74]

Although the 1991 Act overrules *Weber* and *Johnson* on its face, the legislative history suggests that the new provision about motivating factors was directly aimed at overruling a different Supreme Court decision, *Price Waterhouse v. Hopkins*.[75] Nor does there seem to be anything in the legislative history expressly indicating that it was also meant to overrule *Weber* and *Johnson*. Needless to say, the approach to legislative history adopted by Justice Brennan in *Weber* could be used to conclude that the unambiguously plain meaning of the motivating factor provision is trumped by the "spirit" of the statute. *Bostock*, however, rules that out because the Court now emphatically insists that legislative history is irrelevant when the text is unambiguous. The unambiguous meaning of the motivating factor provision therefore controls, notwithstanding the Court's misguided use of legislative history in the past.

But even Justice Brennan's own approach—applied consistently—would not be able to save *Weber* and *Johnson*. One of the strangest features of the long and tangled process that led to the 1991 Act was the absence of any extended discussion of those cases in the legislative history. This is not what one might expect in a debate that focused largely on disputes about whether disparate impact liability would lead employers to adopt racial preferences.[76] It is as though there was a conspiracy of silence about *Weber* and *Johnson*. But that does not mean that Congress has confirmed Brennan's assumption in *Johnson* that congressional inaction after *Weber* (and *Johnson* itself) constitutes ongoing approval of those decisions.

On the contrary, if Congress can confer approval by inaction, as *Johnson* claimed it can, the legislature can also withdraw that approval by inaction, at least if it enacts language that unambiguously overrules prior decisions and fails to enact an exception that preserves those decisions. When Congress simultaneously acts to endorse some Supreme Court decisions while declining to endorse other closely related decisions, it follows a fortiori from *Johnson*'s premises that any implied approval by the legislature has been withdrawn. And that is just what happened in 1991, when Congress added or amended at least 22 statutory provisions dealing with employment discrimination. In doing so, it expressly endorsed the controversial *Griggs* decision (and others), but it chose not to endorse *Weber* and *Johnson*.

This choice was specifically confirmed in the legislative history. A memorandum submitted for the record on behalf of 14 Senators who supported the final compromise, as well as the Administration, specifically said that nothing in the new statute approved or disapproved of *Weber* and *Johnson*.[77] Nobody in either House contradicted that statement.[78] Even if one accepts Brennan's theory of approval by inaction, Congress in 1991 even more clearly indicated that it was *not* approving of *Weber* and *Johnson*. The new statute outlaws race- and sex-based preferences on its face, and uncontradicted legislative history confirms that nothing in the statute constitutes approval of *Weber* and *Johnson*. Justice Brennan's sole justification for affirming and extending *Weber* to approve race and sex preferences, despite the plain meaning of Title VII, has therefore been invalidated by Congress. Even if Justice Gorsuch's *Bostock* approach would defer to on-point precedents because of stare decisis, these precedents have lost any force they might have had before the 1991 Act.[79] Cases interpreting language in the original 1964 Act could not possibly be regarded as binding precedents that control the interpretation of a new provision enacted after those cases were decided.

Nor can *Weber* and *Johnson* be saved by the kind of argument that Justice Blackmun advanced in his *Weber* concurrence. It is true that the codification of the disparate impact theory in the 1991 statute created an excruciating tension with Title VII's basic prohibition against intentional discrimination: an employer that balances its workforce in order to avoid disparate impact liability risks being held liable for disparate treatment. In *Ricci*

73 I am well aware, of course, that the Supreme Court has declared its own opinions to be the supreme law of the land. *See, e.g.*, Cooper v. Aaron, 358 U.S. 1, 18 (1958). I am also aware that this declaration is widely accepted, just as some Roman emperors were once widely worshipped as divinities. Like these ancient rulers, however, Supreme Court Justices are gods only in a metaphorical sense of the term. Similarly, the opinions they issue are law only in a metaphorical sense.

74 140 U.S. at 1747 (citations omitted). Gorsuch even goes out of his way to quote a concurring opinion in which Justice Scalia said that "[a]rguments based on subsequent legislative history . . . should not be taken seriously, not even in a footnote." *Id.*

75 490 U.S. 228 (1989).

76 For an overview of the debate, see Roger Clegg, *Introduction: A Brief Legislative History of the Civil Rights Act of 1991*, 54 La. L. Rev. 1459 (1994).

77 137 Cong. Rec. S15, 477-78 (daily ed. Oct. 30, 1991) (memorandum submitted by Sen. Bob Dole).

78 For further detail on the Dole memorandum and its relation to similar memoranda submitted by Senators Jack Danforth and Edward Kennedy (the other two leading negotiators), see Lund, *The Law of Affirmative Action*, *supra* note 54, at 127 nn.190-91.

79 Note that I am not claiming that the inaction by Congress in 1991 itself operated to overrule *Weber* and *Johnson*. Rather, my claim is that its deliberate inaction deprived those decisions of their precedential force on *Johnson*'s own theory of precedent. That means that the Court now has no excuse for refusing to enforce the statute's completely unambiguous textual commands.

v. DeStefano,[80] the Supreme Court addressed this Catch-22. The Court assumed, quite properly, that it had a responsibility to reconcile the conflicting textual provisions as best it could. It did so by allowing employers to practice intentional discrimination when, but only when, there is strong evidence that such discrimination is necessary to avoid disparate impact liability.

Similarly, continued adherence to *Weber* and *Johnson* creates an intolerable tension with the plain language of the motivating-factor provision in the 1991 Act (as well as with the prohibition against intentional discrimination originally adopted in 1964). Unlike the problem addressed in *Ricci*, however, this tension is not in the statute itself, so it is easy to eliminate—the Court need only apply the statute that Congress enacted. Any practical problems that may have loomed before *Ricci* was decided have been adequately addressed by that decision.

Because Congress has deprived *Weber* and *Johnson* of whatever precedential force they may have had, and because they were clearly wrong when decided, the courts are free to apply the 1964 Act and the 1991 amendment as written. In truth, they are obliged to do so, and *Bostock* removes any plausible excuse for shirking that obligation. As the Supreme Court has now pointedly declared, legislative history is not law. Neither are judicial opinions. "Only the written word is the law, and all persons are entitled to its benefit."[81]

IV. Conclusion

Bostock is an outlandish judicial performance. Its argument that the words of Title VII's prohibition of sex discrimination unambiguously outlaw discrimination based on homosexuality and on being transgender is analytically untenable. *Bostock*'s textualism has a kinship with the academic theory of "living originalism," at least in the sense that they are both simulacra of the real thing. But *Bostock* is even more unrestrained in the license it takes with the actual original meaning of the text it purports to apply.

Although *Bostock*'s particular application of textualist principles is fatally flawed, those principles can and should be faithfully applied in other cases. Title VII's anti-discrimination language does not apply, unambiguously or otherwise, to discrimination on the basis of sexual orientation or of being transgender. But the application of the statute's language to preferences based on race or sex is indisputably clear. The use of such preferences undeniably constitutes discrimination "because of" race or sex, and race or sex are undoubtedly "motivating factors" for the preferences even if other factors also motivated the practice. The Supreme Court has never even pretended that the text says anything else.

The Supreme Court precedents upholding such preferences pre-date the 1991 amendment that reconfirmed and strengthened the statute's unambiguous textual ban on discrimination because of race or sex. Because the precedential force of those judicial decisions has rested, according to the Court itself, entirely on the absence of legislation like the 1991 amendment, they must now be judicially overruled. To preserve their holdings after *Bostock* would require a transparent abandonment of any commitment to logic, consistency, or fidelity to the rule of law. Surely that will not happen.

80 557 U.S. 557 (2009).

81 *Bostock*, 140 S. Ct. at 1737. Lest one think that "the written word" might include judicial opinions, here is the quotation in context: "When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit."

The Deterioration of Appropriate Remedies in Patent Disputes

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Other Views:

• Kai-Uwe Kuhn, *Standard Setting Organizations Can Help Solve the Standard Essential Patents Licensing Problem*, Competition Pol'y Int'l (March 4, 2013), https://www.competitionpolicyinternational.com/standard-setting-organizations-can-help-solve-the-standard-essential-patents-licensing-problem/.

• Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 Tex. L. Rev. 1991 (2006), https://faculty.haas.berkeley.edu/shapiro/stacking.pdf.

• Mark A. Lemley & A. Douglad Melamed, *Missing the Forest for the Trolls*, 13 Colum. L. Rev. 117 (2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2269087.

Property rights are an essential economic institution. As the great UCLA economist Harold Demsetz famously argued, property rights spur specialization, investment, and competition, which in turn increase productivity, innovation, and wealth throughout the economy.[1]

The same holds true for intellectual property rights, including patents, which are no less important than their traditional counterparts in facilitating innovation and the efficient organization of productive economic activity, particularly in the modern, high-tech economy.[2] A wealth of literature indicates that much, if not most, of the value of innovation is passed on to consumers in the form of lower prices and higher quality goods and services.[3] Indeed, as Nobel Laureate William Nordhaus finds, even in the presence of patents to facilitate the appropriability of the value of innovation by inventors, "only a miniscule fraction of the social returns from technological advances over the 1948-2001 period was captured by producers, indicating that most of the benefits of technological change are passed on to consumers rather than captured by producers."[4] Thus, although measurement problems plague such research, there is strong evidence that nations with greater levels of patent protection have historically achieved significantly higher innovative output than those with lower levels of patent protection.[5]

Nevertheless, a significant body of academic and policy work has argued—with very real policy success—that patent

1 Harold Demsetz, *Toward a Theory of Property Rights II: The Competition Between Private and Collective Ownership*, 31 J.L. Stud. S653, S665 (2002) ("The single most important force behind our growing use of private ownership has been the productivity gains that result from specialization."). *See also* Harold Demsetz, *Toward a Theory of Property Rights*, 47 Am. Econ. Rev. Papers & Proc. 347 (1967).

2 *See generally* Edmund W. Kitch*, The Nature and Function of the Patent System*, 20 J.L. & Econ. 265 (1977); F. Scott Kieff, *Property Rights and Property Rules for Commercializing Inventions*, 85 Minn. L. Rev. 697 (2001).

3 *See, e.g.*, Edwin Mansfield, *Social and Private Rates of Return from Industrial Innovations*, 91 Q.J. Econ. 221 (1977); Adam Jaffe, *Technological Opportunity and Spillover of R&D: Evidence from Firms' Patents, Profits, and Market Value*, 76 Am. Econ. Rev. 984 (1986).

4 William D. Nordhaus, *Schumpeterian Profits in the American Economy: Theory and Measurement* 1 (Nat'l Bureau of Econ. Research, Working Paper No. 10433, 2004), *available at* http://www.nber.org/papers/w10433.

5 *See, e.g.,* Zorina Khan & Kenneth L. Sokoloff, *Institutions and Democratic Invention in 19th-Century America: Evidence from "Great Inventors," 1790-1930*, 94 Am. Econ. Rev. 400 (2004). *See also* Josh Lerner, *The Economics of Technology and Innovation: 150 Years of Patent Protection,* 92 Am. Econ. Rev. 221 (2002); Albert G.Z. Hu & I.P.L. Png, *Patent Rights and Economic Growth: Evidence from Cross-Country Panels of Manufacturing Industries*, 65 Oxford Econ. Papers 675 (2013) (finding faster growth and higher value in patent intensive industries in countries that improve the strength of patents); Stephen Haber, *Patents and the Wealth of Nations*, 23 Geo. Mason L. Rev. 823 (2015); Bronwyn H.

rights in the U.S. have been too strong.[6] The past two decades have witnessed a significant weakening of patent protection in the U.S. as courts, legislators, and several private organizations have progressively chipped away at some of the key features of patent protection. This includes the availability of injunctions, the amount of damages awarded to victims of patent infringement, and other, more subtle changes, such as curbs on fee-shifting between parties to patent litigation.

Behind many of these changes lies a powerful intellectual movement, alleging that excessive patent protection is holding back western economies. These critics chiefly fear that the owners of the standard essential patents ("SEPs") crucial to much of modern technology are charging their commercial partners too much for the rights to use their patents—referred to as patent holdup and royalty stacking[7]—and that so-called patent trolls ("patent-assertion entities" or "PAEs") are deterring innovation by small startups by employing "extortionate" litigation tactics.[8] Oversimplifying, the argument is that, by selecting certain winning technologies, standardization artificially weakens implementers' bargaining position vis à vis patent holders. Accordingly, critics argue that the royalties charged by SEP holders should not exceed those that they could have obtained before their technology was included in a standard. However, there is little evidence beyond occasional anecdotes to support the first of these concerns, and a growing body of empirical research points in the opposite direction.[9] And the latter concern, while real, is complex, and the optimal policy response should address these complexities more than typical proposals do. Yet despite the limited evidence and complexities, policymakers have been quick to act on them.

It may even be the case that the policy changes that have been made are impeding the ability of owners of SEPs to enforce their rights to such an extent that they are now being *under*-rewarded. Most notably, there is at least some evidence to suggest that the looser enforcement of IP rights is resulting in *holdout* behavior (i.e., situations where would-be licensees avoid concluding a license agreement because they know that they are shielded from legal repercussions for infringement).[10]

While this does not appear to have resulted in a marked decrease in innovative output so far, there is certainly a risk of that happening, especially if lawmakers continue to alter the legal regime in ways that systematically disadvantage patent holders. Indeed, although the causes are unclear, already there are concerns about secular stagnation and the slowdown in productivity growth.[11] In that context, policies that weaken incentives to innovate seem like the height of folly. Moreover, since many important innovations bear fruit only many years after the initial investment in research and development, any subsequent change of course may have few short-term benefits and might even have short-term costs, making it politically difficult if not impossible to change course once more significant adverse effects on innovation start to appear.

Against this backdrop, this article uses the analytical framework of law and economics to offer insights into what policies can help reduce unnecessarily burdensome patent litigation and thereby accelerate the pace of technological progress. Among other things, law and economics enables us to better understand the incentive effects of different rules regarding the enforceability of patents and the optimal balance of remedies to produce the greatest social welfare. The article begins by discussing the critical role that patents play in fostering dynamic technology markets (Section I). It then reviews recent legal and policy developments concerning the availability of injunctions (Section II) and the size of damage awards (Section III). It then considers other legal rules and procedures that may affect innovation incentives (Section IV). We conclude by discussing the policy implications of these developments (Section V).

I. Patents Facilitate Investments and Exchanges in Some of the Most Dynamic Sectors of the Economy

As suggested above, patents likely play an important role in providing inventors with incentives to innovate. But the role of

Hall & Rosemarie Ham Ziedonis, *The Patent Paradox Revisited: An Empirical Study of Patenting in the US Semiconductor Industry, 1979-1995*, 32 RAND J. Econ. 125 (2001) (identifying "two ways in which the pro-patent shift in the U.S. legal environment appears to be causally related to the otherwise perplexing surge in U.S. patenting rates, at least in the semiconductor industry"); Nikos C. Varsakelis, *The Impact of Patent Protection, Economy Openness and National Culture on R&D Investment: A Cross-country Empirical Investigation*, 30 Res. Pol'y 1067 (2001) ("Patent protection is a strong determinant of the R&D intensity, and countries with a strong patent protection framework invest more in R&D.").

6 *See, e.g.,* Adam B. Jaffe & Josh Lerner, Innovation and Its Discontents: How Our Broken Patent System Is Endangering Innovation and Progress, and What to Do About It (2004); Michele Boldrin & David K. Levine, Against Intellectual Monopoly (2008); Dan L. Burk & Mark A. Lemley, The Patent Crisis and How the Courts Can Solve It (2009).

7 *See, e.g.*, Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 Tex. L. Rev. 1991 (2006).

8 *See, e.g.,* Mark A. Lemley & A. Douglas Melamed, *Missing the Forest for the Trolls*, 113 Colum. L. Rev. 2117 (2013).

9 *See, e.g.*, Alexander Galetovic, Stephen Haber, & Ross Levine, *An Empirical Examination of Patent Holdup*, 11 J. Competition L. & Econ. 549 (2015). For a recent, detailed discussion of this literature, see Dirk Auer & Julian Morris, *Governing the Patent Commons*, 38 Cardozo Arts & Ent. L.J. 121 (forthcoming 2020).

10 *See* Bowman Heiden & Nicolas Petit, *Patent Trespass and the Royalty Gap: Exploring the Nature and Impact of Patent Holdout*, 34 Santa Clara High Tech. L.J. 179, 211 (2017) ("At a general level, patent trespass can be said to arise when a SEP holder's licensing revenue decreases, because some (or all) technology implementers avert, either temporarily or permanently, the conclusion of a licensing agreement on terms that correspond to recognized industry practices."). *See also* Richard A. Epstein & Kayvan B. Noroozi, *Why Incentives for Patent Holdout Threaten to Dismantle FRAND, and Why It Matters*, 32 Berkeley Tech. L.J. 1381 (2017) ("By 'patent holdout' we mean the converse problem—that an implementer refuses to negotiate in good faith with an innovator for a license to valid patent(s) that the implementer infringes, and instead forces the innovator to either undertake significant litigation costs and time delays to extract a licensing payment through a court order, or else to simply drop the matter because the licensing game is no longer worth the candle.").

11 *See* Nicholas Bloom, *Innovation Is Getting More Expensive: Behind the Slowdown in Productivity Growth*, Foreign Aff. (Jun. 7, 2018), https://www.foreignaffairs.com/articles/world/2018-06-07/innovation-getting-more-expensive. *See also* Nicholas Bloom et al., *Are Ideas Getting Harder to Find?*, 110 Am. Econ. Rev. 1104 (2020).

patents in the *commercialization* of ideas is probably even more important. Property rights in general, and patent protections more specifically, reduce the cost of transacting, thus enabling firms to specialize.[12] Critically, this means that the patent system encourages and enables not just *invention* but also *innovation* by providing the basic, enforceable property rights that facilitate (theoretically) efficient organizations of economic resources and the negotiations necessary to coordinate production among them. F. Scott Kieff, a United States Federal Trade Commissioner, explained it well when he argued that IP rights are akin to "beacons in the dark, drawing to themselves all of those potential complementary users of the IP-protected-asset to interact with the IP owner and each other. This helps them each explore through the bargaining process the possibility of striking contracts with each other."[13]

The role of patents in facilitating the commercialization of invention can be illustrated with a simple example: Imagine a world where one firm has invented a next-generation widget (i.e., it has discovered all the information necessary to conceive it). Imagine further that the firm that invented the widget has no manufacturing capacity, but that one or more manufacturers would be willing to implement the technology. For the widget to be brought to market, one of the following needs to occur:

- The inventor vertically integrates, either by acquiring a manufacturer or developing the necessary capacity in-house;
- The manufacturers vertically integrate by acquiring the inventor, discovering alternative means for accomplishing the desired effect of the invention, or even committing outright misappropriation of the invention;
- The inventor and manufacturers sign a series of mutually beneficial contracts whereby the necessary information to enable each to adequately practice and distribute the invention is exchanged for monetary compensation.

While the existence of intellectual property rights may facilitate each of these solutions (IP rights can be used as securities to finance vertical integration, for example),[14] the third solution would be significantly more costly—or even impossible—in their absence. In other words, the ability to patent innovations tremendously reduces the cost of bringing those innovations to market by enabling inventors to specialize in the production of ideas and to transfer rights in their inventions, through enforceable agreements (i.e., contracts), to parties that have the requisite specialized resources to develop and market them.

By clearly defining the boundaries of each party's rights, patent law creates one of the necessary conditions for mutually advantageous exchanges to take place. In the words of Ronald Coase, "[w]ithout the establishment of this initial delimitation of rights there can be no market transactions to transfer and recombine them."[15]

Another key aspect of patent law is that it enables inventors to exclude third parties from making, using or selling their inventions.[16] These rights—and the legal tools that allow them to be enforced (e.g., injunctions and damages)—are essential to spur mutually advantageous exchanges. They ensure that potential licensees cannot free-ride on each other, hoping to reverse engineer an invention once it has been placed on the market by one of them (or by the inventor).

Injunctions, in particular, play a critical role in cementing these rights.[17] Perhaps more than any other tool, they guarantee that the unlawful use of inventions can quickly be terminated by the rightsholder. In so doing, they bring potential licensees to the negotiating table. And, by the same token, *weakening* patent rights may result in patent holdout, whereby firms strategically decide to infringe others' patents or delay license negotiations.[18] Even if one ignores the reduced incentives to innovate that this may entail (i.e., it damages the inventor's ability to recoup costs and threatens the viability of commercialization opportunities),[19] this type of behavior has other highly deleterious effects as well. For example, patent holders may respond by resorting to expanded reliance upon trade secret protection and otherwise inefficient vertical

12 *See* Demsetz, *supra* note 1. *See also* Armen A. Alchian, *Specificity, Specialization, and Coalitions*, 140 J. Institutional & Theoretical Econ. 34 (1984) ("All the components of property rights to a resource need not be held in common. It is possible to sell or delegate the rights to decide uses separately from the rights and thereby obtain the gains of specialization, or separation, of use decision from control and ownership, where ownership is the right to the marketable value.").

13 United States International Trade Commission, Views of the Honorable F. Scott Kieff, Commissioner, on the United States Federal Trade Commission's and the United States Department of Justice Antitrust Division's Joint Guidelines for the Licensing of Intellectual Property (Sept. 23, 2016) at 4-5, *available at* https://www.justice.gov/atr/file/897081/download. *See also, e.g.*, Jonathan M. Barnett, *The Anti-Commons Revisited*, 29 Harv. J.L. & Tech. 127 (2015); Daniel F. Spulber, *How Patents Provide the Foundation of the Market for Inventions*, 11 J. Competition L. & Econ. 271 (2015); F. Scott Kieff & Anne Layne-Farrar, *Incentive Effects from Different Approaches to Holdup Mitigation Surrounding Patent Remedies and Standard-Setting Organizations*, 9 J. Competition L. & Econ. 19 (2013); F. Scott Kieff & Troy A. Paredes, *The Basics Matter: At the Periphery of Intellectual Property*, 73 Geo. Wash. L. Rev. 174 (2004); Naomi R. Lamoreaux & Kenneth L. Sokoloff, *Intermediaries in the U.S. Market for Technology, 1870–1920*, in Finance, Intermediaries, and Economic Development 209 (Stanley L. Engerman, et al. eds., 2003).

14 *See, e.g.,* Spulber, *supra* note 13, at 272 ("[P]atents support the market for inventions in several important ways: (1) by increasing transaction efficiencies and stimulating competition, (2) by establishing what I term 'the market for innovative control' that provides incentives for efficient investment, and (3) by promoting the financing of invention and innovation.").

15 Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 8 (1960). Notably, Coase was here referring to *liability rules*, but the general observation applies equally well to "ownership" of both liability and property.

16 35 U.S.C. § 271 (2010).

17 S*ee infra* Section II.A.

18 *See* Heiden & Petit, *supra* note 10.

19 *See* Epstein & Noroozi, *supra* note 10, at 1389 ("[A]nother aspect of the IEEE's policy revision, as well as two Federal Circuit decisions, . . . have incorrectly deprived innovators of any share of the benefits from the standardization of their technological contributions, creating further distortions in the FRAND framework with significant negative follow-on effects in the innovation marketplace.").

integration.[20] This may reduce the number of commercialized inventions either overall or that ultimately fall into the public domain twenty years later (after a patent would have expired). Similarly, the inability to enforce their rights may discourage rightsholders from taking part in collaborative efforts to develop new technologies (e.g., through standardization efforts), similarly constraining the extent of valuable innovation. In short, on the margins, reducing the incentives provided by the patent system will tend to lower the relative openness of technology- and science-driven industries.

Particularly in highly dynamic industries characterized by fast-paced change and cross-pollination of ideas through fluid employment and rapid development cycles, weakening IP protection can have a dramatic effect. Firms in dynamic markets need some ability to appropriate and protect the fruits of their labor.[21] Reducing the protection afforded by patents will urge them to turn toward inferior (costlier, slower, etc.) alternatives to achieve this protection. In other words, injunctions and related doctrines provide property holders with the ability to operate quickly and in the open with the knowledge that they can continue to adequately commercialize their inventions.

The technology standardization space perfectly illustrates the importance of these issues. Many of the most high-profile modern technologies are the fruit of large-scale collaboration coordinated though standards developing organizations (SDOs). These include technologies such as Wi-Fi, 3G, 4G, 5G, Blu-Ray, USB-C, and Thunderbolt 3.[22] This type of collaboration would surely be far more costly without well-delineated property rights and the legal means to enforce them. The reasonable assurances of protection through patent rights provides innovators the security they need to share the information necessary to enable the creation of these organizations. The patent system enables modern firms of all sizes in a dynamic economy to coordinate their behavior to produce modern marvels like the smartphone. The coordination necessary for this sort of feat is hard to imagine without some form of enforceable property right in inventions.

This is not to say that some of these features could not be replicated by private ordering or internalized by mergers. *Theoretically* Samsung or Apple could invent and produce all of the technologies necessary to produce their devices, but the cost for such devices would likely be astronomical and the development time would be measured in years, not months. Absent compelling evidence that these alternative institutions or hierarchies *would* emerge, policymakers should proceed with caution, or risk killing the goose that lays the golden eggs.

At the very least, the fact that many of the most dynamic industries in the world—notably the smartphone and computer hardware industries—develop technologies collaboratively within SDOs is evidence that the benefits of patent protection go well beyond incentives to innovate.

II. The Misguided Shift Away From Injunctive Relief

Historically, one of the most important features of property rights in general, and patents in particular, is that they provide owners with almost absolute power to exclude use by third parties. As leading law and economics scholar Richard Epstein notes, "Property rights are, in this sense, made absolute because the ownership of some asset confers sole and exclusive power on a given individual to determine whether to retain or part with an asset on whatever terms he sees fit."[23] In the case of physical property, such exclusion is achieved through laws against trespass (the use of real property without permission), nuisance (imposition of adverse effects on property such as noise and pollution), and conversion (the taking of chattels without permission).[24] In the case of IP, exclusion is achieved through rights established by statute.[25] For example, the owner of a patent is granted the exclusive right to determine who may use the product or process specified in the patent, usually for 20 years after filing.

These laws would be meaningless, however, without the ability to enforce them and remedy breaches. And one of the most important remedies is the injunction. In its most general sense, an injunction is a court order either requiring or prohibiting certain acts.[26] In the context of IP rights, injunctions are usually applied by courts as a means of prohibiting the unauthorized or unlicensed use of a patented technology.

The period of exclusivity established by a patent works in tandem with the injunctive power to both create an incentive to invest and—perhaps more critically—to facilitate the licensing of inventions.[27] There are many reasons that someone may invent a new product or process, but if they are to be optimally encouraged to distribute that product—and thus generate the associated social welfare—the ability to engage supply chains to

20 *See, e.g.*, Jonathan M. Barnett, *Intellectual Property as a Law of Organization*, 84 So. Cal. L. Rev 785, 816 (2011) ("Weak or no patents can have adverse effects on innovation even if it appears that the relevant market 'adequately' supports innovation by recourse to integration. . . . While integration may enable those firms to accrue returns sufficient to cover even substantial R&D costs, they may still be forfeiting specialization gains that could be accrued under contract-based organizational forms that would be feasible under lower levels of expropriation risk. And the most weakly integrated firms that would have existed under stronger forms of patent protection cannot be observed at all.").

21 *See, e.g.*, Kenneth J. Arrow, *Economic Welfare and the Allocation of Resources for Invention*, in NBER, The Rate and Direction of Inventive Activity: Economic and Social Factors 609 (1962) ("We have then three of the classical reasons for the possible failure of perfect competition to achieve optimality in resource allocation: indivisibilities, *inappropriability*, and uncertainty.") (emphasis added).

22 For a discussion of the numerous technologies that have been brought about through standardization, *see* Auer & Morris, *supra* note 9.

23 Richard A. Epstein, *The Clear View of The Cathedral: The Dominance of Property Rules*, 106 Yale L.J. 2091 (1996).

24 *See, e.g.*, Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 Va. L. Rev. 965 (2004).

25 *See, e.g.*, 35 U.S.C. § 101 (2018).

26 *See Injunction*, Wex Legal Dictionary, https://www.law.cornell.edu/wex/injunction.

27 *See* Epstein, *supra* note 23, at 2101 ("In the usual case, the system tries to stop the invasion so as to require that the alteration of property rights takes place by voluntary transaction. Damages are a second-tier remedy. As with the necessity rules, it would be a mistake to treat injunctions and damages as dichotomous and mutually exclusive remedies.").

fully commercialize the invention is crucial.[28] If a patent holder believes that the path to commercialization and remuneration is hindered by infringers, she will have less incentive to invest fully in the commercialization process (or in the innovation in the first place). Because infringement affects both the initial incentive to innovate as well as the complex process of commercialization, courts have historically granted injunctions against those who have used a patent without proper authorization.

A. Damages Alone Are Often Insufficient

Injunctions are almost certainly the most powerful means of enforcing property rights and remedying breaches. Nonetheless, courts may sometimes award damages either in addition to or as an alternative to the award of an injunction.[29] But it is often difficult to establish the appropriate size of an award of damages when intangible property—such as invention and innovation in the case of patents—is the core property being protected.

Consider the example of a chattel that has been taken without the owner's consent. If that chattel is a family heirloom of distinctive quality—a vase that has been handed down through the generations, for example—the value of the item to the legitimate owner may be greater than the value that could be obtained through a market transaction. The appropriate remedy in such cases is the return of the item. By contrast, if the item can readily be replaced—a current-model television for example—monetary damages would likely be adequate. The difference between these two items relates to the degree to which their value to the owner is idiosyncratic; the more idiosyncratic, the more difficult it is accurately to adjudge monetary value and thereby ensure that the rightful owner of the property is adequately restituted. Thus, the more idiosyncratic the property, the more appropriate it is to use an injunction—to require the return of the object—to remedy its misappropriation.

Patents are certainly idiosyncratic, but they are also highly valuable and tradeable in commercial markets. The key feature of patents in this latter respect is that their value is uncertain ex ante. The value of a particular invention or discovery cannot be known until it is either integrated into the end-product that will be distributed to consumers or actually used by consumers. This uncertainty creates a need for patent holders to carefully structure their risk and reward calculus such that the commercialization of the invention can reasonably be expected to generate a profit (which in turn goes back to the initial incentives to even proceed with the expensive R&D process to create the invention in the first place).

Particularly with highly complex innovations—such as in pharmaceuticals and technology—the degree of risk taking and the required investment of capital is large, and the foregone opportunities can be massive. As such, it will often be difficult or impossible to adequately calculate appropriate monetary damages for the unauthorized use of a patent, even if the ex post value of the patent is knowable. So while it will be necessary to establish damages for violations after the fact, it will nearly always be appropriate to award injunctions to deter ongoing violations and to allow the property owner to do their own value calculations based on their investments, sunk costs, and—critically—lost opportunities that were foregone in order to realize the particular invention.

And there are several other reasons why courts have historically seen fit to supplement damages for violations of property rights with injunctions. In the context of *physical property rights*, consider a situation in which A's actions have caused harm to B's property. If B is able to demonstrate that the harm was caused by A (even if unintentionally), the courts will typically require A to pay compensation to B such that he is returned, so far as possible, to his initial state. Unfortunately, it is often difficult to evaluate the actual harm done in such cases, especially if that harm has a subjective element. It is also plausible that the appropriate damages exceed the infringer's ability to pay—in which case damages would insufficiently compensate the property right holder. Moreover, there can also be situations when B fears that A might be about to cause irreparable harm to its property. Or instances where A's actions continue to cause harm to B despite an initial damages award. In all of these cases, injunctive relief may be necessary to ensure the effective enforcement of property rights. The application of injunctive relief thus acts to demarcate clearly the property rights of the two parties.

In the context of *intellectual property*, the potential inadequacy of monetary damages has been repeatedly acknowledged by courts.[30] Indeed, one prong of the four-factor test for injunctions specifically questions whether other remedies (including damages) may provide a property holder with *adequate relief*.[31] As noted above, if innovators expect to be under-rewarded for their investments, they will have less incentive to innovate in the first place.

Unfortunately, this risk is often overlooked by critics who argue that courts should limit the award of injunctions to reduce the problem of patent holdup, which happens when patent holders opportunistically extract royalties from implementers, particularly in the context of SEPs.[32] According to these critics, the problem

28 *See, e.g.*, Barnett, *supra* note 20, at 856 ("Strong patents provide firms with opportunities to disaggregate supply chains through contract-based relationships, which in turn give rise to trading markets in intellectual resources, whereas weak patents foreclose those options.").

29 *See, e.g.*, Doris Johnson Hines & J. Preston Long, *The Continuing (R)evolution of Injunctive Relief in the District Courts and the International Trade Commission*, IP Litigator (Jan./Feb. 2013), *available at* https://www.finnegan.com/en/insights/articles/the-continuing-r-evolution-of-injunctive-relief-in-the-district.html (citing Tracy Lee Sloan, *The 1988 Trade Act and Intellectual Property Cases Before the International Trade Commission*, 30 Santa Clara L. Rev. 293, 302 (1990) ("Out of 221 intellectual property cases between 1974 and 1987, the ITC found that only five failed to establish sufficient injury . . . for injunctive-type relief.")).

30 *See, e.g.*, eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 395 (2006) ("[Courts' inclination to grant injunctions for patent infringement] is not surprising, given the difficulty of protecting a right to exclude through monetary remedies that allow an infringer to use an invention against the patentee's wishes.") (Roberts, C.J., concurring).

31 *Id.* at 391.

32 *See, e.g.*, Lemley & Shapiro, *supra* note 7; Joseph Farrell et al., *Standard Setting, Patents, and Hold-Up*, 74 Antitrust L.J. 603 (2007). For a contrary view highlighting the absence of evidence that patent holdup is

of patent holdup is compounded by the availability of injunctions that strengthen the bargaining position of rightsholders.

But while popular accounts often focus on alleged holdup problems, undermining property rights may lead to the opposite harm: patent holdout.[33] Patent holdout occurs when a potential licensee opts to infringe, rather than license, a patent because the potential costs from licensing outweigh the costs associated with litigation if the patent holder enforces the patent.[34] When legal doctrine is altered to make it relatively harder for patent holders to enforce their property rights, the threat of holdout—and a concomitant destruction of the incentive to create and commercialize patentable material—increases.

Indeed, one important feature of injunctions is that they do not impose a suboptimal deal on either party. A prevailing patent holder does not receive a windfall as a result of an injunction, but is merely able to guarantee that private bargaining over a license will take place (or else there will be no license). This makes injunctions inherently less worrisome because they do not entail substituting the judgment of a generalist court for that of the commercial expertise of the would-be bargaining parties. The injunction threat might change the potential *range* of bargaining (by frustrating the ability of potential infringers to attempt to implement at no or low cost initially, for instance). But the interests of the patentee are almost always to license the patent; the patent is worthless to them otherwise.

Removing the injunction option, however, not only changes the bargaining range (and makes infringement a valid business option), but, by extension, it lowers the expected returns of investing in the creation and commercialization of patents, in the first place.[35] Further, lack of an effective injunction remedy perversely incentivizes *more* litigation activity relative to the baseline. With a no-injunction presumption, a potential licensee has a diminished incentive to negotiate with a patent holder. Instead, it can refuse to license, infringe the patent, try its hand in court, avoid royalties entirely until litigation is finished, and in the end never be forced to pay a higher royalty in damages than it would have if it had negotiated at the outset. As long as the expected cost of litigation is less than the expected gain from infringing without paying any royalties, potential licensees will always have an incentive to pursue this strategy. The net result is a shift in bargaining power so that, even when license agreements are struck, royalty rates are lower than they would otherwise be, as well as an increased likelihood of infringement. It also establishes this lower royalty rate as the "customary" rate, which ensures that subsequent royalty negotiations, particularly in the standard-setting context, are artificially constrained.

This effect is multiplied in the SEP context in which the nominal fair, reasonable, and non-discriminatory ("FRAND") royalty rate is said to be determined with reference to the ex ante bargaining position—that is, before the true value of the patent is known once it has been implemented and commercialized. As a result, the inability to seek an injunction against an infringer further ensures that patent holders operate with reduced incentives to invest in technology and to enter into standards because they are precluded from benefiting from any subsequent increase in the value of their patents once they do so. As Richard Epstein, Scott Kieff, and Dan Spulber write:

> The simple reality is that before a standard is set, it just is not clear whether a patent might become more or less valuable. Some upward pressure on value may be created later to the extent that the patent is important to a standard that is important to the market. In addition, some downward pressure may be caused by a later RAND commitment or some other factor, such as repeat play. The FTC seems to want to give manufacturers all of the benefits of both of these dynamic effects by in effect giving the manufacturer the free option of picking different focal points for elements of the damages calculations. The patentee is forced to surrender all of the benefit of the upward pressure while the manufacturer is allowed to get all of the benefit of the downward pressure.[36]

The importance of injunctions in the SEP context, and their effect on licensing rates, has been well-recognized by policymakers. For instance, in a report published in 2011, the FTC argued that:

> The threat of an injunction can lead an infringer to pay higher royalties than the patentee could have obtained in a competitive technology market.
>
> ***
>
> The patentee can use the threat of an injunction to obtain royalties covering not only the market value of the patented invention, but also a portion of the costs that the infringer would incur if it were enjoined and had to switch.[37]

In other words, the FTC endorses the idea that injunctions affect bargaining range during infringement proceedings, which in turn affects their ex ante bargaining range. The FTC thus concludes that courts award damages that exclude the value derived from the threat of injunctions.[38]

occurring, *see* Keith Mallinson, *Mallinson on Patent Holdup and Holdout,* WiseHarbor (Aug. 16, 2016), https://www.wiseharbor.com/pdfs/Mallinson%20on%20Holdup%20and%20Holdout%20for%20IP%20Finance%2016%20Aug%202016.pdf.

33 *See generally* Heiden & Petit, *supra* note 10; *see also* Epstein & Noroozi, *supra* note 10.

34 *See* Epstein & Noroozi, *supra* note 10.

35 *See, e.g.*, Mark Schankerman & Suzanne Scotchmer, *Damages and Injunctions in Protecting Intellectual Property*, 32 RAND J. Econ. 201 (2001) ("The only role of damages and injunctions is to set 'threat points' for negotiating licenses. The terms of each license are negotiated in the shadow of what would happen otherwise, and in this way, the enforcement regime determines how profitable the patent is for its owner.").

36 Richard Epstein, F. Scott Kieff, & Daniel Spulber, *The FTC, IP, and SSOs: Government Hold-Up Replacing Private Coordination* 21 (Stanford Law and Econ. Olin, Working Paper No. 414, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1907450.

37 Federal Trade Commission, The Evolving IP Marketplace: Aligning Patent Notice and Remedies With Competition 4 (2011), *available at* http://www.ftc.gov/os/2011/03/110307patentreport.pdf.

38 *Id.* at 190 ("A reasonable royalty damages award that is based on high switching costs, rather than the ex ante value of the patented technology compared to alternatives, overcompensates the patentee. It improperly

But while the premise is correct, the normative conclusion that the FTC draws does not follow. The higher licensing fees obtained by the threat of injunctions are a feature, not a bug, of the system. They reward licensees that have concluded ex ante license agreements (and who have not, therefore, wasted judicial resources when private bargaining was available), relative to those that have declined to do so. This is precisely the return on risk and innovation that patents are intended to secure.

Compounding this miscalculation, opponents of injunctions overestimate the extent of the threat of patent *holdup* by employing an inappropriate estimation of the proper willingness of potential licensees to negotiate. It is, of course, not optimal to set remedies such that patent holders are over-incentivized to withhold licenses by threatening litigation in order to increase their royalties over the efficient level. But determining whether a potential licensee is really willing to license at a reasonable rate, or is instead holding up negotiation to gain its own litigation-driven bargaining power, is not straightforward. And the measure of willingness commonly employed by commentators—including the FTC—is mistaken.

The crux of the problem is the identification of a willing licensee as one who would license at a hypothetical, ex ante rate absent the threat of an injunction and with a different risk profile than an after-the-fact infringer. The FTC's definition of a willing licensee assumes a willingness to license only at a rate determined when an injunction is not available, and under the unrealistic assumption that the true value of a SEP can be known ex ante. Not surprisingly, then, the Commission finds it easy to declare an injunction invalid when a patentee demands a higher royalty rate in an actual negotiation, with actual knowledge of a patent's value and under threat of an injunction.

This definition of willing licensee ignores a crucial difference between the two situations. One should expect that a patent will be worth more when its value is clear from its use in the market, it has been determined to be valid, and there is a threat of injunction. "[A]verage 'reasonable royalty' damage awards set rates more than double estimated average negotiated patent royalties. This difference is at least in part attributable to the uncertainty surrounding the strength and value of untested patents."[39] As Epstein, Kieff, and Spulber discuss in critiquing the FTC's 2011 Report:

> In short, there is no economic basis to equate a manufacturer that is willing to commit to license terms before the adoption and launch of a standard, with one that instead expropriates patent rights at a later time through infringement. The two bear different risks and the late infringer should not pay the same low royalty as a party that sat down at the bargaining table and may actually have contributed to the value of the patent through its early activities. There is no economically meaningful sense in which any royalty set higher than that which a "willing licensee would have paid" at the pre-standardization moment somehow "overcompensates patentees by awarding more than the economic value of the patent . . . .
>
> Even with a RAND commitment, the patent owner retains the valuable right to exclude (not merely receive later compensation from) manufacturers who are unwilling to accept reasonable license terms. Indeed, the right to exclude influences how those terms should be calculated, because it is quite likely that prior licensees in at least some areas will pay less if larger numbers of parties are allowed to use the same technology. Those interactive effects are ignored in the FTC calculations.[40]

Then-FTC Commissioner Maureen Ohlhausen articulated some of this problem in her dissent from the FTC's proposed settlement in *Google/Motorola*:

> [T]he majority says little about what "appropriate circumstances" may trigger an FTC lawsuit other than to say that a fair, reasonable, and non-discriminatory ("FRAND") commitment generally prohibits seeking an injunction. By articulating only narrow circumstances when the Commission deems a licensee unwilling (limitations added since *Bosch*), and not addressing the ambiguity in the market about what constitutes a FRAND commitment, the Commission will leave patent owners to guess in most circumstances whether they can safely seek an injunction on a SEP.[41]

The critical question over the ambiguity (or simple wrongheadedness) of what constitutes a "reasonable" royalty, and thus whether a potential licensee is "willing" or not, is regularly ignored on an implicit and flawed assumption that reasonableness is readily determined by a party's willingness to accept only estimated, ex ante royalty rates. But this means that any effort by a patent holder to capture any of the ex post value of its patents met with a refusal is likely to be deemed an act of patent holdup (by the patentee) rather than holdout (by the potential licensee), when it is at least as likely to be the latter.

This is not to say that the theoretical fear of patent holdup (or "royalty-stacking" or "patent thickets") and the costs they may impose should be dismissed out of hand: there are trade-offs, to be sure. But there is no basis for the one-sided presumption that patentees, not implementers, always have the upper hand. For one thing, the empirical literature on the topic is inconclusive, at best.[42] Moreover, throughout history, patent thickets have often

reflects the economic value of investments by the infringer rather just than the economic value of the invention. To prevent damage awards based on switching costs, courts should set the hypothetical negotiation at an early stage of product development, when the infringer is making design decisions.").

39 Roger G. Brooks & Damien Geradin, *Interpreting and Enforcing the Voluntary FRAND Commitment* 28 (July 20, 2010), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1645878.

40 Epstein, Kieff, & Spulber, *supra* note 36, at 21-23.

41 Motorola Mobility LLC and Google Inc., FTC File No. 121-0120, 3-4 (Jan. 3, 2013) (Dissenting Statement of Commissioner Maureen K. Ohlhausen), *available at* https://www.ftc.gov/sites/default/files/documents/public_statements/statement-commissioner-maureen-ohlhausen/130103googlemotorolaohlhausenstmt.pdf.

42 *See, e.g.*, David E. Adelman & Kathryn L. DeAngelis, *Patent Metrics: The Mismeasure of Innovation in the Biotech Patent Debate*, 85 Tex. L. Rev. 1677, 1679–82 (2007); James Bessen, *Patent Thickets: Strategic Patenting*

been solved through private ordering solutions.[43] And while some commentators make it sound as if injunctions threaten to cripple complex innovations like smartphones by preventing device makers from licensing essential technology on viable terms,[44] companies in this space have been perfectly capable of orchestrating large-scale patent licensing campaigns. The relevant policy question is whether the legal rules and remedies are set in such a way that they facilitate efficient negotiation and minimize the risk and cost of such imperfect solutions when negotiation fails. It is by no means clear that strong restrictions on the availability of injunctions for patent holders is conducive to that end.

B. eBay v. MercExchange

The Supreme Court's 2006 ruling in *eBay Inc. v. MercExchange, LLC* significantly limited patent holders' ability to obtain permanent injunctions.[45] Injunctions have long been a mainstay of copyright and patent laws in the U.S. For instance, the Patent Act clearly states that, "The several courts having jurisdiction of cases under this title may grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable."[46] Likewise, the U.S. Copyright Act provides that "Any court having jurisdiction of a civil action arising under this title may, subject to the provisions of section 1498 of title 28, grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright."[47]

At first sight, these statutes seem to have at least two important implications. On the one hand, their drafters undoubtedly saw injunctions as a central piece of both patent and copyright laws in the U.S. On the other hand, the right to obtain an injunction is not absolute. Instead, the drafters submitted injunctions to a reasonableness standard. As explained below, the Supreme Court said this much in its *eBay* ruling.[48] This raises the question: when is it reasonable for courts to grant such injunctions?

Outside of patent law, courts had long applied a four-factor test in order to decide whether injunctions were appropriate.[49] The Supreme Court summarized the contours of this test in its *eBay* ruling:

> According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an *irreparable injury*; (2) that *remedies available at law*, such as monetary damages, are *inadequate* to compensate for that injury; (3) that, considering *the balance of hardships between the plaintiff and defendant*, a remedy in equity is warranted; and (4) that the *public interest* would not be disserved by a permanent injunction.[50]

However, in the realm of *permanent patent injunction*s, there were significant uncertainties as to how (and whether) this test should be administered. In its *eBay* ruling, the Supreme Court attempted to stake out a middle ground between two antagonistic approaches to permanent patent injunctions, one defended by the district court and the other by the court of appeals: "[While] the District Court denied MercExchange's motion for permanent injunctive relief . . ., [t]he [] Federal Circuit reversed, applying its 'general rule that courts will issue permanent injunctions against patent infringement absent exceptional circumstances.'"[51]

The Supreme Court concluded that the traditional four-factor test (applied by courts in equity to determine whether a permanent injunction should be granted) was equally applicable to permanent patent injunctions. But the Court provided little detail as to how the test should be applied in practice. Its main conclusion was simply that "The decision whether to grant or deny injunctive relief rests within the equitable discretion of the district courts, and that such discretion must be exercised consistent with traditional principles of equity, in patent disputes no less than in other cases governed by such standards."[52] That said, while the Court failed to describe how the four-factor test should be applied to patent injunctions, it did offer examples of approaches that were not appropriate. In doing so, the Court explicitly excluded what had previously been the Federal Circuit's standard practice when assessing permanent patent injunctions. For decades, the Federal Circuit—which handles appeals in patent lawsuits—had awarded injunctions when claimants established that their patent was valid and infringed.[53] Under the new *eBay* ruling, this approach was no longer tenable:

> In reversing the District Court, the Court of Appeals departed in the opposite direction from the four-factor

of Complex Technologies 1–4 (2003) (Research on Innovation Working Paper), *available at* http://www.researchoninnovation.org/thicket.pdf.

43 Adam Mossoff, *The Rise and Fall of the First American Patent Thicket: The Sewing Machine War of the 1850s*, 53 Ariz. L. Rev. 165, 209, 211 (2011).

44 *See, e.g.*, Lemley & Shapiro, *supra* note 7; Carl Shapiro, *Navigating the Patent Thicket: Cross Licenses, Patent Pools and Standard-Setting*, in 1 Innovation Policy And The Economy 119–26 (Adam B. Jaffe, Josh Lerner & Scott Stern eds., 2001); Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 Science 698, 698 (1998).

45 *eBay*, 547 U.S. 388.

46 35 U.S.C. § 283 (2018).

47 17 U.S.C. § 502 (2018).

48 *eBay*, 547 U.S. at 392.

49 Weinberger v. Romero-Barcelo, 456 U.S. 305, 311–13 (1982); Amoco Production Co. v. Gambell, 480 U.S. 531, 542 (1987).

50 *eBay*, 547 U.S. at 391 (emphasis added).

51 *Id.* Although the District Court recited the traditional four-factor test, 275 F. Supp. 2d at 711, it appeared to adopt certain expansive principles suggesting that injunctive relief could not issue in a broad swath of cases. Most notably, it concluded that a "plaintiff's willingness to license its patents" and "its lack of commercial activity in practicing the patents" would be sufficient to establish that the patent holder would not suffer irreparable harm if an injunction did not issue.

52 *eBay*, 547 U.S. at 388.

53 Miranda Jones, *Permanent Injunction, a Remedy by any Other Name is Patently Not the Same: How* eBay v. MercExchange *Affects the Patent Right of Non-Practicing Entities*, 14 Geo. Mason L. Rev. 1035, 1049 (2007)

test. The court articulated a "general rule," unique to patent disputes, "that a permanent injunction will issue once infringement and validity have been adjudged. . . ."

> Just as the District Court erred in its categorical denial of injunctive relief, the Court of Appeals erred in its categorical grant of such relief.[54]

As a result, the ruling significantly narrowed the circumstances under which patent holders could obtain permanent injunctions.

Such a development is hard to square with guiding principles of IP law. Indeed, as numerous authors have observed, injunctions are a distinguishing feature of IP protection.[55] And this is true in the Patent Act, which explicitly gives inventors the *right to exclude* third parties from using their inventions.[56] The wording of the statute would be meaningless if third parties could routinely force exchanges simply by paying damages to the inventor.[57] This is not to say that the right to obtain injunctions is absolute, of course. But, reflecting the centrality of the right to exclude, the Federal Circuit developed its automatic injunction rule in intentional contrast to the traditional four-factor test for injunctions in other contexts.[58] In doing so, it also adopted a rule in consonance with the long-established approach of courts of equity to the awarding of patent remedies: "In due course, however, the realization emerged that, in situations where an infringement did in fact exist (and was continuing), denying the holder an injunction was tantamount to rendering the patent's grant of exclusivity meaningless."[59]

("The Federal Circuit summarized decades of permanent injunction holdings in a general rule: absent exceptional circumstances, a court will issue a permanent injunction in patent cases following a clear showing of validity and infringement.").

54 *eBay*, 547 U.S. at 394.

55 *See, e.g.*, Shyamkrishna Balganesh, *Demystifying the Right to Exclude: Of Property, Inviolability, and Automatic Injunctions*, 31 Harv. J.L. & Pub. Pol'y 593 (2008); Mark P. Gergen et al., *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 Colum. L. Rev. 203 (2012).

56 35 U.S.C. § 154 (1952) ("Every patent shall contain a short title of the invention and a grant to the patentee . . . of the right to exclude others from making, using, offering for sale, or selling the invention"). *See also eBay*, 547 U.S. at 392 ("To be sure, the Patent Act also declares that 'patents shall have the attributes of personal property,' including 'the right to exclude others from making, using, offering for sale, or selling the invention.'") (citations omitted).

57 *See* Balganesh, *supra* note 55, at 599 ("The *eBay* decision thus calls into question, rather starkly, the meaning and relevance of the right to exclude, both within the domain of intellectual property and in the wider subjects of real and personal property, at least insofar as each remains premised on the idea of exclusion. If property is no longer automatically associated with exclusionary relief, is it meaningless to continue characterizing the right to exclude as its central attribute?"). *See also* Epstein, *supra* note 23, at 2091.

58 *See, e.g.*, Richardson v. Suzuki Motor Co., 868 F.2d 1226, 1246-47 (Fed. Cir. 1989) ("Infringement having been established, it is contrary to the laws of property, of which the patent law partakes, to deny the patentee's right to exclude others from use of his property.").

59 *Id.* at 647 (citing 2 Joseph Story, Commentaries on Equity Jurisprudence as Administered in England and America (W.H. Lyon, Jr. ed., 14th ed. 1918) (1836)).

*C. Post-*eBay

Predictably, the *eBay* ruling led lower courts to grant fewer permanent injunctions in patent litigation suits, and numerous empirical studies have shown that the *eBay* ruling made permanent injunctions harder to obtain in patent litigation. For instance, one study found that, in the two years following the *eBay* ruling, twenty-four district court decisions granted injunctions, and ten denied them.[60] This is echoed by another study which concluded that courts granted injunctions at a rate of roughly two-to-one.[61] Finally, an extensive study by Kirti Gupta and Jay Kesan concluded that permanent injunctions were 44.1% less likely to be granted after the *eBay* ruling (and 33% less likely for preliminary injunctions).[62] The authors also show that the reduction in injunctions was stronger for PAEs.[63]

Critics of injunctions had hoped that reducing the availability of injunctions would have a positive effect on innovation—notably by reducing patent holdup.[64] But empirical research by Alexander Galetovic, Stephen Haber, and Ross Levine suggests that this was not the case: Overall, the *eBay* decision does not appear to have significantly affected innovation levels in patent-intensive industries.[65] Other authors have reached a similar conclusion.[66] However, the fact that the *eBay* ruling has not *yet* reduced innovation is no guarantee that it will not do so in the future. Likewise, as this paper makes abundantly clear, the *eBay* ruling is but one of many policy developments that have weakened the legal protections afforded to patent holders (or that threaten to do so). While each of these developments might not *individually* have a statistically significant effect on innovation (which is what the Galetovic, et al. paper looks at in relation to the *eBay* ruling), the cumulative effect of these changes could be much larger. In other words, available evidence suggests that the threat of injunctions is unlikely to cause patent holdup and reduce innovation. However, this does not suggest

60 *See* Benjamin Petersen, *Injunctive Relief in the Post-*eBay *World*, 23 Berkeley Tech. L.J. 193, 196 (2008).

61 *See also* Robin M. Davis, *Failed Attempts to Dwarf the Patent Trolls: Permanent Injunctions in Patent Infringement Cases Under the Proposed Patent Reform Act of 2005 and* eBay v. MercExchange, 17 Cornell J.L. & Pub. Pol'y 431, 444 (2008).

62 Kirti Gupta & Jay P. Kesan, *Studying the Impact of eBay on Injunctive Relief in Patent Cases* 33 (Hoover Inst. Working Grp. on Intellectual Prop., Innovation, & Prosperity, Working Paper No. 17004, 2017).

63 *Id.* at 35.

64 Lemley & Shapiro, *supra* note 7, at 2045 ("The Supreme Court's recent decision in *eBay Inc. v. MercExchange, L.L.C.* also promises to help solve holdup problems by making permanent injunctions.").

65 Galetovic, Haber, & Levine, *supra* note 9, at 571 ("We could not reject the null hypothesis that there was no change in the relative rates of innovation in SEP-reliant industries after the *eBay* decision.").

66 *See* Filippo Mezzanotti & Timothy Simcoe, *Patent Policy and American Innovation After* eBay*: An Empirical Examination*, 48 Res. Pol'y. 1271, 1280 (2019) ("The *eBay* decision marked a turning point in U.S. patent policy in the minds of many observers, but we find no evidence that it had a dramatic impact—positive or negative—on American Innovative performance.").

that systematically weakening the patent system would have no effect on technological progress.

One of the important features of injunctions that critics miss is that they are not solely a tool for simple exclusion from property, but a tool that *promotes efficient bargaining*.[67] If a property holder ultimately has the right to exclude infringers, there is relatively more weight placed on the importance of initial bargaining for licenses. Post-*eBay*, "efficient infringement" becomes a viable choice for firms seeking to maximize profits. Thus, implementing firms seeking to pay as little as possible for the use of an invention have incentives to disregard the bargaining process with a patent holder altogether. The relative decline in the importance of injunctions narrows the bargaining range, and the narrower range of prices an implementing firm will offer means agreement is less likely even if it does bargain. Where rightsholders can be reasonably expected to enforce their patent rights, by contrast, the bargaining range is expanded and agreement more likely because the cost of negotiating for a license in the first place is relatively smaller than always (or more often) opting for "efficient infringement"; that is, infringement becomes less efficient.

The ultimate tension is not between seeking damages or an injunction, but between whether a firm opts to commercially negotiate or legally litigate and face the risk of some combination of damages and injunction on the back end. This reality is particularly important in the context of SDOs where implementers and innovators are in a constant dance both to maximize their own profits as well as to facilitate the product of a joint agreement that binds each party. Permitting one party through weakened legal doctrine to circumvent or artificially constrain the bargaining process inappropriately imbalances the careful commercial relationships that should otherwise exist.

In the SEP context, furthermore, it is rarely mentioned that "an implementer's decision to reject a certifiably FRAND license and continue to infringe is contrary to the spirit of the FRAND framework as well."[68] In such situations, the threat of an injunction is plainly important. But it is worth noting what it is important *for*.

It is not typically the case that a negotiation process ends with an injunction and a refusal to license, as critics sometimes allege. Rather, the threat of an injunction is important in hastening an infringing implementer to the table and ensuring that protracted litigation to determine the appropriate royalty (which is how such disputes *do* usually end) is costly not only to the patentee, but also to the infringer. As James Ratliff and Daniel Rubinfeld note:

> [T]he existence of that threat does not lead to holdup as feared by those who propose that a RAND pledge implies (or should embody) a waiver of seeking injunctive relief. If RAND terms are reached by negotiation, the negotiation is not conducted in the shadow of an injunctive threat but rather in the shadow of knowledge that the court will impose a set of terms if the parties do not reach agreement themselves. *The crucial element of this model that substantially diminishes the likelihood that the injunctive threat will have real bite against an implementer willing to license on RAND terms is the assumption that an SEP owner maintains its obligation to offer a RAND license even if its initial offer is challenged by the implementer and, further, even if the court agrees with the SEP owner that its initial offer was indeed RAND*. Thus any implementer that is willing to license on court-certified RAND terms can avoid an injunction by accepting those RAND terms without eschewing any of its challenges to the RAND-ness of the SEP owner's earlier offers.[69]

Concerns about the holdup threat of injunctions are overstated because the implementer can always accept a royalty rate that is either offered by the patent holder or certified by a court without waiving its right to contest whether such a rate is FRAND. If it will not do either, then it is an "unwilling licensee," appropriately enjoined from implementing the patent. The alternative view—that the failure to reach agreement over royalties presumptively means that the patent holder is offering supra-FRAND terms—is unwarranted. Coupled with the unavailability of injunctive relief, such an approach puts a heavy thumb on the bargaining scales. Of course, licensees will often prefer to pay less than they are able to negotiate, but this is not a reality that supports interfering in the bargaining process. The purpose of patents is to facilitate the creation of incentives to generate the overall production of social welfare desired: it is not to guarantee that a particular party to a negotiation achieves its preferred terms.

III. Other Changes Have Reduced the Value of Patents

Injunctive relief is not the only area of patent litigation that has become more hostile to inventors. Several other changes to the rules relating to patent law enforcement have contributed to a broader weakening of legal certainty around patent licensing. This includes calls for courts to curtail the amount of damages awarded to owners of SEPs. Changes to the rules regarding fee-shifting and the establishment of inter partes review by the U.S. Patent and Trademark Office are also of concern. Last but not least, there has also been significant pressure for SDOs to restrict the terms under which standard essential technologies can be licensed.

A. Damages Awards Have Also Faced Downward Pressure

Injunctive relief is not the only area of patent litigation that has become more hostile to patentees. The same policymakers and scholars who have been calling for courts to curb injunctions have also complained that patent holders—especially those that operate in the SEP space—routinely obtain exorbitant damages awards from courts and juries.

Some critics, for example, have argued that courts routinely award "unreasonable" damages to patent holders.[70] This is purportedly the case in some instances where courts ignore "apportionment" rules and award damages that are based on an end-device's "Entire Market Value" ("EMV") rather than the

67 *See, e.g.*, Schankerman & Scotchmer, *supra* note 35.

68 James Ratliff & Daniel L. Rubinfeld, *The Use and Threat of Injunctions in the RAND Context*, 9 J. Comp. L. & Econ. 14 (2013).

69 *Id*. at 7 (emphasis added).

70 William F. Lee & A. Douglas Melamed, *Breaking the Vicious Cycle of Patent Damages*, 101 Cornell L. Rev. 385 (2016).

so-called "Smallest Saleable Patent Practicing Unit" ("SSPPU"). As Brian Love put it:

> The entire market value rule allows for recovery of patent infringement damages based on the value of an entire product or device containing an infringing component, rather than on the value of the infringing component alone.
>
> * * *
>
> Until courts abandon current doctrine and apply the entire market value rule only when the patented component of the accused devices truly accounts for the entire market demand for the infringed device, patentees will continue to be unjustly rewarded.[71]

Likewise, Mark Lemley and Carl Shapiro have argued that "[t]he way reasonable royalties are calculated, particularly for component inventions, has made them into a tool for patentees to capture more than their fair share of a defendant's profit margins."[72]

These critiques seem to have gained some traction with some courts and SDOs. Indeed,

> the principal focus of Lemley and Shapiro's work has been to discourage the availability of injunctions in the context of products that practice multiple patents, such as mobile handsets that practice numerous SEPs. Lemley and Shapiro advise courts to deny injunctions "when the product that would be enjoined contains multiple components, of which only one is the subject of the patent in suit"—a factual description that applies to nearly every product in the modern marketplace, including many pharmaceutical products.[73]

In a very high-profile move, the Institute of Electrical and Electronics Engineers ("IEEE") (one of the leading SDOs) changed its internal rules in 2015 in order to, effectively, impose component level pricing for standard essential patents.[74] Contributors of essential patents must routinely make so-called FRAND pledges, whereby they guarantee that their technology will be licensed at fair, reasonable, and non-discriminatory rates. Under IEEE's modified internal rules, firms that base license fees on the EMV would no longer meet the FRAND benchmark.[75] In turn, this may limit the damages that these inventors can claim if their patents are infringed.

Similarly, courts have often based their calculations of patent infringement damages on the smallest saleable component into which the underlying patent is incorporated.[76] Although this may seem like a small detail, it is of the highest importance for innovators. At first sight, it might seem like the choice of a small royalty base could be compensated by applying a higher percentage when royalties are calculated. But the problem is more fundamental.

Take the example of a 5G chipset. This piece of technology is far more valuable when combined with a high-end smartphone that can make full use of its capabilities, of course, but the smartphone and every innovation it contains is *also* made more valuable by the combination with the cellular chipset. In fact, virtually all of the value of a smartphone would be lost if the modem were removed (and reduced if limited to a slower, lower-quality chipset). In other words, the value of the smartphone and virtually every component in it depends in significant part upon the modem technology with which it is combined.

By basing their damages calculations on the value of the smallest saleable component, however, courts effectively prevent innovators from benefiting from these synergies, even if the parties would, in the absence of the court's calculation method, voluntarily agree to a very different allocation of royalties. In the shadow of that prospect, it becomes extremely difficult for a patentee to negotiate a royalty for the true, synergistic value of its technology. And given that innovation is almost systematically based on combining existing elements to new effects, a rule that prevents innovators from benefitting from such synergies can be expected to impede innovation in the first place and limit the extent of efforts to combine technologies in innovative ways.

And this is not just a problem for damages calculations. Some antitrust authorities and courts have gone even further, arguing that SEP license fees calculated on the EMV may infringe *antitrust* law. This was the case for Judge Lucy Koh's ruling in the recent *FTC v. Qualcomm* case, now on appeal to the Ninth Circuit.[77] The ruling cited the Federal Circuit's *Quanta* case to support its assertion that Qualcomm's pricing method was not FRAND because its royalties were not based on the value of the SSPPU.[78] But that case is inapposite, as is the underlying logic of assessing the FRAND-ness of a royalty rate by comparing it to the royalty a court would arrive at by applying its standard method of apportioning damages for infringement in the absence of any licensing agreement. While the rule of apportionment may be relevant (if not sensible) for determination of royalties by a court after a finding of infringement, there is no reason to assume that that assessment should be in any way instructive of the boundaries of a reasonable FRAND royalty rate negotiated by private parties

71 Brian J. Love, *Patentee Overcompensation and the Entire Market Value Rule*, 60 Stan. L. Rev. 263, 263-93 (2007).

72 Lemley & Shapiro, *supra* note 7, at 2044.

73 Epstein & Noroozi, *supra* note 10, at 1406 (quoting Lemley & Shapiro, *supra* note 7, at 2036).

74 *See* Press Release, IEEE, IEEE Statement Regarding Updating of its Standards-Related Patent Policy (Feb. 8, 2015), *available at* https://perma.cc/TV9H-V6RK.

75 *Id.*

76 *See, e.g.*, Cornell Univ. v. Hewlett-Packard Co., 609 F. Supp. 2d 279 (N.D.N.Y. 2009); In re Innovatio IP Ventures, LLC, 2013 WL 5593609, at *1 (N.D. Ill. Oct. 3, 2013). For a detailed discussion of these cases, see Anne Layne-Farrar, *The Patent Damages Gap: An Economist's Review of U.S. Statutory Patent Damages Apportionment Rules*, 26 Tex. Intell. Prop. L.J. 34 (2018).

77 FTC v. Qualcomm Inc., 411 F. Supp. 3d 658 (2019).

78 *Id.* at 783 (citing Virnetx, Inc. v. Cisco Sys., Inc., 767 F.3d 1308, 1327 (Fed. Cir. 2014)).

in an arms-length licensing agreement.[79] Indeed, such an approach drives a wedge between judicial royalty determinations and actual practice:

> [U]sing the price of the smallest salable patent-practicing component as a royalty base deviates from real-world practice . . ., [where] the patent holder and the licensee often use the value of the downstream product as a royalty base, even when no evidence indicates that the patented feature drives the demand for the downstream product.[80]

Where common practice throughout an industry is to determine royalties based on the entire product, it can hardly also be in any way indicative of the exercise of market power.

B. Fee-Shifting Standards Increase the Likelihood of Litigation Over Negotiation

In the U.S., in general each party is responsible for its own litigation costs associated with prosecuting or defending a patent. However, the Patent Act permits that the court, "in exceptional cases may award reasonable attorney fees to the prevailing party."[81] This exception has been interpreted with varying degrees of liberality by the courts. In the 2005 case *Brooks Furniture v. Dutailier*, the Federal Circuit narrowed the interpretation of "exceptional cases" such that it would apply only:

> [W]hen there has been some material inappropriate conduct related to the matter in litigation, *such as willful infringement, fraud or inequitable conduct in procuring the patent, misconduct during litigation, vexatious or unjustified litigation*. . . . Absent misconduct in conduct of the litigation or in securing the patent, sanctions may be imposed against the patentee only if both (1) the litigation is brought in subjective bad faith, and (2) the litigation is objectively baseless.[82]

The problem with this approach, however, is that, in conjunction with the Patent Act's presumption of validity,[83] it results in an asymmetrical assignment of burdens and access to attorneys' fees between a patentee and an accused infringer:

> Under the present system, the high costs of junk patents are directly tied to the legal presumption of validity that is applied to all issued patents, under which the litigant challenging validity bears the burden of proving invalidity under a higher standard of proof than that which usually applies in civil cases.[84]

This means that, while a patentee may be able to obtain sanctions for an accused infringer's willful infringement, it is substantially more difficult for an accused infringer to obtain sanctions for a patentee's bad faith assertion of the validity of its patent. While on its face this might seem to offer additional protection for patentees by putting a thumb on the scale in their favor in litigation, it is mainly beneficial for PAEs that rely on the threat of judicial remedies (rather than a patent's true market value) to extract payment; it is less helpful for parties with valid patents and valid claims acting in good faith.

In 2014, the Supreme Court ruled in *Octane Fitness v. ICON Health* that the *Brooks Furniture* court's interpretation was too narrow and should be rejected and replaced with a more discretionary framework:

> An "exceptional" case, then, is simply one that stands out from others with respect to the substantive strength of a party's litigating position (considering both the governing law and the facts of the case) or the unreasonable manner in which the case was litigated. District courts may determine whether a case is "exceptional" in the case-by-case exercise of their discretion, considering the totality of the circumstances.[85]

There are good arguments for permitting fee-shifting in some patent cases. Indeed, the primary concern when contemplating fee-shifting relates to improper attempts by PAEs to extract rents from implementers. Most frequently, this occurs when PAEs engage in one or more of the acts specifically described as "exceptional" in *Brooks Furniture*, such as vexatious or unjustified litigation, or bringing litigation either in bad faith or without any solid basis.[86] Early evidence also suggests that courts have rightly continued to permit fee-shifting in cases of willful infringement since *Octane*.[87]

The precise implications of *Octane* and a liberalized fee-shifting regime are not yet clear, but there is research demonstrating that fee-shifting can work to deter meretricious

79 *See* Brief of the Honorable Paul R. Michel (Ret.) as Amicus Curiae Supporting Appellant, *Qualcomm*, 411 F. Supp. 3d 658 ("Indeed, an attempt to dictate that businesses must negotiate patent licenses based on the SSPPU concept for each licensed patent and each licensed product would be highly counterproductive and infeasible. Such a rule would force parties to engage in patent-by-patent and component-by-component negotiations, greatly magnifying transaction costs. Instead, licensing parties should remain free to use all the valuation and efficiency tools available to them, as would any rational, competitive firm. This will most efficiently lead to effective negotiations and equitable agreements for all.").

80 J. Gregory Sidak, *The Proper Royalty Base for Patent Damages*, 10 J. Competition L. & Econ. 989, 1020 (2014).

81 35 U.S.C. § 285 (2018).

82 Brooks Furniture Mfg., Inc. v. Dutailier Int'l, Inc., 393 F.3d 1378, 1381 (2005).

83 *See* 35 U.S.C. § 282 ("A patent shall be presumed valid."). In *Microsoft Corp. v. i4i Ltd. Partnership*, 564 U.S. 91 (2011), the Supreme Court confirmed that the presumption of validity can be overcome only with clear and convincing evidence of invalidity.

84 F. Scott Kieff, *The Case for Preferring Patent-Validity Litigation Over Second-Window Review and Gold-Plated Patents: When One Size Doesn't Fit All, How Could Two Do the Trick?*, 157 U. Penn. L. Rev. 1937, 1950-51 (2009).

85 Octane Fitness, LLC v. Icon Health & Fitness, Inc., 572 U.S. 545, 554 (2014).

86 *Id.*

87 Hannah Jiam, *Fee-Shifting and Octane Fitness: An Empirical Approach Toward Understanding Exceptional*, 30 Berkeley Tech. L.J. 635 (2015).

suits.[88] Further, in the wake of *Octane*, there is some evidence that courts are shifting fees more often.[89] One shortcoming of the available literature is the difficulty in determining exactly what the post-*Octane* shifts may signal. In an ideal world, all meretricious suits would be subject to sanction or dismissal, and all meritorious suits would proceed on the merits. We do not live in such a world.

Liberalizing fee-shifting will have mixed effects. First, courts have evidently been applying the standard set out in *Octane* somewhat unevenly.[90] But more to the point, the *Octane* change permits courts to essentially second-guess even meritorious litigants pursuing patent protection in good faith. Hindsight is 20/20, and judges who have been witness to an extended legal process and production of evidence could come to see an otherwise good faith plaintiff who loses as having brought a frivolous claim.

While the fee-shifting regime laid out in *Octane* might not be perfect, it is not *intentionally* biased against the interests of patent holders. Much will depend on how the courts use their discretion. But one thing *Octane* does not clearly do (except perhaps accidentally) is to overcome the problem of asymmetry brought about by the operation of the heightened burden of proof under the presumption of validity. And to the extent it does, it does not clearly differentiate between good and bad faith assertions of validity that map onto the distinction between abusive PAE litigation and valid infringement litigation. Indeed, it is plausible under *Octane* that even a valid effort by a SEP holder to enforce its patent by means of an injunction could be deemed an "unreasonable manner" of litigation.

Meanwhile, many voices have called for the introduction of more widely applied fee-shifting mechanisms in US patent disputes, including some who have proposed a blanket shift towards loser-pays (also known as the English Rule).[91] One key goal of this proposed policy is to dull patentees' incentives to litigate. As Megan la Belle summarizes:

> Congress passed the America Invents Act, the most significant overhaul to the U.S. patent system in over half a century, in 2011. Yet, less than two years later, calls for further reform began. *More than a dozen bills were introduced in Congress between 2013 and 2015, many of which included fee shifting provisions.* The fee provisions in these bills varied. *Some were one-way, awarding fees only to the accused infringer, while others were two-way, allowing either prevailing party to recover. Certain of these bills targeted PAEs, while others drew no distinctions based on the identity of the parties.*[92]

These initiatives essentially boil down to a "patent troll tax" that deters PAEs from, allegedly, seeking "nuisance settlements," knowing defendants will seek to avoid litigation costs.[93] Unfortunately, as under *Octane*, good faith enforcement efforts may also be deterred.

More problematically, these proposals wrongly assume that inventors are *systematically* the ones who have the upper hand in licensing negotiations. But this does not have to be the case. In a world where courts have become increasingly reluctant to grant injunctions, and where there has been increasing pressure to reduce damages awards, the cost of patent infringement has almost certainly decreased. In turn, this improves the bargaining position of licensees and makes patent holdout behavior more attractive. As a result, to the extent that a general regime of fee-shifting is justified,[94] there is little reason to design one that is deliberately tilted *against* the interests of inventors, any more than there is to maintain one that is deliberately tilted in their favor.[95]

C. Inter Partes Review Undermines the Certainty of Patent Rights

Critics of the current patent system have turned to administrative process in an attempt to address the problem of junk patents.[96] The 2011 America Invents Act established an expansive inter partes review process (IPR) which allows *anyone* (other than the patent owner) to challenge the validity of a patent through an administrative post-grant review by the U.S. Patent and Trademark Office (PTO).[97] Under IPR, the threshold for challenging a patent is much lower than it had been under

88 Christian Helmers et al., *The Effect of Fee Shifting on Litigation: Evidence from a Policy Innovation in Intermediate Cost Shifting* (TSE Working Papers 16-740, 2017), *available at* https://ideas.repec.org/p/tse/wpaper/31251.html.

89 *See, e.g.*, Colleen V. Chien, et al., *Enhanced Damages, Litigation Cost Recovery, and Interest* in Patent Remedies and Complex Products: Toward a Global Consensus 90-114 (C. Bradford Biddle, et al., eds. 2019), *available at* https://www.cambridge.org/core/books/patent-remedies-and-complex-products/enhanced-damages-litigation-cost-recovery-and-interest/D81F3F599BA6447F97B60B0247D1D0C9/core-reader. *See also* Darin Jones, *A Shifting Landscape for Shifting Fees: Attorney-Fee Awards in Patent Suits After* Octane *and* Highmark, 90 Wash. L. Rev. 505 (2015).

90 *See* Mateo J. de la Torre, *The Troll Toll: Why Liberalized Fee-Shifting in Patent Cases Will Do More Harm Than Good*, 101 Cornell L. Rev. 813 (2016), *available at* https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=4696&context=clr.

91 *See, e.g.*, Emily H. Chen, *Making Abusers Pay: Deterring Patent Litigation by Shifting Attorneys' Fees,* 28 Berkeley Tech. L.J. 351, 381 (2013) ("Abusive litigation practices and nonmeritorious patent infringement claims are real and present dangers in the current patent litigation ecosystem, imposing significant social costs. Therefore, these practices must be addressed in a swift manner. . . . By implementing a fee-shifting provision, under which the loser must pay the winner's legal fees, complainants in patent actions will be more likely to pause and reconsider each new infringement action before it is filed—and even during litigation itself in order to avoid risking responsibility for paying the defendant's legal costs.").

92 Megan M. La Belle, *Fee Shifting for PTAB Proceedings*, 24 Tex. Intell. Prop. L.J. 367, 384 (2016) (emphasis added).

93 *See, e.g.*, David Rosenberg & Steven Shavell, *A Model in Which Suits are Brought for their Nuisance Value*, 5 Int'l Rev. L. & Econ. 3 (1985).

94 *But see* de la Torre, *supra* note 90, at 850 ("Awarding attorneys' fees liberally in patent cases and curtailing the Federal Circuit's ability to second-guess such decisions is a framework that will likely create more negative effects than improvements for litigants, patentees, and the patent and civil litigation systems.").

95 *See* Kieff, *supra* note 84, at 1952-55.

96 They would be better off addressing junk patents by dealing with the problem of the asymmetrical operation of the presumption of validity in the litigation context.

97 35 U.S.C. Ch. 31 § 311-19 (2018); *Inter Partes Review*, United States Patent and Trademark Office (May 9, 2017), https://www.uspto.gov/patents-application-process/appealing-patent-decisions/trials/inter-partes-review.

re-examination (the only administrative option for third parties to challenge patents prior to the introduction of IPR).[98]

There are several important differences between IPR and adjudication in an Article III court. Most notably, the Patent Trial and Appeal Board (PTAB) applies lower standards of proof when conducting the IPR, and challengers are not required to have standing. Regarding the lower standards of proof, Professor Joanna Shepherd has noted:

> In federal court, patents are presumed valid and challengers must prove each patent claim invalid by "clear and convincing evidence." In IPR proceedings, no such presumption of validity applies and challengers must only prove patent claims invalid by the "preponderance of the evidence." In addition to the lower burden, it is also easier for challengers to meet the standard of proof in IPR proceedings. In federal court, patent claims are construed according to their "ordinary and customary meaning" to a person of ordinary skill in the art. In contrast, the PTAB uses the more lenient "broadest reasonable interpretation" standard; this more lenient standard can result in the PTAB interpreting patent claims as "claiming too much" (using their broader standard), resulting in the invalidation of more patents.[99]

Of course, the invalidation of more patents is considered by its proponents to be the very goal of IPR.[100] And to the extent that IPR results in the less costly invalidation of a larger number of patents that would not have withstood more rigorous legal challenges in federal court *without* also erroneously invalidating good patents, this is a positive outcome. But it is not clear that achieving this positive outcome is optimal, if it is done in by administrative agency action, removed from the full set of protections and responsibilities of the Federal Rules of Civil Procedure that apply to all civil litigation. As Scott Kieff has noted:

> While desirable in the abstract, these goals [establishing a mechanism for deciding validity that is faster or less expensive than court] are dangerous when taken out of the context of their conflicting counterparts among the set of goals associated with civil litigation generally (such as accuracy and finality). That is, before simply trying to change some characteristics of this highly complex and interconnected system, we should at least consider the full range of concerns explored earlier in the discussion of intellectual approach.[101]

Kieff's approach employs the tools of New Institutional Economics (including the economic analysis of law)

> to highlight the ways that property rights in intangible assets can be structured so as to improve economic development, innovation, and competition by encouraging private actors to interact and strike deals with each other rather than with legislators, regulators, judges, and the powerful political constituents who influence these government actors.[102]

For IPR, the most obvious problems are the use of attenuated procedures to adjudicate constitutionally protected property rights, and the relative lack of finality and determinateness that the process imposes on such property rights. As Justice Neil Gorsuch noted in dissenting from the Supreme Court's decision upholding IPR, "[a]llowing the Executive to withdraw a patent . . . 'would be to deprive the applicant of his property without due process of law, and would be in fact an invasion of the judicial branch of the government by the executive.'"[103] Once a patent examination has been made and a patent issued, even if not all degrees of *heightened* protection are warranted, surely lessened protection is not appropriate either. As Professor Epstein notes:

> The initial review process should give rise to some confidence that the patent has been rightly issued so that the odds that a post-issue review will correct some previously unknown error are lower than they would have been if the patent had initially been issued without any review at all. This argument renders problematic all iterations of post-issuance IPR.[104]

Moreover, it is not clear that the IPR approach actually does much to improve the quality of issued patents. As Professor Gregory Dolin notes:

> Congress has adopted an overly simplistic approach that can be described as "one set of eyes is good, two is better, three is better still, etc." But as it turns out, the relationship between patent quality (however defined), certainty of patent rights, and the number of levels of review is not linear. Importantly, more opportunities to challenge issued patents also means more opportunities to engage in abusive practices to undermine legitimate patent rights.[105]

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98 *See, e.g.*, Brian J. Love & Shawn Ambwani, *Inter Partes Review: An Early Look at the Numbers*, 81 U. Chi. L. Rev. Dialogue 105 (2014) ("Compared to requests for *inter partes* reexamination, petitions for IPR are currently granted at a similar rate, but once instituted, they result in the elimination of every challenged claim about twice as often, reach a final decision almost twice as quickly, and make accused infringers almost twice as likely to win motions to stay co-pending litigation.").

99 Joanna Shepherd, *Inter Partes Review Jeopardizes the Social Contract Between Drug Makers and Patients*, Truth on the Market (Oct. 22, 2017), https://truthonthemarket.com/2017/10/22/inter-partes-review-jeopardizes-the-social-contract-between-drug-makers-and-patients/.

100 *See, e.g.*, Craig Beuerlein & Graham Dufault, *Why STRONGER is Weaker: The Imbalance of Automatic Injunctions and No Post-Grant Review*, ACT The App Association (July 1, 2019), https://actonline.org/2019/07/01/why-stronger-is-weaker-the-imbalance-of-automatic-injunctions-and-no-post-grant-review/.

101 Kieff, *supra* note 84, at 1947.

102 *Id.* at 1941.

103 Oil States Energy Services, LLC v. Greene's Energy Group, LLC, 584 U.S. __, 138 S. Ct. 1365, 1385 (2018) (Gorsuch, J., dissenting) (quoting McCormick Harvesting Machine Co. v. Aultman, 169 U.S. 606, 612 (1898)).

104 Richard A. Epstein, *The Supreme Court Tackles Patent Reform: A Series of Articles Examining* Oil States Energy Services, LLC v. Greene's Energy Group, LLC, 19 Federalist Soc'y Rev. 132, 139 (2018), *available at* https://fedsoc.org/commentary/publications/the-supreme-court-tackles-patent-reform-why-the-supreme-court-should-end-inter-partes-review-in-oil-states.

105 Gregory Dolin, *Dubious Patent Reform*, 56 B.C. L. Rev. 881, 883 (2015).

Thus, for example, as Professor Shepherd notes, the lack of any standing requirement in IPR has perversely resulted in "reverse patent trolling,"

> in which entities that are not litigation targets, or even participants in the same industry, threaten to file an IPR petition challenging the validity of a patent unless the patent holder agrees to specific pre-filing settlement demands. The lack of a standing requirement has also led to the exploitation of the IPR process by entities that would never be granted standing in traditional patent litigation—hedge funds betting against a company by filing an IPR challenge in hopes of crashing the stock and profiting from the bet.[106]

In addition, there is evidence that the PTAB has been politicized, as has been documented by Professor Saurabh Vishnubhakat.[107] Consider, for example, the following exchange, which occurred during oral arguments in the *Yissum* case:

> Judge Taranto: And, anytime there has been a seeming other outlier, you've engaged the power to reconfigure the panel so as to get the result you want?
>
> Patent Office: Yes, your Honor.
>
> Judge Taranto: And, you don't see a problem with that?
>
> Patent Office: Your Honor, the Director is trying to ensure that her policy position is being enforced by the panels.[108]

Vishnubhakat offers numerous other examples of the apparent abuse of administrative discretion by the PTAB and observes:

> The sum of these illustrations of Patent Office panel-stacking is that the ostensibly neutral and independent adjudicatory process that the AIA put in place has been overlaid with a system of adjustments and distortions that are much more outcome-driven in nature and much more beholden to the agency's political hierarchy than a narrative of impartial technocracy might suggest.[109]

The IPR process is embraced by critics of patents generally, and it is rooted in a valid concern with the over-issuance of junk patents. But it has not substantially added value to the system and has further undermined the incentives necessary for the production of innovative and expensive-to-produce technologies and pharmaceuticals.

D. Private Institutions Have Also Weakened Some Key Elements of Patent Protection

The same critics who have been calling for policymakers and courts to weaken the protections available to inventors have also urged private institutions to adopt similar changes. These calls for reform have mostly focused upon the internal rules of SDOs.[110]

Innovation through SDOs is a pivotal part of the digital economy. Standardized technologies enable a vast ecosystem of complex digital devices to interact seamlessly. In turn, this allows firms to specialize, boosting innovation and providing consumers with cheaper goods.[111] Despite these groundbreaking advances, however, the inner workings of SDOs have been subject to important criticism.[112] The gist of this pushback is that SDOs have not been doing everything in their power to avert patent holdup and royalty stacking—even though reliable empirical evidence of these harms is lacking.[113]

SDOs make numerous critical decisions that can affect the development and commercialization of technological standards. Chief among these are the terms under which successful technologies can be licensed.[114] Participants in the standardization process routinely select pieces of technology that then become "essential" to a subsequent standard, and this may increase the market power of inventors.[115] In extreme cases, inventors may even attempt to capture the economic rents of implementers that develop products incorporating their technology.[116]

Traditionally, SDOs have sought to address these market power issues by requiring that SEP holders license their patents under FRAND terms. But critics have argued that this is insufficient. Instead, they urge SDOs to adopt internal rules that limit the ability of SEP holders to seek injunctions, and that determine the method according to which royalties should be calculated.[117]

These calls have not fallen upon deaf ears. Several high-profile SDOs have altered their internal rules along the lines

106 Joanna Shepherd, *The Hatch-Waxman Integrity Act of 2018—Reestablishing Balance in the Drug Industry*, Truth on the Market (Dec. 17, 2018), https://truthonthemarket.com/2018/12/17/the-hatch-waxman-integrity-act-of-2018-reestablishing-balance-in-the-drug-industry/.

107 Saurabh Vishnubhakat, *Disguised Patent Policymaking,* 76 Wash. & Lee L. Rev. 1667 (2019).

108 Audio Transcript of Oral Argument at 47:20, *Yissum Research Development Co. of the Hebrew University of Jerusalem v. Sony Corp.*, Nos. 2015-1342, 2015-1343 (Fed. Cir, Dec. 7, 2015), www.perma.cc/S6AQ-C6EE, cited in Vishnubkhat, *supra* note 107, at 1678.

109 Vishnubhakat, *supra* note 107, at 1684.

110 Mark A. Lemley, *Ten Things to Do About Patent Holdup of Standards (and One Not To)*, 48 B.C. L. Rev. 155 (2007). *See also* Fiona Scott Morton & Carl Shapiro, *Patent Assertions: Are We Any Closer to Aligning Reward to Contribution?*, *in* 16 Innovation Policy and the Economy 89, 109 (Josh Lerner & Scott Stern eds., 2016).

111 *See, e.g.,* Auer & Morris, *supra* note 9, at 103.

112 *See, e.g.,* Josh Lerner & Jean Tirole, *Standard-Essential Patents*, 123 J. Pol. Econ. 547 (2015) (arguing that competition between SDOs prevents them from adopting socially optimal internal rules).

113 *See* Auer & Morris*, supra* note 9.

114 SDOs usually adopt internal rules that dictate the terms on which winning technologies are selected and can subsequently be licensed by inventors. For an empirical overview of these heterogeneous rules, see Justus Baron & Daniel F. Spulber, *Technology Standards and Standard Setting Organizations: Introduction to the Searle Center Database*, 27 J. Econ. & Mgmt. Strat. 462 (2018).

115 *See, e.g.*, Joanna Tsai & Joshua D. Wright, *Standard Setting, Intellectual Property Rights, and the Role of Antitrust in Regulating Incomplete Contracts*, 80 Antitrust L.J. 157 (2015). *See also* Scott Morton & Shapiro, *supra* note 110, at 109.

116 *See* Lemley & Shapiro, *supra* note 7, at 1991.

117 *See* Lemley, *supra* note 110, at 155.

suggested by critics. This has resulted in a further weakening of the protections afforded to patent holders.

Most notably, the IEEE made sweeping reforms to its IP policy. Under new rules adopted in 2015, IEEE prohibits SEP holders from seeking injunctions against so-called "willing licensees."[118] The IP policy also mandates that royalties for SEP licenses be based on the value of the smallest saleable component that practices the essential patent, and that these royalties should not include any of the added value created by the patent's inclusion in a standard.[119] In short, by greatly reducing the availability of injunctions, these rules tilt the bargaining range against SEP holders. And they further depress royalty rates by limiting the terms that inventors can include in their license agreements.

IEEE is not the only SDO to have contemplated policies of this sort. For instance, the European Telecommunications Standards Institute (ETSI) seriously considered plans to bar SEP holders from seeking injunctions against "willing licensees," though the proposed reforms were ultimately shelved.[120]

The problem with the weakening of patent protections in the context of technology standards is that it may undermine the R&D investment leading to the development of SEPs in the first place, as well as the participation of potential SEP holders in the standardization process. In a recent speech, Assistant Attorney General Makan Delrahim aptly summarized the potentially nefarious consequences of the developments in SDO rules:

> Any discussion regarding injunctive relief should include the recognition that in addition to patent holders being able to engage in patent "hold up," patent implementers are also able to engage in "hold out" once the innovators have already sunk their investment into developing a valuable technology. Additionally, a balanced discussion should recognize that some standard-setting organizations may make it too easy for patent implementers to bargain collectively and achieve sub-optimal concessions from patent holders that undermine the incentive to innovate.[121]

FRAND obligations are themselves a constraint on the ability of patentees to recoup their investments, and firms may refrain from participation in SDOs simply because they impose a FRAND obligation.[122] Unsurprisingly, there is empirical evidence that further limitations on patent enforcement and protection imposed by SDOs can exacerbate this dynamic:

> The positive effect of patent protection on the strategic complementarity between a firm's R&D spending and its participation in the development of open standards has important policy implications. We particularly predict that a policy change resulting in an increased profitability of patents would be associated with increased participation of R&D-intensive firms in standards development. We confirm this prediction. . . .[123]

Participation in SDOs is also a function of the extent of patent protection. "[C]ompared with other commonly used means of appropriation, such as secrecy, complexity, and lead time, patents offer a higher level of compatibility with the processes adopted by open standards organizations."[124]

In short, the current antagonism towards patent holders extends beyond government institutions. The actions of private parties, most notably IEEE's revised IPR policy, also threaten to weaken the protection afforded to inventors. While it is difficult to pinpoint the exact cause of this shift, it seems almost certain that pressure from regulatory authorities and lobbying by interested parties both played a part.[125] If left unchecked, however, this trend could ultimately stifle investments in one of the most dynamic areas of the economy.

IV. Conclusion

Patent law is consistently evolving. This is usually a good thing. Laws created over a century ago will not always be a perfect fit for today's circumstances. However, it is often difficult to know how the seemingly small changes brought to a field of law will play out in the future.

The developments discussed in this article might seem like small details, but they are part of a wider trend whereby U.S. patent law is becoming increasingly inhospitable for inventors. This is particularly true when it comes to the enforcement of SEPs by means of injunction.

Critics of the traditional patent system overlook the crucial role that injunctions play in cementing IP rights and facilitating transactions around them. More than any other tool, injunctions (and the threat thereof) bring would-be licensees to

118 *See* IEEE, IEEE-SA Standards Board Bylaws 16 (2019), *available at* https://standards.ieee.org/content/dam/ieee-standards/standards/web/documents/other/sb_bylaws.pdf. For a discussion of willing licensees in the context of the patent holdup/holdout debate, see *supra* notes 38—41 and accompanying text.

119 *Id. See also* Press Release, IEEE, *supra* note 74.

120 *See, e.g.*, Sophia Anatolis, *ETSI IPR committee continues discussions on injunctive relief*, ETSI (July 25, 2014), https://www.etsi.org/events/9-news-events/news/812-2014-07-news-etsi-ipr-committee-continues-discussions-on-injunctive-relief.

121 Makan Delrahim, *"Telegraph Road": Incentivizing Innovation at the Intersection of Patent and Antitrust Law*, 19th Annual Berkeley-Stanford Advanced Patent Law Institute (Dec. 7, 2018), *available at* https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-19th-annual-berkeley-stanford. Another paper similarly argues that "the risk of technology leakages may deter R&D-intensive firms from participating in the development of open standards. Patents tend to reduce this risk: so, when firms have a strong patent position, it should be less likely that an increase in their R&D effort reduces the extent of such participation." Justus Baron, Cher Li, & Shukhrat Nasirov, *Why Do R&D-Intensive Firms Participate in Standards Organizations? The Role of Patents and Product-Market Position* 5 (Apr. 1, 2019), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3287475.

122 *See* Anne Layne-Farrar, Gerard Llobet & Jorge Padilla, *Payment and Participation: The Incentives to Join Cooperative Standard Setting Efforts*, 23 J. Econ. & Mgmt. Strat. 24 (2014).

123 Baron, et al., *supra* note 121, at 4.

124 *Id.* at 27.

125 *See* Tsai & Wright, *supra* note 115, at 158. *See also* IPWatchdog & Kristen Osenga, *The IEEE IPR Policy Amendments: Strategic Behavior and Feedback Loops*, IPWatchdog (Sept. 11, 2019), https://www.ipwatchdog.com/2019/09/11/ieee-ipr-policy-amendments-strategic-behavior-feedback-loops/id=113162/.

the negotiating table because they enable rightsholders to prevent unauthorized uses of their inventions by third parties. Owners can thus take part in negotiations without bargaining distortions skewing in favor of one party or the other. Contrary to critics' claims, this is a critical part of the patent system. Not only do injunctions prevent courts from acting as price regulators, but by enabling inventors and complementary resource owners to earn a return on their investments, they create economic conditions that encourage innovation in the first place.

This backdrop—and the arguable overcorrection by courts and legislatures in recent years—likely explains why some legislators have recently put forward bills that seek to reinforce the U.S. patent system. A bipartisan bill put forward in 2017, for instance, would replace *eBay*'s injunction analysis with the courts' previous presumption that injunctions should be granted when patents are valid and infringed.[126] In 2019, the Inventor Rights Act was introduced, and it seeks to create a rebuttable presumption in favor of injunctions and abolish the IPR process.[127] There have also been efforts to come up with legislation that would make more inventions eligible for patent protection (though such efforts are still far from coming to fruition).[128]

These bills have come up because, since *eBay* and the IPR changes wrought by the AIA, the relative predictability of investing in the development of patentable technologies has declined. The findings of the Inventor Rights Act frame the problem well:

> Recent changes to patent laws and procedures and Supreme Court decisions have adversely affected inventors such that the promise of . . . "securing for limited times to inventors the exclusive right to their discoveries" is no longer attainable . . . Inventors are denied the fundamental right to "exclude others" by the Supreme Court's 2006 decision in *eBay Inc. v. MercExchange, LLC* . . . .[129]

The increasing enmity of courts and private institutions towards robust patent enforcement also spurred the USPTO, National Institute of Standards and Technology, and the DOJ to issue a strongly worded statement that urges policymakers to continue applying appropriate remedies—including injunctions—in SEP disputes.[130] In the meantime, while the macroeconomic effects of the shift towards weaker patent protection are still uncertain, its consequences can already be observed at a more granular level.

The antitrust case brought by the FTC against Qualcomm—currently pending before the Ninth Circuit—perfectly encapsulates this trend.[131] For instance, one of the case's key claims is that the royalties agreed upon by Qualcomm and its licensees were calculated as a percentage of the price of end-devices.[132] Both the FTC and the district court saw this as evidence of monopolization by Qualcomm.[133] However, as various commentators have observed, this type of pricing may simply be guided by efficiency considerations.[134] In a nutshell, basing license fees on the price of an end-device might simply be a cost-efficient way of allocating risk between inventors and implementers.[135] The FTC and the district court overlooked this important counterargument.

Furthermore, the theory of the case, while necessarily couched in quite narrow legal terms, is fundamentally an indictment of Qualcomm's vertically integrated business model whereby it uses its SEP licensing business to finance massive amounts of R&D. As we discuss above, the indictment of such a model is rooted in faulty assumptions that patent holders like Qualcomm deploy excessive bargaining power derived from patents to extract supracompetitive royalties. But such a conclusion fails to properly account for the role of strong patents in facilitating Qualcomm's complex business model and innovation and commercialization strategies. This threatens to lead to suboptimal levels of investment and innovation.[136]

Further, the weakening of patent protection may also embolden holdout behavior by implementers. The evidence is still tentative, but survey data suggests that implementers have become increasingly reluctant to conclude license agreements with innovators.[137] The consequences of this shift are still unfolding, but left unchecked it could ultimately reduce the production of innovations.

Finally, the push to curtail patent protection has also filtered into the internal rules of SDOs. As explained above, IEEE moved to implement SSPPU for holders of essential technologies.[138] Likewise, ETSI started discussions aimed at contractually limiting the availability of injunctions for rightsholders (though these

126 STRONGER Patents Act of 2017, S.1390, 115th Cong. § 106 (2017).

127 Inventor Rights Act of 2019, H.R. 5478, 116th Cong. § 3 (2019).

128 *See Patent Legislation to Watch in 2020*, Kirkland & Ellis (Jan. 1, 2020), https://www.kirkland.com/news/in-the-news/2020/01/patent-legislation-to-watch-in-2020.

129 Inventor Rights Act of 2019, *supra* note 127, at §§ 3-6.

130 *See* U.S. Dep't of Justice, U.S. Pat. & Trade Off., and Nat'l Inst. of Standards and Tech., *Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments* 1–8 (Dec. 19, 2019) ("The agencies have heard concerns that the 2013 policy statement has been misinterpreted to suggest that a unique set of legal rules should be applied in disputes concerning patents subject to a F/RAND commitment that are essential to standards (as distinct from patents that are not essential), and that injunctions and other exclusionary remedies should not be available in actions for infringement of standards-essential patents. Such an approach would be detrimental to a carefully balanced patent system, ultimately resulting in harm to innovation and dynamic competition.").

131 FTC v. Qualcomm, Inc., No. 19-16122 (9th Cir. Feb. 27, 2020), *available at* https://www.ca9.uscourts.gov/content/view.php?pk_id=0000001003.

132 *Qualcomm*, 411 F. Supp. 3d at 673.

133 *Id.*

134 Auer & Morris, *supra*, note 9.

135 *Id.*

136 *See, e.g.*, Geoffrey A. Manne, *FTC v. Qualcomm: Innovation and Competition*, Truth on the Market (Jan. 22, 2019), https://truthonthemarket.com/2019/01/22/ftc-v-qualcomm-innovation-and-competition/.

137 *See* Heiden & Petit, *supra* note 10, at 179.

138 *See* Press Release, IEEE, *supra*, note 74.

discussions do not yet appear to have led to meaningful reforms). These are bad developments from the perspective of encouraging the necessary innovations that the patent system was developed to foster and protect.

At this point it is unclear whether the decision to use the SSPPU standard or consensually limit injunctive remedies is appropriate in an *ideal* world in which private parties are free to negotiate as they will. We do not live in such an ideal world, however, and it is impossible to divorce such a decision from the current regulatory and legal overlays on the system. Private organizations should be expected to adopt these measures in the shadow of court decisions and regulatory biases that artificially favor such terms, but the optimality of such rules cannot be inferred from the fact of their adoption in such a context.

But outside the pressure imposed by cases like *Qualcomm* and *eBay*, it is dubious that such policies would necessarily be uniformly adopted by all licensing parties. Indeed, economic theory suggests that a value-added per component approach to licensing may yield inferior results.[139] As Greg Sidak observes:

> Using the retail price of the downstream product as the royalty base enables the patent holder to capture the complementarity and network effects generated by its technology. When complementarity effects are strong, the full social value of a patent implemented in a complex product is captured in the end user's demand for the downstream product. In the case of a patented technology implemented in a smartphone, the demand for the handset approximates the value generated by the sum of all individual patented technologies when used in combination with one another. That combined value is greater than the sum of the parts, and it is at least as great as the amount that consumers willingly pay for the downstream product. Consequently, the retail price of the downstream product is an appropriate royalty base.[140]

Indeed, real-world voluntarily negotiated licenses tend to reflect a norm of using the entire market value for calculating an SEP's royalty base.[141] One need look no further, for example, than the *Qualcomm* case itself to see that viable licensing schemes not based on SSPPU are the norm—the post-licensing complaints of implementers notwithstanding.

Of course, this is not to say that all changes have gone in the direction of weaker or less certain patent protection. The Supreme Court's *Halo* decision overruled the so-called *Seagate* test for willful patent infringement, ultimately making it easier for rightsholders to obtain treble damages.[142] Similarly, in the UK and the EU, respectively, the *Unwired Planet* and *Huawei v. ZTE* rulings both attempted to find a middle ground between the rights of inventors and implementers.[143] Nevertheless, the fact remains that there is today a strong undercurrent pushing for weaker or less certain patent protection that threatens to undermine the utility of patents in facilitating the efficient allocation of resources for innovation and its commercialization.[144] Policymakers should pay careful attention to the changes this trend may bring about and move swiftly to recalibrate the patent system where needed in order to better protect the property rights of inventors and yield more innovation overall.

139 *See* Sidak, *supra* note 80, at 995.

140 *Id.*

141 *Id.* at 996.

142 Halo Elecs., Inc. v. Pulse Elecs., Inc., 579 U.S. __ (2016).

143 Unwired Planet Int'l Ltd. v. Huawei Technologies Co. Ltd. [2018] EWCA (Civ) 2344 (Eng.); *see* Case C-170/13, Huawei Technologies Co. Ltd. v ZTE Corp., 2016 R.P.C. 259.

144 Barnett, *supra* note 20, at 812 ("Adverse effects will necessarily occur in every case in which weak patent coverage compels an innovator to incur commercialization costs that it would not otherwise bear under lower levels of expropriation risk. Those inflated commercialization costs impose a subtle social cost that can distort the entire supply chain running from idea to market.").

After *Espinoza*, What's Left of the Establishment Clause?

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Other Views:

• Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 Harv. C.R.-C.L. L. Rev. 343 (2014), https://harvardcrcl.org/wp-content/uploads/sites/10/2011/09/343_Geddicks.pdf.

• Brief for the Federal Respondent, Hosanna-Tabor v. EEOC, No. 10-553 (U.S. Sup. Ct. 2012), *available at* https://www.justice.gov/sites/default/files/osg/briefs/2011/01/01/2010-0553.mer.aa.pdf.

• Espinoza v. Montana Department of Revenue, 140 S. Ct. 2246, slip op. at 56 (2020) (Ginsburg and Kagan, JJ., dissenting; Breyer, J., dissenting; Sotomayor, J., dissenting), *available at* https://www.supremecourt.gov/opinions/19pdf/18-1195_g314.pdf.

On June 30, 2020, the Supreme Court of the United States handed down its decision in *Espinoza v. Montana Department of Revenue*.[1] In a 5 to 4 ruling, the Supreme Court held that when there is a government program with a secular purpose, such as education, health care, social services, emergency disaster assistance, or economic relief, the Free Exercise Clause requires that the program be available without regard to religion. A government cannot enact a law or program that purposefully[2] discriminates against religion, a religious practice, or an individual because of his or her religion.[3]

In 2015, the Montana legislature created a program to expand parental choice in primary and secondary education. The statute provided an income tax credit of up to $150 for any state income taxpayer who donated money to a student scholarship organization ("SSO"). In turn, SSOs would use the donations to fund scholarships for students attending private K-12 schools. Kendra Espinoza and other plaintiffs enrolled their children in private religious schools. Ms. Espinoza successfully applied for scholarships to defray the cost of her daughters' tuition. However, the tax credits and tuition awards to attend private schools were halted following a determination by the state supreme court that the aid to religious schools violated the state constitution.

The appeal in *Espinoza* built on *Trinity Lutheran Church v. Comer*, where the Court held that a childcare center could not be denied a state grant to pay for a new playground surface to enhance child safety simply because of the center's status as church-operated.[4] With reference to a state constitutional

1 140 S. Ct. 2246 (2020) (Roberts, C.J., for the Court, joined in full by Thomas, Alito, Gorsuch, and Kavanaugh, JJ).

2 "Purposefully" means the legislature's objective or goal as apparent from the plain text of the statute and its authoritative interpretation. It need not be shown that government officials acted invidiously or with malice, only that the government intended to do what it did. Inquiry into "purpose" may go beyond the mere text or "face" of a statute. Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533-34 (1993); *see* Kiryas Joel Sch. Dist. v. Grumet, 512 U.S. 687, 699 (1994) (plurality opinion in part).

3 *See Church of Lukumi Babalu Aye*, 508 U.S. 520; McDaniel v. Paty, 435 U.S. 618 (1978) (plurality opinion).

4 137 S. Ct. 2012 (2017). As he did in *Trinity Lutheran*, Chief Justice John Roberts limited the holding in *Espinoza* to status-based discrimination. *Espinoza*, slip op. at 9-12. The state constitutional provisions in both Missouri and Montana discriminated based on status. However, Justice Neil Gorsuch has convincingly pointed out that a distinction between religious status and religious use is not durable. *Id.* at 2-8, (Gorsuch, J., concurring); *Trinity Lutheran*, 137 S. Ct. at 2025-26 (Gorsuch, J., concurring in part, joined by J. Thomas). And Chief Justice Roberts said he "acknowledge[s] the point but need not examine it here." *Espinoza*, slip op. at 12. Moreover, Roberts noted that two of the Court's previous free exercise holdings struck down use or conduct restrictions. *Id.* (citing *Church of Lukumi Babalu Aye*, 508 U.S. 520 and Thomas v. Review Bd., 450 U.S. 707 (1981)). This seems to all but abandon the status/use distinction for most future applications of the Free Exercise Clause.

prohibition on government aid going to religious organizations, Missouri denied the funding because of the grantee's status as a church. This purposeful discrimination was found to violate the Free Exercise Clause. For some, *Trinity Lutheran* was distinguishable from *Espinoza* because the aid was for playground safety,[5] which was perceived to be more secular in character than the religious elementary schools assisted in *Espinoza*.

Two decades ago the Supreme Court held that the Establishment Clause permitted a government program of secular purpose to directly confer benefits to K-12 religious schools, along with other schools similarly situated, so long as the aid was not diverted to an explicitly religious purpose.[6] When it came to indirect aid, the Court had been even more lenient in its scrutiny under the Establishment Clause.[7] In the latter instance, such as with school vouchers and tuition tax deductions, the power to choose is in the hands of the ultimate beneficiary who then exercises that authority by selecting the service provider, whether secular or religious. Because the beneficiary is not a state actor, it does not matter that the benefit might also work to advance explicitly religious beliefs or practices.

The Court in *Espinoza* said the parties did not dispute that the Establishment Clause allowed such aid, nor could they.[8] The type of aid was indirect via tax credits, but whether the aid was direct or indirect was not at all determinative in the Court's decision.[9] It seems that the Court is no longer concerned with diversion of the aid or the nature of the aid delivery mechanism. Going forward, the Free Exercise Clause requires religious groups to be able to compete for all secular programs without discrimination due to religious status. To be sure, the government may require that recipient schools, including religious schools, be accredited. In that way, the state is assured that it receives full secular educational value in return for the aid. But that is the end of the state's educational interests. It does not matter that religious schools also provide their students with a religious education and an integrated secular/sacred environment for nurturing the faith. Indeed, the religious character of a school is often a material reason parents select it for their children. This approach has the added virtue of reducing regulatory entanglements between church and state.

Espinoza does not mean that a state is compelled to provide funding for K-12 religious schools. A state may continue to provide money and other aid only to public schools, thereby excluding all similarly situated private schools, whether nonsectarian or religious.[10] That too is discrimination of a sort, but it is not discrimination based on religion.

The rationale behind *Espinoza* is to enlarge religious choice (historically termed religious "voluntarism") within the educational, health care, and social service initiatives of the modern welfare state. This avoids putting pressure on individuals and religious organizations through financial incentives that are biased against religion. For example, if people want to obtain drug rehabilitation counseling at their church rather than from a secular agency, they ought to have that choice. If that freedom of choice is to be meaningful, then church-affiliated rehabilitation centers have to be equally eligible for government funding. Of course, the religious providers have to meet the same criteria for proficiency and success as other eligible providers, but their religious status should not disqualify them from public aid.

In *Espinoza*, Montana became purposefully discriminatory only after state tax officials and later the state supreme court determined that the state constitution did not permit religious schools to participate in the scholarship program. Accordingly, while the original legislation was intended to assist all private schools, as implemented the law turned out to be non-neutral because of the state constitutional exclusion. Because the discrimination was intentional, the Free Exercise Clause was violated. Had the claim concerned generally applicable legislation that was neutral as to religion, then the law of *Employment Division v. Smith*[11] would have applied. Under *Smith*, generally applicable legislation that has an adverse but unintended impact on religion does not violate the Free Exercise Clause. The *Smith* decision is up for reconsideration in the fall of this year in *Fulton v. City of Philadelphia*.[12]

Now that the Supreme Court has decided that government aid for education, health, social services, and other such secular programs must be available to providers without regard to religion, what is left of the Establishment Clause? Many commentators had thought that such access to taxpayer funds violates the Establishment Clause. So, it might be difficult for them to see a future for a clause that should be, to their point of view, the chief guarantor of the separation of church and state. Yet despite what such commentators might have thought, *Espinoza* can be seen, not as a break with separationist doctrine, but as an extension of it. In trying to properly interpret the Establishment Clause, the

5 *Trinity Lutheran*, 137 S. Ct. at 2024 n.3 (limiting holding to aid for playground resurfacing).

6 *See* Mitchell v. Helms, 530 U.S. 793 (2000) (plurality opinion) (in face of Establishment Clause challenge, upholding federal primary and secondary education act that provides equal aid to public and private schools, including religious schools). The controlling opinion was that by Justice Sandra Day O'Connor, *id.* at 836, concurring in the judgment, joined by Justice Stephen Breyer. *See* Marks v. U.S., 430 U.S. 188, 193 (1977) (explaining that when Supreme Court fails to issue majority opinion, the opinion of the members who concurred in the judgment on the narrowest grounds is controlling).

7 *See* Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (upholding school vouchers for K-12 schools, including religious schools); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993) (providing special education services to Catholic student not prohibited by Establishment Clause); Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481 (1986) (upholding a state vocational rehabilitation grant to disabled student choosing to use grant for training as cleric); Mueller v. Allen, 463 U.S. 388, 399-400 (1983) (upholding a state income tax deduction for parents paying school tuition).

8 *Espinoza*, slip op. at 7.

9 *See id.* (relying on *Trinity Lutheran* where the nature of the aid was direct).

10 *See* Norwood v. Harrison, 413 U.S. 455, 462 (1973); Everson v. Board of Educ., 303 U.S. 1, 16 (1947) (dictum); Luetkemeyer v. Kaufmann, 364 F. Supp. 376 (E.D. Mo.), *aff'd mem.*, 419 U.S. 888 (1974); Brusca v. State Bd. of Educ., 332 F. Supp. 275 (E.D. Mo. 1971), *aff'd mem.*, 405 U.S. 1050 (1972).

11 494 U.S. 872 (1990).

12 U.S. Supreme Court No. 19-123, *cert. granted* 140 S. Ct. 1104 (Feb. 24, 2020). A decision in *Fulton* is not expected until spring 2021.

Court has sought to prevent government from putting its thumb on the scale of private religious judgment, whether for individuals or religious institutions. In that light, the Establishment Clause forbids the government from preferring religion, or taking sides in religious disputes. But it also permits the government to exempt religion from regulatory burdens imposed on others; the state thereby leaves religion alone, and a state does not establish a religion by leaving it alone. The integrating principle behind the clause is not to prevent the government from doing things that might benefit religion. Rather, it is to keep government from interfering with the voluntary choices by citizens that are religious, as well as walling off from state interference the internal autonomy of religious bodies. Seen from that vantage, *Espinoza* is of a piece with a separation of church and state that minimizes the role of government in private religious judgment while expanding the liberty to exercise religion or choose another path.

I. Religious Preferences Violate the Establishment Clause

A. What is a Religious Preference?

If we look back at the last century, there are examples of religious preferences that strike us as crude today. Government cannot penalize blasphemy, sacrilege, or other expression that speaks ill of a religion.[13] Government cannot compel an individual, upon pain of material penalty, inconvenience, or loss of public benefit, to profess a religious belief[14] or to observe an explicitly religious practice.[15]

A more plainspoken way of defining a religious preference is that the government is taking sides on a religious question. The establishment of a state church is the quintessential act of taking sides in a religious matter. Accordingly, the Establishment Clause prohibits government from purposefully discriminating between or among religions,[16] and from using classifications based on denominational or church affiliation to extend benefits[17] or to impose burdens.[18]

On the other hand, the government may use classifications based on a person's religious beliefs or practices—as distinct from denominational affiliation—to lift civil burdens from those individuals. For example, Congress may confer conscience objector draft status "on religious pacifists who oppose war in any form."[19] Government cannot use classifications that single out a particular religion's practice for favoritism, as opposed to favoring a general category of religious observance.[20] For example, prison authorities may accommodate religious dietary requirements, but they may not accommodate only kosher diets; the latter would be a religious preference that violates the Establishment Clause. To accommodate religious prisoners and still satisfy the Establishment Clause, authorities should permit inmates to

13 *See* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) (striking down law permitting censorship of films that are "sacrilegious"); *see also* Epperson v. Arkansas, 393 U.S. 97, 107 n.15 (1968) (dictum concerning blasphemy statutes).

14 *See* Torcaso v. Watkins, 367 U.S. 488, 496 (1961) (overturning requirement of an oath declaring belief in God as a prerequisite for public office); United States v. Ballard, 322 U.S. 78, 86 (1944) ("Freedom of thought, which includes freedom of religious belief, is basic in a society of free men."). Concerning compelled speech, this is an area where the purview of the Free Speech and Establishment Clauses overlap. Additionally, the Constitution provides that there may be no religious test for federal office. U.S. Const. art. VI, cl. 3.

15 *See* Lee v. Weisman, 505 U.S. 577, 587 (1992) ("[G]overnment may not coerce anyone to support or participate in religion or its exercise."); *cf.* McGowan v. Maryland, 366 U.S. 420, 431-49 (1961) (holding that a Sunday closing law is not explicitly religious and thus that compelling its observance does not violate the Establishment Clause).

16 *See* Larson v. Valente, 456 U.S. 228 (1982) (unconstitutional discrimination in state regulatory legislation adverse to new religious movements); Fowler v. Rhode Island, 345 U.S. 67 (1953) (ordinance permitting church services in park but no other religious meetings was a way of unconstitutionally preferring some religious groups over others based on a given sect's type of religious gatherings or occasion for delivering sermons); Niemotko v. Maryland, 340 U.S. 268 (1951) (unconstitutional to deny use of city park for Bible talks when permits were issued for worship services by other religious organizations and for Sunday school picnics).

When a law of nondiscriminatory purpose has a disparate effect on religious organizations or their observances, the Establishment Clause is not violated. *See* Hernandez v. Commissioner of Internal Revenue, 490 U.S. 680, 696 (1989); Bob Jones Univ. v. United States, 461 U.S. 574, 604 n.30 (1983) (effect on religious groups was not purposeful, but the unintended effect of IRS's facially neutral, secular regulation); *Larson*, 456 U.S. at 246 n.23.

17 "Benefit" means affirmative financial assistance for a secular purpose in the nature of a subsidy, grant, entitlement, loan, or insurance, as well as a tax credit or deduction. A tax exemption, such as that upheld for religious organizations in *Walz v. Tax Comm'n*, is to be distinguished from tax credits and deductions. 397 U.S. 664 (1970). A tax exemption is considered government's election to "leave religion where it found it" and is thus not considered a benefit. The idea that exemptions, credits, and deductions for organizations should all be regarded alike as "tax expenditures," while useful in other areas of legal policy, does not make sense in dealing with issues that arise under the Religion Clauses. *See* Boris I. Bittker & George K. Rahdert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 Yale L.J. 299, 345 (1976); Boris I. Bittker, *Churches, Taxes and the Constitution*, 78 Yale L.J. 1285 (1969).

18 *Grumet*, 512 U.S. at 702-08 (plurality opinion in part); Gillette v. United States, 401 U.S. 437 (1971); *see Larson*, 456 U.S. at 246 n.23 (further explaining *Gillette*). The rationale, in part, is that the Court wants to avoid making membership in a denomination more attractive. If the rule stated in the text was not the law, then merely holding religious membership would result in the availability of a civil advantage. For example, it would violate the rule stated in the text if Congress were to confer conscientious objector draft status "on all Quakers," for that may induce conversions (real or pseudo) to Quakerism.

19 *See Gillette*, 401 U.S. at 448-60; *Grumet*, 512 U.S. at 715-16 (O'Connor, J., concurring in part and concurring in the judgment). Government can either treat all religions alike, not concerning itself with unintended effects, or government can purposefully lift civic burdens from individuals based on their religious practices. What is impermissible is to lift such burdens based on an individual's denominational or religious affiliation.

20 *See* Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985) (striking down state law favoring Sabbath observance); *cf.* Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 145 n.11 (1987) (explaining and distinguishing *Caldor*); Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 18 n.8 (1989) (plurality opinion). For example, if Saturday as a day of rest is required to be accommodated by employers, then all religious days of rest must be accommodated. If a student absence from public school is excused for Good Friday, then so must absences for all religious holy days.

request food that meets the dietary requirements of all religions present in the prison population.

More generally, it is an unconstitutional preference for government to confer a benefit targeted on a religion or on those observing a particular religious practice.[21] *Estate of Thornton v. Caldor, Inc.* is the leading case.[22] The Connecticut legislature was about to repeal its law prohibiting retailing on Sunday.[23] Anticipating that the repeal would lead to scheduling conflicts between employers and churchgoing employees, the legislature took the side of the employee over the retail employer.[24] The new statute read in part: "No person who states that a particular day of the week is observed as his Sabbath may be required by his employer to work on such day."[25] Donald Thornton was an employee of Caldor, Inc., a retail department store.[26] He was a Presbyterian and observed Sunday as his Sabbath.[27] When the store began opening on Sundays, Thornton worked Sundays once or twice a month.[28] Unhappy with the situation, he invoked the statute and demanded Sundays off.[29] The store resisted, and the State Board of Mediation filed a lawsuit on Thornton's behalf.[30] The store argued that the Connecticut statute violated the Establishment Clause, and the Court agreed.[31]

The Supreme Court found that the Connecticut law forced the private sector to assist in the religious observance of fellow citizens.[32] That is what a preference often does: the government compels one private citizen to help another private citizen better conform to his or her religion.[33] The religious preference in *Caldor* was doubly offensive, for the statutory right was "unyielding."[34] That is, the statute took no notice of the commercial burden imposed on the employer or of the inconvenience to Thornton's co-workers who would have to fill in during his absence on Sundays.[35] An unyielding statute that compelled private parties to assist others in their religious duties was found to be state action that transgressed the Establishment Clause.

It is possible for a religious preference to pass constitutional challenge. In *TWA v. Hardison*, decided a few years before *Caldor*, the statutory provision in question—a requirement that covered employers adjust to the needs of their religious employees[36]—was a religious preference.[37] However, the Court upheld the law because the employer's duty of religious accommodation was not unyielding, as it was in *Caldor*, for the duty dissolved if the employer met the burden of showing "undue hardship."[38] The Supreme Court did not reach the claim that the law requiring accommodations for religious employees—section 2000e(j) of Title VII of the Civil Rights Act—violated the Establishment Clause,[39] albeit the prospect of such a ruling influenced the Court's interpretation of the statute.[40] The Court held:

> To require TWA to bear more than a *de minimis* cost in order to give [the employee-claimant] Saturdays off is an undue hardship. Like abandonment of the seniority system, to require TWA to bear additional costs when no such costs are incurred to give other employees the days off that they want would involve unequal treatment of employees on the basis of their religion.[41]

Congress enacted section 2000e(j) to address a conflict created by private market forces. The government stepped into that conflict and took the side of the religious claimant over that of the employer. In that sense, section 2000e(j) is like the statute in *Caldor*, a religious preference that raised Establishment Clause concerns.[42] However, unlike in *Caldor,* the section 2000e(j) preference was not absolute: employers did not have to comply if they could show that the requested accommodation would create an "undue hardship."[43] The *TWA* Court avoided reaching the Establishment Clause question by interpreting the preference as relieving the employer from the duty to accommodate an

21 *See Grumet*, 512 U.S. at 702-08 (legislation favoring one particular religious sect is unconstitutional); *Texas Monthly*, 489 U.S. at 14-15 (plurality opinion) (upholding sales tax exemption for those purchasing religious sacred writings).

22 472 U.S. at 709-11.

23 *Id.* at 705 n.2.

24 *Id.* at 706 n.3.

25 *Id.* at 706.

26 *Id.* at 705.

27 *Id.* at 705-06.

28 *See id*. at 705.

29 *Id.* at 706.

30 *Id.* at 706–07.

31 *Id.* at 707, 710–11.

32 *See id.* at 710.

33 *See id.* at 708 ("[G]overnment . . . must take pains not to compel people to act in the name of any religion.").

34 *Id.* at 709–10.

35 *Id.* at 708–09.

36 42 U.S.C. § 2000e(j). Care should be exercised to not confuse Title VII's preference favoring religious employees in § 2000e(j), a duty imposed on employers, with Title VII's exemptions for religious employers found in §§ 2000e-1(a) and 2000e-2(e)(2). *TWA* involved the former and *Amos* the latter.

37 432 U.S. 63, 66 (1977).

38 *See id.* at 84–85.

39 *See id.* at 69 n.4.

40 *See id.* at 89 (Marshall, J., dissenting) ("The Court's interpretation of the statute, by effectively nullifying it, has the singular advantage of making consideration of [TWA's] constitutional challenge unnecessary.").

41 *Id.* at 84 (majority opinion) (footnote omitted).

42 The Title VII accommodation at issue in *TWA* is not to be confused with general civil rights antidiscrimination statutes. Rather, it is a mandate to prefer employees who need affirmative help to both work and practice their religion. So the latter asks of the private sector to take on a new obligation so that the employee can better practice his religion. It is a plea for special treatment, not equal treatment. Hence, it is rightly characterized as a preference.

43 42 U.S.C. § 2000e(j).

employee when the burden was more than de minimis.[44] So long as the statutory preference costs the employer nothing or next to nothing, it is harmless to the employer, and therefore the state action did not in fact have any effect on the conflict. That being so, the Court quite consciously misinterpreted what Congress required by the accommodation. And we now know, after *Caldor*, that it needlessly did so under the belief that the Court had to give this interpretation to save the statute from violating the Establishment Clause. So long as the accommodation is not unyielding, but balances the competing interests of employer and employee, the statute does not fail the *Caldor* rule against religious preferences.

Larkin v. Grendel's Den, Inc. is another example of an unconstitutional preference.[45] *Larkin* struck down a municipal ordinance that gave churches the right to veto the issuance of liquor licenses to businesses within a 500-foot radius of the church.[46] Religious interests were preferred by the city over private retailing interests, and the preference was unyielding. The Court hastened to point out that it was not uncommon for cities to consider, along with other factors, the desire of churches to be free from noisy and rowdy neighbors.[47] Such considerations are constitutional, but a zoning ordinance cannot take the next step and grant an absolute preference in favor of church interests over competing secular interests.[48]

B. Religious Exemptions Are Not Preferences

The Establishment Clause is not violated when government enacts regulatory or tax legislation but provides an exemption from these burdens for those holding religious beliefs or practices. Such exemptions are at the discretion of a legislature and have as their purpose to ameliorate hardships borne by religious minorities and other dissenters who find themselves out of step with the prevailing social or legal culture. Statutory religious exemptions are common in our nation where there is a long and venerable tradition of religious tolerance.

A categorical mistake has emerged in the secondary literature (but not the case law) where statutory religious *exemptions* are conflated with religious *preferences*. The two are quite different. As to preferences, it is entirely proper to be concerned when a government intentionally favors religion over the secular. Being able to distinguish an exemption from a preference is paramount.

A true exemption ensures that a regulatory or tax burden imposed on others is not also required of the religiously devout who are predisposed to conform to their faith. Government does not establish religion by choosing to leave it alone. Because the religious devotion of the one invoking the exemption—not the government's decision to withhold regulation—is the driving force behind the religious observance, any harm that befalls a third party is the result of wholly private conduct.

In *Corporation of the Presiding Bishop v. Amos*, a janitor was dismissed from employment by his church-affiliated employer for failing to tithe to the church. He filed a claim for religious discrimination.[49] Title VII of the Civil Rights Act exempts religious employers from such claims when the adverse employment decision was motivated by the religious beliefs or practices of the employer.[50] The janitor claimed that this exemption violated the Establishment Clause. The Supreme Court readily acknowledged that the janitor suffered a religious burden.[51] However, he was harmed by his own church, not as a consequence of the religious exemption provided by Congress. As Justice Byron White wrote for the Court, "Undoubtedly, [the janitor's] freedom of choice in religious matters was impinged upon, but it was the Church . . . and not the Government, who put him to the choice of altering his religious practices or losing his job."[52]

A helpful way to think about what the Supreme Court held in *Amos* is to draw on the law of state action. When a legislature passes a statute that says an entity in the private sector may take a certain action, it is not state action when a private actor later avails itself of that opportunity. In *Flagg Brothers, Inc. v. Brooks*, the legislature permitted landlords to use self-help in removing the possessions of a tenant who was behind on the rent and had abandoned the leasehold.[53] A landlord availed itself of the self-help option. The tenant later sued the landlord for removing the tenant's property without adequate notice and opportunity for a hearing as required by the Due Process Clause of the Fourteenth Amendment. The lawsuit was dismissed because the Fourteenth Amendment only binds state actors, and the landlord's exercise of self-help was not state action.

A true preference arises when government takes note of a religious dispute and proceeds to affirmatively impose its resolution on the conflict. These disputes often emerge in situations not of the state's creation, usually from private social or market forces. When the legislature's intervening law takes the side of the religious disputant, the government is intentionally preferring religion over the secular. If the government's resolution

44 *See TWA*, 432 U.S. at 84.

45 459 U.S. 116 (1982).

46 *See id.* at 117.

47 *See id.* at 125.

48 *Id.* at 124 nn.7–8. There is commentary in *Larkin* suggesting that the constitutional offense was that the municipal ordinance delegated sovereign authority to a religious organization. *Id.* at 125-27. But the fact that the ordinance created an unyielding preference for religious interests over business interests was quite enough to justify the holding. In a modern regulatory state, many tasks formerly done by the government are delegated to the private sector. Just as the issuance of state drivers' licenses can be delegated to an independent contractor, so can the issuance of liquor licenses. There are few exclusive sovereign functions. It is best to regard *Larkin* as a straightforward case of striking down an unyielding religious preference.

49 483 U.S. 327, 330 (1987).

50 42 U.S.C. §§ 2000e–2000e-17. In Title VII, Congress did not cover acts of religious discrimination by religious employers. *Id.* at § 2000e-1(a). The nature of the religious employer exemption in Title VII is sometimes misunderstood. The exemption reflects a determination by Congress that religious employers should not be subjected to claims of religious discrimination. The exemption begins with language that places this type of claim outside the scope of all Title VII. *Id.* ("This subchapter shall not apply to . . . .").

51 *Amos*, 483 U.S. at 337 n.15.

52 *Id.*

53 436 U.S. 149 (1978).

of the dispute goes on to unyieldingly side with religion such that any harm to third parties is not also weighed in the balance, then the Supreme Court will strike down the preference. The prototypical case is *Caldor*, striking down a law where Connecticut took the side of a religious claimant in a dispute with his employer.

Parallel to the rationale in *Amos* is that in *Walz v. Tax Commission of New York*.[54] The Supreme Court was asked to consider whether a municipal property tax exemption for churches and other houses of worship advanced religion in violation of the Establishment Clause.[55] The Court 8-1 held that it did not. The *Walz* Court reached two conclusions of law. First, it held that the tax exemption for religious organizations was not a subsidy, but the government electing not to impose a tax burden on religion and thereby leaving religion alone.[56] In the Court's own words, the "grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but [it] simply abstains from demanding that the church support the state."[57] The Court distinguished an exemption from a subsidy saying that it "cannot read New York's statute as attempting to establish religion; it is simply sparing the exercise of religion from the burden of property taxation levied on [others]."[58] The proposition is simple: government does not establish religion by leaving it alone. As to the virtue of "leaving churches alone" arising from the principle of church-state separation, the Court observed: "The hazards of churches supporting government are hardly less in their potential than the hazards of government supporting churches; each relationship carries some involvement rather than the desired insulation and separation."[59] Unlike a religious preference, a tax exemption for religious entities "tends to complement and reinforce the desired separation [thereby] insulating each from the other."[60]

Second, the *Walz* Court rejected a quid pro quo argument as a justification for upholding the tax exemption. The tax commission had argued that the exemption was valid because it compensated religious groups for generating social capital through providing the poor and needy with welfare services, education, and health care.[61] Religious charities do just that, of course, but viewing the tax exemption as a reward for good works invites unconstitutional entanglement by way of "governmental evaluation and standards as to the worth of particular social welfare programs, thus producing a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize."[62]

Moreover, a reward-for-works rationale would risk violating the rule against authorities taking up religious questions concerning the validity, meaning, or importance of religious beliefs and practices. The rationale behind the no-religious-questions rule is that the government lacks the jurisdiction to make judgments concerning the civic value of religious practices. To contemplate civil courts passing on such questions implies an established state church against which "unapproved" ministries and "underperforming" churches are civilly tested and found wanting.

The *Walz* Court noted that religious organizations were not the only ones that received tax-exempt status under the city ordinance, but were joined by art, educational, and poverty-relief organizations.[63] However, the Court did not say that the inclusion of secular organizations in the tax exemption was necessary to its holding. Indeed, in cases like *Amos*[64] and *Zorach v. Clauson*,[65] the Court upheld exemptions that were exclusive to religious organizations or religion.

In addition to *Amos* and *Walz*, the Supreme Court has in five other instances rejected an Establishment Clause challenge to a discretionary religious exemption. In *Cutter v. Wilkinson*, the Court upheld the Religious Land Use and Institutionalized Persons Act ("RLUIPA"),[66] which accommodates religious observance by prison inmates otherwise subject to correctional policies.[67] In *Gillette v. United States*, a religious exemption from the military draft for those opposed to all war was found not to violate the Establishment Clause.[68] The Court in *Zorach v. Clauson* found that a public school policy of release from the state compulsory education law to allow pupils to attend voluntary religion classes away from the school grounds did not violate the Establishment Clause.[69] In *Arver v. United States*, the draft exemptions during World War I pertaining to clergy, seminarians, and pacifists were found not to violate the Establishment Clause.[70] Finally, in *Goldman v. United States*, the Court summarily rejected constitutional claims to the same military draft exemptions, relying on the newly decided holding in *Arver*.[71]

Academics who attack religious exemptions often blur the line between exemptions and preferences to make their case

54 397 U.S. 664.

55 *Id.* at 666–67.

56 *See id.* at 675 (majority opinion).

57 *Id.*

58 *Id.* at 673.

59 *Id.* at 675 (footnote omitted).

60 *Id.* at 676.

61 *Id.* at 674.

62 *Id.* Justice William Brennan's concurrence did rely on the reward-for-works justification, but no other Justice joined his opinion. *See id.* at 687–88 (Brennan, J., concurring).

63 *Id.* at 666–67 & n.1, 673.

64 *Amos*, 483 U.S. at 338–39.

65 343 U.S. 306, 315 (1952) (upholding a local public school release-time policy that exempted students from a state compulsory education attendance law to attend religion classes).

66 42 U.S.C. §§ 2000cc–2000cc-5.

67 544 U.S. 709, 720 (2005).

68 401 U.S. at 448–60.

69 343 U.S. at 308–15.

70 245 U.S. 366, 376, 389 (1918).

71 245 U.S. 474, 476 (1918). *Arver* and *Goldman* also illustrate that a religious exemption can be granted by a legislature even in the absence of coercion of religiously informed conscience. The World War I exemption to the draft embraced not only religious pacifists, but also clergy and seminarians without regard to the latter two showing they would suffer a religious burden if drafted. *See id.*; *Arver*, 245 U.S. at 367.

against the former.[72] These scholars were particularly distressed by the decision in *Burwell v. Hobby Lobby Stores, Inc.*,[73] with its broad application of the Religious Freedom Restoration Act ("RFRA")[74] that brought relief to a closely held for-profit corporation.[75] In some instances, no doubt, elected lawmakers should exercise their discretion and narrow or deny an exemption sought by religiously faithful people. It is entirely proper for legislators to consider any palpable harm to third parties as part of the overall political calculus. This is the familiar balancing for the common good by the two political branches, legislative and executive. But elected lawmakers are not constitutionally prohibited from enacting religious exemptions. And once the political branches have struck their balance and enacted a law with an exemption, the judicial branch should not rebalance the equities under the guise of discovering a constitutional violation.

II. Government Symbols and Other Expression with Religious Content

The Establishment Clause prevents the government from using its vast powers of communication to promote explicitly religious beliefs or practices.[76] Accordingly, the government may neither confess explicitly religious beliefs,[77] nor advocate that individuals profess explicitly religious beliefs or observe religious practices.[78] However, government may acknowledge the role of religion in society and teach about its contributions to, for example, history, literature, music, charity, architecture, and the visual arts.[79]

The Supreme Court has struggled with whether the Establishment Clause is implicated when a motto, anthem, official seal, or patriotic pledge places the government's imprimatur on monotheism,[80] or on an explicitly religious belief or practice.[81]

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72 *See* Frederick Mark Gedicks & Andrew Koppelman, *Invisible Women: Why an Exemption for Hobby Lobby Would Violate the Establishment Clause*, 67 Van. L. Rev. En Banc 51, 54-55, 61-62 (2014); Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 Harv. C.R.-C.L. L. Rev. 343, 357-71 (2014).

73 573 U.S. 682 (2014).

74 42 U.S.C. §§ 2000bb–2000bb-4.

75 These scholars claim that any burden that is traceable to a religious exemption is a "third-party harm" that renders the exemption violative of the Establishment Clause. This notion was explicitly rejected by Justice Alito, joined by Justice Gorsuch, in a concurring opinion filed in *Little Sisters of the Poor v. Pennsylvania*, slip op. 1, 140 S. Ct. 2367 (2020). *Little Sisters* involved a religious exemption from the Affordable Care Act involving health care policies providing coverage for contraceptive drugs and devices. Justice Alito took up several issues not reached by the Court. He said that while RFRA was a religious exemption, it did not create a burden for employees by depriving them of contraception benefits in their health care plans. Rather, the Affordable Care Act itself, as implemented, exempted religious objectors from having to provide contraception coverage, and therefore never promised such benefits. Because of that exemption, there never was an entitlement to contraception coverage; if there was no entitlement, there was no loss of benefit and therefore no harm. *Id*. at 18 & n.13.

76 *See* Westside Bd. of Educ. v. Mergens, 496 U.S. 226, 250 (1990) (plurality opinion) ("[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.") (emphasis in original).

77 The Supreme Court has found that prayer, devotional Bible reading, veneration of the Ten Commandments, classes in confessional religion, and the biblical story of creation are explicitly religious. *See* Engel v. Vitale, 370 U.S. 421 (1962) (teacher-led prayer); Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963) (teacher-led prayer and Bible reading); *Lee*, 505 U.S. 577 (prayer at commencement); McCollum v. Board of Educ., 333 U.S. 203 (1948) (teaching religion); Edwards v. Aguillard, 482 U.S. 578 (1987) (teaching creationism in science class); *Epperson*, 393 U.S. 97 (barring the teaching of evolution in science class). On the other hand, legislation restricting abortion, Sunday closing laws, rules prohibiting interracial marriage, teenage sexuality counseling, and loaning secular textbooks are not explicitly religious. *See* Harris v. McRae, 448 U.S. 297 (1980) (abortion restrictions); *McGowan*, 366 U.S. 420 (Sunday closing law); *Bob Jones*, 461 U.S. at 604 n.30 (student interracial dating); Bowen v. Kendrick, 487 U.S. 589 (1988) (teenage counseling); Central Bd. of Educ. v. Allen, 392 U.S. 236, 244 (1968) (textbooks).

78 *See McCollum*, 333 U.S. 203 (facilitating the teaching of religion); *Engel*, 370 U.S. 421 (teacher-led prayer); *Schempp*, 374 U.S. 203 (prayer and devotional Bible reading); Wallace v. Jaffree, 472 U.S. 38 (1985) (encouraging prayer); *Edwards*, 482 U.S. 578 (teaching creationism); *Epperson*, 393 U.S. 97 (prohibiting teaching evolution); *Lee*, 505 U.S. 577 (prayer). *But cf.* Marsh v. Chambers, 463 U.S. 783 (1983) (upholding legislative chaplain and prayer).

There are narrow exceptions to this rule in situations where government has isolated an individual from his or her religious community, such as in the armed forces or prisons. In these "special environments," government may bring religion to the individual because government is responsible for the individual's inability to obtain the requisite religious services at his or her own initiative. *See Schempp,* 374 U.S. at 299 (Brennan, J., concurring) ("[H]ostility, not neutrality, would characterize the refusal to provide chaplains and places of worship for prisoners and soldiers cut off by the State from all civilian opportunities for public communion.").

79 *See Edwards*, 482 U.S. at 606-08 (Powell, J., concurring); *Schempp*, 374 U.S. at 225; *McCollum*, 333 U.S. at 235-38 (Jackson, J., concurring). The rule stated in the text accords with *Florey v. Sioux Falls Sch. Dist.*, 619 F.2d 1311 (8th Cir.), *cert. denied*, 449 U.S. 987 (1981) (allowing public school to include Christmas music as part of a balanced program of secular and sacred selections representative of the culture and season).

80 America's governmental institutions have long acknowledged general theism in such forms as the national motto ("In God We Trust"), the Pledge of Allegiance (". . . one nation, under God, indivisible . . ."), and patriotic music ("God Bless America"). The idea that our governmental institutions are in a sense "under God" was present at America's founding, and the political philosophy is reflected in many of its constituting documents and the words of early statesmen. *See* Rector of Holy Trinity Church v. United States, 143 U.S. 457, 465-72 (1892) (numerous references to America's religious origins); *Wallace*, 472 U.S. at 91-106 (Rehnquist, J., dissenting) (same). As Justice William O. Douglas observed for the Court concerning America in *Zorach v. Clauson*, "We are a religious people whose institutions presuppose a Supreme Being." 343 U.S. at 313. This is a First Amendment issue of great sensitivity, and the lower courts have, in uneasy fashion, avoided working out the implications of America's public theology. *See* Sherman v. Community Consol. Sch. Dist., 980 F.2d 437 (7th Cir. 1992), *cert. denied*, 508 U.S. 950 (1993) (reciting the Pledge of Allegiance at public schools, including the phrase "one nation, under God," is not unconstitutional where students are free not to participate); O'Hair v. Murray, 588 F.2d 1144 (5th Cir. 1979) (rejecting claim that the national motto "In God We Trust" and its required use are unconstitutional).

81 Elected and other high public officials may, without violating the First Amendment, be particularistic about religious faith when they speak. In America, pronouncements by elected officials that interweave patriotism and religion have a long and venerable tradition. Familiar examples are presidential speeches that call upon God's providence as the nation faces some new challenge or adventure or addresses that conclude with

For example, on the same day that a government's display of the Ten Commandments was found constitutional, a similar display of the Ten Commandments was found unconstitutional.[82] While teacher-led prayer in public schools has consistently been struck down,[83] prayer by a state legislative chaplain has been upheld.[84]

In *Town of Greece v. Galloway*, the Supreme Court upheld a municipal practice of beginning meetings of the town governing board with a prayer delivered by a variety of local volunteer clergy.[85] As historical precedent, the Court referred to prayers before the Continental Congress and the First Congress's approval of paid legislative chaplains. While some of the prayers were explicitly Christian, none disparaged other religions. The *Galloway* Court went on to reject four alternatives offered by those challenging the prayers. Each alternative was itself forbidden by the Establishment Clause. The alternatives were: to allow only nonsectarian prayer, a limitation that officials could enforce only by parsing and censoring the content of each prayer;[86] to allow only prayer offered by individuals chosen through a process of "religious balancing" based on local demographics, inviting more intense involvement by officials with competing religions;[87] to offer only prayers acceptable to a majority of Americans, a none too subtle establishment of a national religion;[88] or to script prayers that aligned with an American "civic religion," a mix of patriotism and nationalism that competes with actual religions and that the Court had earlier rejected as a form of religious establishment.[89]

In an effort to cut through the confusion, the Court recently signaled a more sweeping shift in how it approaches these cases. In *American Legion v. American Humanist Association*, the Court looked to historical events and understandings as guides for interpreting the Establishment Clause.[90] This is part of a larger push to interpret the Establishment Clause in accord with its original public meaning. The case addressed a state-sponsored World War I memorial featuring a large Latin cross that was alleged to prefer the Christian faith. There is no denying that a Latin cross is the preeminent symbol of Christianity, for it speaks of the atoning sacrifice of Jesus Christ and is widely recognized as such. There also is no denying that the 32-foot long cross was the dominant feature of the WWI memorial located on a traffic island at a major highway intersection in Maryland.

Justice Samuel Alito began his opinion for the Court by acknowledging that a Latin cross is profoundly religious to Christians, but he argued that at the same time the WWI memorial cross is secular in its meaning to the state.[91] Further, a memorial or similar display can have a religious meaning at the outset, but then the object's meaning—at least for the state—can evolve and transform over time.[92] Thus the circuit court was mistaken to conclude that a Latin cross is inherently Christian and thus per se unconstitutional no matter the longevity of the symbol or other context. In this regard, the Court majority entertained the theory—contested by plaintiffs—that the Memorial Committee had initially adopted the design because Americans visualized the Great War in terms of the rows upon rows of individual white crosses at the military gravesites in Europe.[93]

In holding that the memorial's cross did not violate the Establishment Clause, six of the seven Justices in the majority sharply criticized the test announced almost 60 years ago in *Lemon v. Kurtzman*.[94] Then they proceeded to follow a different

"... may God bless America," celebrating Thanksgiving as a day for collective acknowledge of God's hand in the harvest and other good favor, and the practice started by George Washington of taking the presidential oath of office with the added "... so help me God." *See Zorach*, 343 U.S. at 312-13 (dicta approving of "appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; 'so help me God' in our courtroom oaths" and "the supplication with which the Court opens each session: 'God save the United States and this Honorable Court'"); Lynch v. Donnelly, 465 U.S. 668, 692-93 (1984) (O'Connor, J., concurring) (same).

82 *Compare* McCreary County v. ACLU, 545 U.S. 844 (2005) (Ten Commandments in county courthouse display case unconstitutional) *with* Van Orden v. Perry, 545 U.S. 677 (2005) (Ten Commandments monument on grounds of state capitol constitutional).

83 *See* Santa Fe Ind. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (prayer offered by student at solemn occasion that authorities had set aside at beginning of high school football game violated the Establishment Clause).

84 *See Marsh*, 463 U.S. 783 (approving prayer by chaplain at beginning of state legislative day).

85 572 U.S. 565 (2014).

86 *Id.* at 581 ("To hold that invocations must be nonsectarian would force the legislatures that sponsor prayers and the courts that are asked to decide these cases to act as supervisors and censors of religious speech, a rule that would involve government in religious matters to a far greater degree than is the case under the town's current practice of neither editing or approving prayers in advance nor criticizing their content after the fact.").

87 *Id.* at 585-86 ("[T]he Constitution does not require [the town] to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing. The quest . . . would require the town 'to make wholly inappropriate judgments about the number of religions [it] should sponsor and the relative frequency with which it should sponsor each' . . . [which would be] a form of government entanglement with religion that is far more troublesome than the current approach.") (quoting *Lee*, 505 U.S. at 617 (Souter, J., concurring)).

88 *Id.* at 582 ("[I]t would be unwise to adopt what respondents think is the next-best option: permitting those religious words, and only those words, that are acceptable to the majority, even if they will exclude some.").

89 *Id.* at 581 ("Government may not mandate a civic religion that stifles any but the most generic reference to the sacred any more than it may prescribe a religious orthodoxy."). In *Lee v. Weisman*, the Court had already said, "The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction . . . ." 505 U.S. at 590.

90 139 S. Ct. 2067 (2019) (plurality opinion in part).

91 *Id.* at 2074, 2090. *See also id.* at 2082-83 (arguing that "longstanding monuments, symbols, and practices" tend to develop secular purposes and meanings alongside their religious origins); *id.* at 2075 ("The image used in the Bladensburg memorial—a plain Latin cross—also took on new meaning after World War I . . . .") (footnote omitted).

92 *Id.* at 2074, 2075, 2085-87, 2089-90.

93 *Id.* at 2089 ("That the cross originated as a Christian symbol and retains that meaning in many contexts does not change the fact that the symbol took on an added secular meaning when used in World War I memorials."). *See also id.* at 2076, 2085.

94 403 U.S. 602 (1971). The Court in *Lemon* said that a government's law or practice challenged under the Establishment Clause must pass a

interpretative approach. Five of the six Justices, still a Court majority, would interpret the Establishment Clause by aligning it with historical practices and understandings. Yet what qualifies as a binding historical practice was still a matter of disagreement among the five. Justice Alito, in a part of his opinion commanding only a plurality, collected examples from federal historical events and noted that officials involved in these occurrences were careful to embrace multiple Christian denominations and disparaged no faiths.[95] He did not claim that these historical examples were inclusive of all faiths. However, given the 1919–1925 period when the memorial was designed and erected, it was sufficient that those who conceived the memorial centered on the Latin cross moved forward in a spirit of inclusiveness with respect to religion and did not intentionally disparage others. We will have to await further cases to see if the Supreme Court adopts a comprehensive rule of interpretation based on the Establishment Clause's original public meaning.

III. The Religious Question Doctrine and the Rhetoric of "Entanglement"

In *Thomas v. Review Board,* the state sought to defeat an employee's free exercise claim challenging the government's denial of unemployment compensation.[96] Thomas was laid off from a factory when he refused to work on parts for military tanks because he was a religious pacifist. By using the testimony of a co-worker who was also a longtime member of the same religion as Thomas, the state sought to show that Thomas, a new convert, was misapplying the teachings of his newfound denomination. The Supreme Court would have none of it, observing that Thomas "drew a line" concerning his own beliefs that the state had to accept lest the civil courts become "arbiters of scriptural interpretation."[97]

It is common for the modern Supreme Court to declare that the judiciary must avoid legal classifications that cause it to probe into the religious meaning of words, practices, or events,[98] as well as for the courts to avoid making determinations concerning the centrality of a religious belief that has been drawn into question.[99] Such declarations affirm what is an important restraint on the jurisdictional reach of the courts. Typically called the "religious question doctrine," the rule bars the judiciary—indeed all civil officials and authorities—from attempting to resolve disputes over the correctness of what a religious person or organization believes, or from taking up an issue that goes to the validity, meaning, or importance of a religious belief or practice.

The religious question doctrine has developed in response to a threefold concern: (1) judges lack competence to resolve doctrinal questions; (2) the government must not interfere in matters internal to a given religion; and (3) when a court favors one interpretation of a sacred text or miraculous event over competing interpretations, there is a micro establishment of religion. There are two aspects to the first concern about lack of judicial competence. First, the civil courts do not have subject matter jurisdiction over religious questions. Second, civil judges do not have the theological training and experience to rightly divine answers to religious questions.[100] The lack of subject matter jurisdiction is attributable to the Establishment Clause. It is a mark of a state church, such as the Church of England, that the civil government determines the doctrine and liturgy of the church. When government in any of its offices, including the office of civil judge, takes on the business of resolving religious disputes, it ends up favoring one side and disfavoring the other. That harms both voluntary religion and civil government. Government divining and dictating religious truth (or falsehood) has inevitably resulted in a breach of the peace by inflaming and multiplying civic divisions along religious lines. The American solution is to bracket religious questions and move them outside the government's authority, resulting in more liberty and more domestic tranquility. This is church-state separation at its most constructive. Of course, political and religious disagreement and

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test consisting of three factors: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion." *Id.* at 612-13 (internal quotation marks omitted).

95 *American Legion*, 139 S. Ct. at 2087-88 (Alito, J.).

96 450 U.S. 707.

97 *Id.* at 715, 716. Thomas was a Jehovah's Witness. He believed his religion prohibited him from working in a factory on the task of fabricating turrets for military tanks. *Id.* at 710.

98 *See* Rosenberger v. Rector & Visitors, 515 U.S. 819, 843-44 (1995) (university should avoid distinguishing between evangelism, on the one hand, and the expression of ideas merely approved by a given religion); *Bob Jones*, 461 U.S. at 604 n.30 (avoiding potentially entangling inquiry into religious practice); Widmar v. Vincent, 454 U.S. 263, 269-70 n.6, 272 n.11 (1981) (holding that inquiries into religious significance of words or events are to be avoided); *Thomas*, 450 U.S. at 715-16 (not within judicial function or competence to resolve religious differences); *Gillette*, 401 U.S. at 450 (Congress permitted to accommodate "all war" pacifists but not "just war" inductees because to broaden the exemption invites increased church-state entanglements and would render almost impossible the fair and uniform administration of selective service system); *Walz*, 397 U.S. at 674 (avoiding entanglement that would follow should tax authorities evaluate the temporal worth of religious social welfare programs is desirable); Cantwell v. Connecticut, 310 U.S. 296, 305-07 (1940) (petty officials not to be given discretion to determine what is a legitimate "religion" for purposes of issuing permit); *see also* Rusk v. Espinosa, 456 U.S. 951 (1982) (aff'd mem.) (striking down charitable solicitation ordinance that required officials to distinguish between "spiritual" and secular purposes underlying solicitation by religious organizations).

99 *See* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988) (rejecting free exercise test that "depend[s] on measuring the effects of a governmental action on a religious objector's spiritual development"); *Amos*, 483 U.S. at 336 (recognizing a problem when government attempts to divine which jobs are sufficiently related to the core of a religious organization so as to merit exemption from statutory duties is desirable); United States v. Lee, 455 U.S. 252, 257 (1982) (rejecting government's argument that free exercise claim does not lie unless "payment of social security taxes will . . . threaten the integrity of the Amish religious belief or observance"); *Smith*, 494 U.S. at 886-87 (same).

100 The latter task is not akin to the choice-of-law problem of a judge determining the law of a foreign country. Rather, in many instances religious doctrine has evolved, or is said by one faction to have evolved, such that the task of determining current orthodoxy is both contested ground and a moving target.

division is protected by the Free Speech Clause.[101] Divisiveness does not itself violate the Establishment Clause, but certain governmental actions that help cause divisions along religious lines can violate the clause. For example, when government takes sides in a religious controversy, it is violating the rule against religious questions—and that is forbidden by the Establishment Clause.

RFRA[102] has been the cause of some high-stakes applications of the religious question doctrine. When bringing a claim under RFRA, an element of the prima facie case is to show that claimants are "substantially burden[ed]" in their religion.[103] The substantial burden element cannot invite a judicial inquiry into whether the religious belief at issue is central to or mandated by the claimant's faith system.[104] That would be a question concerning the importance or meaning of the religious belief and thus forbidden by the religious question doctrine. Rather, as the Court held in *Hobby Lobby*, the question RFRA poses is whether the challenged law or policy "presents believers with the choice of either violating their religious beliefs or suffering a substantial penalty."[105] In *Hobby Lobby*, an employer's failure to provide the required contraceptive coverage in health care plans for all employees, or to let its insurance carrier do it for the employer at no additional cost, resulted in tens of thousands of dollars in fines. Fines at that level easily met the substantial burden element.

Similarly, in *Little Sisters of the Poor v. Pennsylvania*,[106] the Third Circuit found that the Little Sisters failed RFRA's required showing of a substantial burden on their religion. The health care regulations required that the Little Sisters merely sign a certificate to relieve the religious order of the contraception mandate, in which case the insurance carrier would take over the legal duty. The circuit court deemed this a minor, one-time inconvenience to the Little Sisters.[107] But the substantial burden element does not ask how easy it would be for religious claimants to violate the teachings of their faith in order to comply with the offending law. That would be a judgment concerning the importance of a religious practice to the claimant and thus violate the rule against answering religious questions. Rather, RFRA's substantial burden element frames the inquiry as one that can be answered by a civil judge: "What harm occurs if the claimant remains faithful and disobeys the law?" The Little Sisters would have incurred thousands of dollars in penalties if they did not comply—easily a substantial burden as the Court held in *Hobby Lobby*.

In *Walz v. Tax Commission of New York*, the Supreme Court first sang the virtues of avoiding entanglement between the institutions of church and state.[108] A property tax exemption for churches was not only found to be consistent with the Establishment Clause, but the Court praised the exemption because it avoided administrative entanglements otherwise present in the property appraisal and tax administration of ad valorem statutes.[109] Just one year later in *Lemon*, the Court fashioned a wholly new requirement that governments eschew "excessive entanglement" between church and state to avoid violating the Establishment Clause.[110] In a complex society, however, a certain level of regulatory interaction between church and state is inevitable, even desirable. While the *Lemon* test is now in disfavor, for a time there were cases where administrative entanglement alone, deemed to be excessive by some measure never quantified, led to laws being deemed unconstitutional.[111] That unhappy state of affairs seems to have gotten sorted. The idea that regulatory entanglements independently implicate the Establishment Clause has now been contracted and subsumed into the rule against taking up religious questions. Judges and lawyers continue to refer to "entanglement" as their descriptor for when a church-state boundary has been crossed, but it is now just a succinct and colorful way of describing a failure by officials to heed the rule against religious questions.

The religious question doctrine does not forbid government authorities to inquire into the *sincerity* of a party asserting a claim to religious freedom.[112] As difficult as it can be to measure what is in the hearts of people with respect to their religious professions, requiring sincerity is a logical necessity. The Religion Clauses must not be allowed to become a refuge for fakers, frauds, and charlatans.

The scope of the religious question rule also leaves room for government to make inquiries *about* a religion. These are factual findings concerning a given religion's nature, beliefs, or practices that do not go on to assess their validity, meaning, or importance. For example, a civil magistrate, using the familiar rules of evidence, can determine whether a community center or an international disaster relief organization is a religious employer that therefore qualifies for an exemption from federal

101 *See McDaniel*, 435 U.S. at 641 (plurality opinion) (Brennan, J., concurring in the judgment). Justice Brennan observes that religious organizations have as much right as other types of organizations to engage in political activism.

102 42 U.S.C. §§ 2000bb to 2000bb-4.

103 *Id.* at 2000bb-1(a).

104 This principle was added to RFRA by amendment in August 2000. *See* Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-5(7)(A).

105 573 U.S. at 726.

106 U.S. Supreme Court No. 19-431, slip op.1, 140 S. Ct. 2367 (2020).

107 *See* Little Sisters of the Poor v. Pennsylvania, 930 F.3d 543, 572-74 (3d Cir. 2019), *reversed* Little Sisters of the Poor v. Pennsylvania, 140 S. Ct. 2367 (U.S. Sup. Ct. 2020). You can almost imagine the circuit panel thinking, "Look, Sisters, just sign the piece of paper and be done with it, once and for all. How hard is that?"

108 397 U.S. 664.

109 *Id.* at 674 (holding that exemption had the laudable effect of not expanding "the involvement of government [with religious organizations] by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontation and conflicts that follow in the train of those legal processes"). *See also id.* at 676.

110 *See Lemon*, 403 U.S. at 612-13 ("entanglement" elevated to a third test for measuring Establishment Clause compliance).

111 *Lemon* held that state programs to aid K-12 religious schools generated excessive entanglement between church and state in violation of the Establishment Clause. *Id.* at 617-18.

112 The leading case on sincerity as necessary to invoking a religious freedom claim under the First Amendment is *United States v. Ballard*, 322 U.S. 78.

employment nondiscrimination laws.[113] It is no invasion of religious freedom to ask an employer, claiming to be statutorily exempt, to demonstrate that it is organized under state law as a religious corporation and that it holds itself out to the public as such. A recent decision concerning collective bargaining and religious colleges is illustrative. Reversing a prior decision to the contrary, the National Labor Relations Board ruled that lay faculty at a Lutheran college were not subject to union organization.[114] The prior case law recognized collective bargaining rights for lay faculty unless a college was "substantially religious in character."[115] That put the NLRB in the position of making exacting inquiries into the religious curriculum and other programs at the college, and then weighing the religious importance of these classes and the religious meaning of its other endeavors. Judging the degree of religiosity of these matters was unconstitutionally entangling. To avoid transgressing the religious question rule, the Board's new three-part inquiry looks to whether the college: (a) holds itself out to the public as religious; (b) is a nonprofit; and (c) is affiliated with a church or other religious organization.[116] Such findings of fact are permitted because they are *about* religion, but they do not question whether the tenets of the religious college are important or meaningful to maintaining its religious character.

IV. The Church Autonomy Doctrine More Generally

With respect to matters of internal governance, churches and other religious societies are free from regulation or other juridical burdens.[117] This has come to be known as the doctrine of church autonomy.[118] While the principles of church autonomy reference both Religion Clauses,[119] they are primarily derived from the Establishment Clause because of its natural grounding in church-state separation.

The rule against religious questions discussed in Part III is a subpart of the church autonomy doctrine. Church autonomy also entails the selection and control of the organization's polity (i.e., ecclesiology), the selection and control of clergy and other ministers (i.e., ecclesiasticism), and the admission and retention of church members. Common in this area of law are religious disputes over title to church property. The state courts have devised "neutral principles of law" as a means of settling these disagreements. The formation of such neutral principles is permitted by the Supreme Court, even encouraged. But their adoption is permitted only if the neutral principles do not transgress church autonomy. In other words, the principles adopted to settle a church title dispute are "neutral" only if they honor the doctrine of church autonomy.

The Establishment Clause and the Free Exercise Clause each have their own line of cases. However, there is a distinct, third line of cases that tracks the development of church autonomy. The first case in this line is *Watson v. Jones*.[120] The Supreme Court in *Watson* laid down the first broad principles of church autonomy when courts deal with disputed matters in religious bodies that concern doctrine, polity, and ecclesiastical oversight.[121] To avoid trespassing on church autonomy courts should defer to church authorities:

> [W]henever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.[122]

Watson was a post-Civil War case that involved a struggle between two factions of a local Presbyterian church for control of the church building. Title to the property was in the name of the trustees of the local church. However, the deed and charter of the local church "subjected both property and trustees alike to the operation of [the general church's] fundamental laws."[123] The general church was the Presbyterian Church of the United States. Its governing body was called the General Assembly. The ecclesiastical rules of the General Assembly stated that it possessed "the power of deciding in all controversies respecting doctrine and discipline."[124] Following the Civil War, the General Assembly ordered the members of all local congregations who believed in a divine basis for slavery to "repent and forsake these sins."[125]

A majority of the local church members were willing to comply with the directive. A minority faction, however, deemed the resolution of the Assembly a departure from the doctrine held at the time when the local church first joined with the general church. The minority's legal theory was that the general church held an interest in the property of the local church subject to an implied trust. The condition said to be implied was that the church adhere to its original doctrines. Any departure by the general church meant a breach of trust and thus forfeiture of its interest

113 *See, e.g.,* Spencer v. World Vision, Inc., 633 F.3d 723, 724 (9th Cir. 2011) (per curiam) (developing an approach for determining who is a religious organization and thus able to invoke the religious employer exemption); LeBoon v. Lancaster Jewish Community Center, 503 F.3d 217, 226-29 (3d Cir. 2007) (same).

114 Bethany College and Thomas Jorsch and Lisa Guinn, 369 NLRB 1 (No. 98, June 10, 2020).

115 *Id.* at 2.

116 *Id.* at 3-4.

117 *See* Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 565 U.S. 171, 190 (2012).

118 Professor Paul G. Kauper first used the term in *Church Autonomy and the First Amendment: The Presbyterian Church Case*, in Church and State: The Supreme Court and the First Amendment 67, 95 (Paul Kurland ed., 1975).

119 *Hosanna-Tabor*, 565 U.S. at 188-89.

120 80 U.S. (13 Wall.) 679 (1872).

121 In *Watson,* the federal trial court had diversity jurisdiction. The rule of decision was based on federal common law rather than the First Amendment. This is because *Watson* was decided prior to *Erie Ry. Co. v. Tompkins*, 304 U.S. 64 (1938). In following the old rule of *Swift v. Tyson*, federal courts sitting in diversity could deviate from state substantive law. 41 U.S. (16 Pet.) 1 (1842). Further, the First Amendment Religion Clauses had not yet been applied to the states through the Fourteenth Amendment.

122 *Watson*, 80 U.S. at 727.

123 *Id.* at 683.

124 *Id.* at 682.

125 *Id.* at 691.

in the property occupied by the local church. Accordingly, the minority faction claimed that the majority relinquished any right to control the property when the general church repudiated the original, proslavery doctrine. Because they were the "true church," the minority faction maintained that it should be awarded the local church real estate.[126]

The Supreme Court rejected the implied trust theory—which originated in English law with its established Church of England[127]—because the departure from doctrine inquiry would require the civil adjudication of a religious question. The Watson Court gave three reasons for determining that it did not have subject matter jurisdiction of the case: (1) civil judges are unschooled in religious doctrine and thereby not competent to resolve disputes concerning religious doctrine nor to properly interpret church documents and canon law;[128] (2) for the civil law to award the property to the faction adhering to original doctrine would entail the government taking sides, thereby "establishing" one creedal position while severely inhibiting changes in religious doctrine;[129] and (3) both clerics and lay members of a church have voluntarily joined the entire church, the general as well as the local body, thus giving implied consent to the polity of the entire church and its administration.[130] These bases for church autonomy are rooted, said the Court, in the American governmental system that—unlike the English system—separates the institutions of church and state, thereby sharply limiting the involvement of civil courts in the affairs of religious bodies.[131]

Watson's principles were elevated to First Amendment stature in *Kedroff v. Saint Nicholas Cathedral*.[132] The Supreme Court in *Kedroff* struck down a New York statute that displaced control of the Russian Orthodox Churches from the central governing hierarchy located in the Soviet Union with a church sub-organization limited to the Diocese of North America. The felt need to transfer control of ecclesiastical authority was linked to the Marxist Revolution of 1917 and doubt concerning whether Moscow had "a true central organization of the Russian Orthodox Church capable of functioning as the head of a free international religious body."[133] Because the statute did more than just "permit the trustees of the Cathedral [in New York City] to use it for services consistent with the desires of the members," but transferred control over domestic churches by legislative fiat,[134] the Court held that the statute violated the "rule of separation between church and state."[135] The *Watson* Court had repudiated the English implied trust rule and its departure from doctrine standard, but only as a matter of federal common law. A number of states had continued to follow the implied trust rule as a matter of their own common law. *Kedroff,* however, clearly foreshadowed the sweeping aside of the common law in those states still following the English rule.

In *Presbyterian Church v. Mary Elizabeth Blue Hull Church*, the Supreme Court held that the rule of church autonomy from *Watson* was now a First Amendment principle.[136] *Presbyterian Church* involved a dispute between a general church and two of its local congregations over who had the authority to control the local church properties. The controversy began when the local churches claimed that the general church had violated the organization's constitution and had departed from original doctrine and practice.[137] Georgia followed the implied trust rule with its requisite fact finding into alleged departures from doctrine. On the basis of a jury's finding that the general church had abandoned its original doctrines, the Georgia courts entered judgment for the local congregations. On appeal, the Supreme Court held that the First Amendment does not permit a departure from doctrine standard as a substantive rule of decision. The "American concept of the relationship between church and state,"[138] the Court said, "leaves the civil court *no* role in determining ecclesiastical questions in the process of resolving property disputes."[139]

The Supreme Court in *Serbian E. Orthodox Diocese v. Milivojevich* rejected an Illinois bishop's lawsuit challenging a top-down reorganization of the American-Canadian Diocese of the Serbian Eastern Orthodox Church and his removal from office.[140] *Milivojevich* involved internal church administration and clerical appointment, which the Court determined were insulated from civil review under the First Amendment.[141] There was no dispute between the parties that the Serbian Eastern Orthodox Church was a hierarchical church and that the sole power to remove clerics rested with the ecclesiastical body in Europe that had decided the bishop's case.[142] Nor was there any question that the matter

126 *Id.* at 691-94.

127 *Id.* at 727-28.

128 *Id.* at 729, 730, 732.

129 *Id.* at 728, 730, 735.

130 *Id.* at 729. *See also* Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 714-20 (1976) (civil courts will not tell general church that it is misapplying its own canons). The Supreme Court has held that consent to be governed by the church polity and its authorities is sufficient to protect an individual member's free exercise right, so long as the member has the absolute right to leave the church at any time. Order of Saint Benedict v. Steinhauser, 234 U.S. 640, 647-51 (1914). Departing from a church, of course, means a cleric or church member leaving behind the "work of one's hands," both spiritual and material. But being willing to leave behind one's spiritual and material works is what is impliedly consented to at the outset when one voluntarily joins both the church-wide units and local congregations of a denomination.

131 80 U.S. at 728-29, 730.

132 344 U.S. 94 (1951).

133 *Id.* at 106.

134 *Id.* at 119.

135 *Id.* at 110.

136 393 U.S. 440 (1969).

137 *Id.* at 442 n. l.

138 *Id.* at 445-46.

139 *Id.* at 447 (emphasis in original).

140 426 U.S. 696 (1976).

141 *Id.* at 709, 713, 720, 721.

142 *Id.* at 715.

at issue was a religious dispute.[143] Nevertheless, the state court decided in favor of the defrocked bishop in Illinois because, in its view, the church's adjudicatory procedures had been applied in an arbitrary manner. On appeal, the U.S. Supreme Court rejected an arbitrariness exception to the judicial deference rule of *Watson* when the question concerns church polity or supervision of a bishop.[144] When the subject of the dispute is within one of the spheres of church autonomy, civil courts may not examine whether the church judicatory body properly followed its own rules of procedure.[145] To accept jurisdiction over such subject matters is not "consistent with the constitutional mandate [that] the civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law."[146]

Using reasoning similar to that in *Watson,* the *Milivojevich* Court explained that there are three bases for a First Amendment prohibition of civil court jurisdiction in such cases. First, civil courts cannot delve into canon law or church documents.[147] These matters are too sensitive to permit any civil probing because such inquiry may prove intrusive and entail the court taking sides in a religious dispute. Second, civil judges have no training in canon law and theological interpretation.[148] Third, the "[c]onstitutional concepts of due process, involving secular notions of 'fundamental fairness,'" cannot be borrowed from American civil law and grafted onto a church's polity to somehow "modernize" the church.[149] The Supreme Court also reversed the state court's undoing of the diocesan reorganization, holding that the Illinois court had impermissibly "delved into the various church constitutional provisions" relevant to "a matter of internal church government, an issue at the core of ecclesiastical affairs."[150] The enforcement of church documents, often unclear to a civil judge, cannot be accomplished "without engaging in a searching and therefore impermissible inquiry into church polity."[151]

The Supreme Court held in *Jones v. Wolf* that courts may, in limited instances, devise "neutral principles of law" to adjudicate intrachurch disputes that affect title to property.[152] Courts may examine church charters, constitutions, deeds, and trust indentures to resolve property disputes using "objective, well-established concepts of trust and property law familiar to lawyers and judges."[153] The method's advantage is that it sometimes "obviates entirely the need for an analysis or examination of ecclesiastical polity or doctrine in settling church property disputes . . . ."[154] However, a neutral principles approach may not be used in a manner that trespasses into any of the subjects reserved to church autonomy. The Court said it was clear "that the First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes."[155]

In *Watson,* the rule of judicial deference was encouraged as a means of resolving a dispute while still honoring church autonomy doctrine. That can work in a church with a hierarchical polity. In *Wolf*, "neutral principles of law" was approved as an alternative to judicial deference. Neither of these two rules is an exception to the doctrine of church autonomy. Rather, these rules are alternative means of resolving an intrachurch dispute over title while honoring church autonomy:

> [T]here may be cases where the deed, the corporate charter, or the constitution of the general church incorporates religious concepts in the provisions relating to the ownership of property. In such a case, if the interpretation of the instruments of ownership would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body.[156]

In other words, the available dispute resolution principles are "neutral" only if they avoid transgressing the doctrine of church autonomy.

In January 2012, the U.S. Supreme Court issued its unanimous decision in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*.[157] This was the Court's first church autonomy case since *Wolf* was decided in 1979. *Hosanna-Tabor* involved a fourth-grade teacher, Cheryl Perich, who sued her employer, a church-related religious school, alleging retaliation for having asserted her rights under the Americans with Disability Act (ADA).[158] In the lower federal courts, the school raised the "ministerial exception" as a defense, which recognizes that under the First Amendment religious organizations have the exclusive

143 *Id.* at 709.

144 *Id.* at 712-13.

145 *Id.* at 713.

146 *Id.*

147 *Id.*

148 *Id.* at 714 n.8.

149 *Id.* at 714-15.

150 *Id.* at 721.

151 *Id.* at 723.

152 443 U.S. 595, 602-06 (1979). The *Wolf* Court made it clear that a neutral principles approach is not mandated by the First Amendment. Rather, in intrachurch property disputes, the use of neutral principles is a permissible alternative to the judicial deference rule. *Id.* at 602.

153 *Id.* at 602-03.

154 *Id.* at 605.

155 *Id.* at 602.

156 *Wolf*, 433 U.S. at 604. *See also Milivojevich,* 426 U.S. at 712-13 (that "the decisions of the Mother Church were 'arbitrary' was grounded upon an inquiry that persuaded the Illinois Supreme Court that the Mother Church had not followed its own laws and procedures" and that is an inquiry prohibited by the First Amendment); Md. & Va. Churches of God v. Church at Sharpsburg, 396 U.S. 367, 369 (1970) (Brennan, J., concurring) ("To permit civil courts to probe deeply enough into the allocation of power within a church so as to decide where religious law places control over the use of church property would violate the First Amendment in much the same manner as civil determination of religious doctrine."); *id.* at 369 n.2 ("Only express conditions [in a church document] that may be effected without consideration of doctrine are civilly enforceable" by a civil court.).

157 565 U.S. 171.

158 42 U.S.C. §§ 12101 *et seq.*

authority to select their own ministers—which necessarily entails not just initial hiring but also promotion, retention, and all the other terms and conditions of employment. As a matter of church autonomy, the ministerial exception overrides not just the ADA, but a number of venerable employment nondiscrimination civil rights statutes.[159]

The Supreme Court, in an opinion by Chief Justice John Roberts, wrote that "[r]equiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs."[160] The Court said that although "the interest of society in the enforcement of employment discrimination statutes is undoubtedly important . . . so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission."[161] Accordingly, in a lawsuit that strikes at the ability of the church to govern itself, any balancing of interests between a vigorous eradication of employment discrimination, on the one hand, and institutional religious freedom, on the other, is a balance already struck on the side of ecclesial freedom: "When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us."[162]

In *Hosanna-Tabor*, the U.S. Department of Justice's Office of the Solicitor General (OSG) claimed that there was no ministerial exception because the First Amendment did not require one. All that was required, argued the OSG, was that the government be formally neutral with respect to religion and religious organizations. That was the case here, said the OSG, because the ADA treats religious organizations just like every other employer when it comes to discrimination on the basis of disability. The same is true of federal and state civil rights statutes prohibiting discrimination on the bases of sex, age, race, and so forth. The OSG allowed that religious organizations had freedom of expressive association, but so did labor unions and service clubs, and they were still subject to the ADA.[163] The nondiscrimination statutes could be blind to religion and religious organizations, asserted the OSG, and while Congress could choose to accommodate religion, the First Amendment did not require it to do so.

The Court reacted to the OSG's argument for a religion-blind Constitution by calling it "remarkable," "untenable," and "hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations."[164] Religious organizations have freedom of expressive association, not merely to the same degree as other expressional groups, but much more. The text of the First Amendment recognizes the unique status of organized religion, and a properly conceived separation of church and state that is to the good of both.[165] So the *Hosanna-Tabor* Court held that the First Amendment requires a ministerial exception that is in the nature of an immunity.[166]

Before proceeding to examine more closely the facts that convinced the Court that this teacher was a minister for purposes of the exception, the Chief Justice had to distinguish *Employment Division v. Smith*.[167] In *Smith*, the state of Oregon had listed peyote, a hallucinogenic, as one of several controlled substances and criminalized its use. The plaintiffs in *Smith* were Native Americans who had been employed as counselors at a private drug rehabilitation center.[168] They were fired for illegal drug use after they used peyote in a religious ceremony, and they were later denied unemployment compensation by the state because they were fired for cause. The *Smith* Court held that the Free Exercise Clause was not implicated when Oregon enacted a neutral law of general applicability that happened to have an adverse impact on the religious use of peyote.[169]

Chief Justice Roberts admitted that the ADA was a neutral law of general applicability that happened to have an adverse effect on Hosanna-Tabor's personnel decisions.[170] But then, for a unanimous Court, he drew this distinction between *Hosanna-Tabor* and *Smith*: "The present case, in contrast [to *Smith*], concerns government interference with an internal church decision that affects the faith and mission of the church itself."[171] Without the ministerial exception, a civil court would be ordering a church to employ a minister by command of the state—historically an act of a state with an established church. The Court proceeded to carve out a subject-matter class of cases to which the rule in *Smith* does not apply: those involving "internal" decisions within the church's autonomous sphere of self-governance.

Obviously, a sacrament is an important religious practice, and the *Smith* plaintiffs suffered a material burden on this religious observance that was unrelieved by the rule in *Smith*. But the point of church autonomy is not to relieve religious burdens as such. If it were, then *Hosanna-Tabor* would have been at odds with and thereby overruled *Smith*. That did not happen. Rather,

159 *See, e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*; The Equal Pay Act of 1963, 29 U.S.C. § 206(d); Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.*

160 *Hosanna-Tabor*, 565 U.S. at 188.

161 *Id.* at 196.

162 *Id.*

163 *Id*. at 188-89.

164 *Id.*

165 *See, e.g., McCollum*, 333 U.S. at 212 ("[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."); *Engel*, 370 U.S. at 431 (The Establishment Clause's "first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion.").

166 *Hosanna-Tabor*, 565 U.S. at 188-90.

167 494 U.S. 872.

168 *Id*. at 874.

169 The *Smith* decision is up for reconsideration in *Fulton v. City of Philadelphia*, U.S. Sup. Ct. No. 19-123. The *Fulton* case will be argued in November 2020, and a decision is expected in spring 2021.

170 *Hosanna-Tabor*, 565 U.S. at 189-90.

171 *Id*. at 190.

Hosanna-Tabor distinguished *Smith*. What was remedied in *Hosanna-Tabor* was not a burden on an organization's religion but the government's intrusion into the self-governance of religious groups. "The purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason."[172]

The *Hosanna-Tabor* Court went on to provide another example in which *Smith* does not apply: in lawsuits over title to church property, the government must not take sides on the question concerning the rightful ecclesiastical authority to resolve the property dispute.[173] These two examples—a church selecting its own minister and a church determining the ecclesiastical judicatory with final authority to solve disputes over title to property—are contrasted with the religious practice at issue in *Smith*: an individual's ingestion of peyote as part of a sacrament.

A survey of the High Court's cases yields relatively few—yet important—subject matters of this sort within which civil officials have been barred categorically from exercising jurisdiction: (1) the validity, meaning, or importance of religious questions, and resolving doctrinal disputes;[174] (2) the selection of ecclesiastical polity, including the proper application of procedures set forth in a church's organic documents, bylaws, and canons;[175] (3) the selection, credentialing, promotion, overseeing, discipline, or retention of clerics and other ministers;[176] and (4) the admission, discipline, or expulsion of church members.[177]

Church autonomy cases are relatively few but they are important because once it is determined the doctrine applies, no rejoinder is permitted by the opposing party. That is, once it is determined that a suit falls within the subject matter class of internal church governance, there is no follow-on judicial balancing. There is no balancing because there can be no legally sufficient governmental interest to justify interfering in internal church affairs. The First Amendment has already struck the balance.[178] In this regard, the Court criticized the OSG's argument that the school's religious reason for firing Perich was pretextual. "This suggestion misses the point of the ministerial exception," wrote the Chief Justice:

> The purpose of the [ministerial] exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful—a matter "strictly ecclesiastical," . . . is the church's alone.[179]

The defense upheld in *Hosanna-Tabor* is an affirmative defense. Lower courts applying *Hosanna-Tabor* have properly interpreted the ministerial exception not as a personal right, but as a structural limitation on government action.[180] That *Hosanna-Tabor* is a constraint on the power of the government explains why the case is rooted in large part in the Establishment Clause. The text of that clause bespeaks a structural limit on authority: "Congress shall make no law" about a given subject matter described as "an establishment of religion." As Chief Justice Roberts wrote, "the Free Exercise Clause . . . protects a religious group's right to shape its own faith and mission" by controlling who are its ministers, and "the Establishment Clause . . . prohibits government involvement in such ecclesiastical decisions."[181] The Chief Justice gave examples in which the English Crown had interfered with the appointment of clergy in the established Church of England.[182] The Establishment Clause was adopted in America to flatly deny such power to our national government.[183]

There is a welcome absence of balancing tests in *Hosanna-Tabor*. Such tests abound in past areas of doctrine derived from the Religion Clauses, including: prohibitions on endorsements of religion thought to lower the perceived standing of religious

172 *Id.* at 194.

173 *Id.* at 190.

174 *Md. & Va. Churches of God*, 396 U.S. at 368 (per curiam) (avoid doctrinal disputes); *Presbyterian Church*, 393 U.S. at 449-51 (refusing to follow a rule that discourages changes in doctrine); *Watson*, 80 U.S. at 725-33 (rejecting implied-trust rule because of its departure-from-doctrine inquiry); *see Thomas*, 450 U.S. at 715-16 (courts are not arbiters of scriptural interpretation).

175 *Milivojevich*, 426 U.S. at 708-24 (civil courts may not probe into church polity); *Presbyterian Church*, 393 U.S. at 451 (civil courts forbidden to interpret and weigh church doctrine); Kreshik v. St. Nicholas Cathedral, 363 U.S. 190, 191 (1960) (per curiam) (First Amendment prevents judiciary, as well as legislature, from interfering in ecclesiastical governance of Russian Orthodox Church); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 119 (1952) (same); Shepard v. Barkley, 247 U.S. 1, 2 (1918) (aff'd mem.) (courts not allowed to interfere with merger of two Presbyterian denominations).

176 *See Milivojevich*, 426 U.S. at 708-20 (civil courts may not probe into defrocking of cleric); *Kedroff*, 344 U.S. at 116 (courts may not probe into clerical appointments); Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1, 16 (1929) (declining to intervene on behalf of petitioner who sought order directing archbishop to appoint petitioner to ecclesiastical office). *See also* NLRB v. Catholic Bishop, 440 U.S. 490, 501-04 (1979) (refusal by Court to force collective bargaining on parochial school because of interference with relationship between church superiors and lay teachers).

177 Bouldin v. Alexander, 82 U.S. (15 Wall.) 131, 139-40 (1872) ("This is not a question of membership of the church, nor of the rights of members as such. It may be conceded that we have no power to revise or question ordinary acts of church discipline, or of excision from membership. . . . [W]e cannot decide who ought to be members of the church, nor whether the excommunicated have been regularly or irregularly cut off."); *Watson*, 80 U.S. at 733 (court has no jurisdiction over church discipline or the conformity of church members to the standard of morals required of them).

178 *Hosanna-Tabor*, 565 U.S. at 196 ("When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us.").

179 *Id.* at 194-95 (internal citation omitted).

180 *See* Conlon v. InterVarsity Christian Fellowship, 777 F.3d 829, 836 (6th Cir. 2015) ("The ministerial exception is a structural limitation imposed on the government by the Religion Clauses."); Lee v. Sixth Mount Zion Baptist Church of Pittsburgh, 903 F.3d 113, 118 n.4 (3d Cir. 2018) (recognizing that the ministerial exception is a structural protection "rooted in constitutional limits on judicial authority").

181 *Hosanna-Tabor*, 565 U.S. at 188-89.

182 *Id.* at 182-85.

183 *Id.* at 183-85.

minorities in the political community;[184] a requirement that a law's "principal or primary effect must be one that neither advances nor inhibits religion," as distinct from lesser effects;[185] and injunctions on government's "excessive entanglement" with religion, as distinct from lesser entanglements.[186] Balancing tests are still valid under the Free Exercise Clause, but not in cases where the subject matter warrants the categorical protection of what Justice Alito calls "religious autonomy."[187] In the latter instances, the First Amendment, understood within the Western liberal tradition and America's state-by-state disestablishments that gave rise to church-state separation, has determined that hiring, promoting, supervising, and dismissing ministers is one area of authority that is not to be rendered unto Caesar.[188]

The Court in *Hosanna-Tabor* found that the fourth-grade teacher, Cheryl Perich, was a "minister" and therefore that her claim must be dismissed. Perich was also a part-time school principal and held an earned ecclesial title issued by her denomination to laity. She also used the title of minister to claim tax advantages and for other reasons. It was not clear to the lower courts if the ministerial exception was limited to organizational leaders, visionaries, and top administrators,[189] or if the definition also extended to those performing explicitly religious functions like teaching religion, leading students in worship, and directing students in classroom prayer. Perich was not an organizational leader and visionary. However, she was a part-time school principal, held a lay ecclesial title, had completed some theological classes, and on occasion had used the title of minister.

The circuit court in *Our Lady of Guadalupe School v. Morrissey-Berru*—a 2020 case addressing application of the ministerial exception—treated these items as requirements on a check list, and the High Court reversed.[190] Writing for a 7-2 Court, Justice Alito noted that the ministerial exception is a subpart of the more encompassing "principle of church autonomy" that relies on both the Establishment and Free Exercise Clauses.[191] In the two cases that were consolidated for the appeal in *Our Lady of Guadalupe*, the Court said:

> The independence of religious institutions in matters of faith and doctrine is closely linked to independence in what we have termed "matters of church government." . . . This does not mean that religious institutions enjoy a general immunity from secular laws, but it does protect their autonomy with respect to internal management decisions that are essential to the institution's central mission. And a component of this autonomy is the selection of the individuals who play certain key roles.
>
> . . . Under this rule, courts are bound to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions. . . . [A] wayward minister's preaching, teaching, and counseling could contradict the church's tenets and lead the congregation away from the faith. The ministerial exception was recognized to preserve a church's independent authority in such matters.[192]

The Court went on to find that the two K-12 teachers in the religious schools were ministers for purposes of the exception. Accordingly, their employment claims alleging discrimination on the basis of age and disability, respectively, were dismissed. The nonrenewal of the contracts of the teachers were reported by the schools to be based on poor classroom performance,[193] and thus the decision did not hinge on the schools having a religious purpose for severing the employment relationship. That makes sense because what is being protected here is autonomy in internal operations and governance, not a right of religious staffing. The Court admitted that it would have been easier to find that the claimants were ministers if they met the items on the checklist, but it said that none were required. What mattered was what the employees did[194] and the sort of institutions at which they were employed.[195] The institutions here were K-12 religious schools,

184 Justice O'Connor, concurring in *Lynch v. Donnelly*, first suggested an "endorsement test" to determine violations of the Establishment Clause. 465 U.S. at 687, 690-92. She proposed that government endorsement of religion was unconstitutional because it made religious minorities feel of lesser status, not full members of the political community. Yet whether a state has endorsed religion is in the eyes of the beholder, for to others the government is merely acknowledging religion, a reality to which the state could hardly be blind. Accordingly, application of the rule quickly mired in failed attempts to objectify it.

185 Summarizing prior precedent, the Court in *Lemon* held that a violation of the Establishment Clause was present where a law failed to meet any one of three requirements. 403 U.S. at 612-13. The second requirement or prong of *Lemon* was that the principal or primary effect of the law must not be to advance religion. But it was unclear when a law's principal effect was to advance religion, as opposed to benignly acknowledge or accommodate it, so it was difficult to apply this requirement consistently against commonplace and otherwise agreeable religious symbols and practices. Indeed, it was never convincingly explained why it was wrong for a law to incidentally, as opposed to purposefully, advance religion.

186 *See Lemon*, 403 U.S. at 612-13. The third prong of the Court's *Lemon* test was that the law in question must not generate excessive entanglement between church and state. But some administrative interaction between church and state can hardly be avoided and is obviously in the public interest, e.g., building codes and zoning laws. And the Court could never explain just when the level of such interactions exceeded the norm and became "excessive," and therefore unconstitutional. Nonentanglement is more like a rule of prudence that is desirable for its good tendencies, not a bright line that when crossed should cause a given church-state arrangement to fall because unconstitutional. Hence, it is not the stuff of a fixed constitutional boundary that can be policed with consistency.

187 *Hosanna-Tabor,* 565 U.S. at 198. Many have observed that "ministerial exception" is not a good label for the rule. Some, like Justice Alito, are suggesting the rule be called "religious autonomy." That makes sense, in part, because the ministerial exception is a subset of the church autonomy doctrine.

188 *See* Carl H. Esbeck and Jonathan J. Den Hartog eds., Disestablishment and Religious Dissent: Church-State Relations in the New American States, 1776–1833 10-12 (2019).

189 *Hosanna-Tabor*, 565 U.S. at 188, 196.

190 U.S. Sup. Ct. No. 19-267, slip op. 1, 140 S. Ct. 2049 (2020).

191 *Id*. slip op. 10-12.

192 *Id*. slip op. at 10-11 (citations, internal quotations, and notes omitted).

193 *Id*. slip op. at 6, 9.

194 *Id*. slip op. at 11 ("What matters, at bottom, is what an employee does.").

195 *Id*. slip op. at 1-2, 26-27.

which are integral to passing on the faith to the next generation. And the claimants taught classes in Catholic doctrine, led the students in classroom prayer and recitation of creeds, accompanied the students to weekly mass, and agreed to employment contracts setting forth the religious mission of the school and agreeing to do nothing to undermine it.[196]

In sorting which employees occupy a religiously central position or perform a substantial religious function such that they are deemed ministers, judges must be careful to not violate the religious question doctrine. Justice Thomas filed a concurring opinion stating that the determination as to who is a minister ought to be unilaterally decided by the religious employer.[197] Justice Alito, for the Court, did not go that far. But he was deferential to the employers in interpreting the evidence from which the Court held that the two teachers were ministers for purposes of church autonomy.[198]

Church autonomy involves freedom for religious organizations, but it is freedom of a different sort. What is involved is not an ordinary constitutional right that can be overcome upon the showing of a compelling governmental interest not achievable by a means more narrowly tailored. Rather, the defense operates like an immunity from suit as to certain discrete subject matters that go to a religious organization's control over the doctrine, polity, and personnel that execute its present vision or determine its future destiny.

V. The Difficulty in Defining Religion

The First Amendment's use of the word "religion" necessarily makes the definition of religion a question of constitutional law. Although a definition is of great theoretical difficulty, in practice the issue rarely arises. To avoid omitting unfamiliar and emerging religions from constitutional protection, the Supreme Court has evaded defining the term.[199] Accordingly, the definition remains broad and indeterminate,[200] including naturalistic, nontheistic, and anthropocentric religions.[201] However, the definition excludes a purely personal or philosophical way of life.[202]

Religious claimants under the First Amendment may disagree with their co-religionists, be unsure or wavering,[203] or be recent converts.[204] A religious claimant need not be a member of an organized religious denomination, community, or sect.[205] However, a claimant must be sincere.[206] The Establishment Clause is not implicated when a law reflects a moral judgment about conduct that is harmful or beneficial to the common good, even if a religion shares that judgment.[207]

VI. Conclusion

The driving force behind the American disestablishment of state churches in the period 1776 to 1833 was remarkably straightforward, if difficult to implement after centuries of Christendom. The idea was that it was best for both church and government when "religious beliefs are a matter of voluntary choice by individuals and their [religious] associations, and that each sect is entitled to 'flourish [or fail] according to the zeal of its adherents and the appeal of its dogma.'"[208]

With this principle in mind, the common thread that runs through most of the forgoing cases is the minimization of governmental influence over the religious choices of individuals and organizations. In *Espinoza*, the rule of nondiscrimination in the funding of religious and nonreligious private schools in Montana was not an end in itself. Rather, equal treatment was a means to minimizing the government's influence over the choices of parents when enrolling their children in school, religious or otherwise. Similarly, when imposing general regulatory and tax burdens on society, the Court in *Amos* and *Walz* held that

196 *Id.* slip op. at 2-9.

197 *Id.* slip op. at 1-3 (Thomas. J., concurring, joined by Gorsuch, J.). Complete deference to the religious employer would be too easily abused.

198 *Id.* slip op. at 21-22.

199 The Court has addressed the definition of religion for the purpose of legislation and the military draft, but not for purposes of the First Amendment. *See* Welsh v. United States, 398 U.S. 333 (1970) (plurality opinion); United States v. Seeger, 380 U.S. 163 (1965).

200 Often the government stipulates to the nature of the claim "being religious," but then raises other defenses. An excellent discussion concerning the definition of religion appears in *Malnak v. Yogi*, 592 F.2d 197, 200 (3d Cir. 1979) (Adams, J., concurring in result). Judge Arlin Adams' definition was later adopted in the Third Circuit in *Africa v. Pennsylvania*, 662 F.2d 1025 (3d Cir. 1981), *cert. denied*, 456 U.S. 908 (1982). He defined religion for purposes of the First Amendment as a belief system that seeks comprehensive answers to life's ultimate questions with characteristics such as clergy, sacred literature, holy days, formal services, and efforts at propagation.

201 *See Seeger*, 380 U.S. 163 (belief system qualifies as a religion in selective service system if it occupies a place in claimant's life parallel to that filled by an orthodox belief in God); *Torcaso*, 367 U.S. at 495 n.11 (naming as nontheistic religions "Buddhism, Taoism, Ethical Culture, [and] Secular Humanism").

202 *See* Frazee v. Illinois Dep't of Emp't Sec., 489 U.S. 829, 833 (1989) ("[O]nly beliefs rooted in religion are protected by the Free Exercise Clause."); Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972).

203 *See Thomas*, 450 U.S. at 715-16. It is sufficient if the practice in question is religiously motivated so long as the burden is more than de minimis. It would be an impoverished notion of religion that limits it to a list of absolute "do's and don'ts." For many major religious groups, obedience by a religious claimant is often not religiously *compelled* but is *motivated* by the faith. The teaching of a Sunday school class or volunteering to work in the church nursery, of example, are done out of religious motive rather than compulsion.

204 *See Hobbie*, 480 U.S. 136.

205 *See Frazee*, 489 U.S. 829.

206 *See Ballard*, 322 U.S. 78; *see Thomas*, 450 U.S. at 715 ("One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause . . . .").

207 *See* Bowen v. Kendrick, 487 U.S. 589, 604 n.8, 613 (1988); *Harris*, 448 U.S. at 319-20; *McGowan*, 366 U.S. at 442; Hennington v. Georgia, 163 U.S. 299, 306-07 (1896); *see Bob Jones*, 461 U.S. at 604 n.30.

208 *See McDaniel*, 435 U.S. at 640 (Brennan, J., concurring in the judgment) (quoting *Zorach*, 343 U.S. at 313 (footnote omitted)).

government may exempt religious persons and organizations from those same burdens. This is government leaving religion alone, again minimizing its role so that private religious judgments can be freely made.

Critics on the left compare funding cases like *Espinoza* and its rule of equal treatment with cases like *Amos* that have upheld religious exemptions, and they decry the inconsistency. When equality helps religion, you are for equality, say progressives, but when being exceptional helps religion's cause, you are for exemptions. Not so. The rules of equality and exemptions are instrumental, mere tools in the service of minimizing government's impact on private religious choice. The older term for this is religious voluntarism, the driving force behind the disestablishment of religion in the American revolutionary states.

Religious preferences are a different story. These occur when government interjects itself into a private dispute and takes the side of religion over the interests of the other disputants. In *Caldor*, government sided with religious employees wanting their Sabbath off. In *Larkin*, government unyieldingly sided with churches in busy downtowns wanting control over neighboring enterprises. In both cases, the result was that some private actors were compelled to aid the religious observance of others. This does not minimize government's influence over private religious choices, but increases it.

The same integrating principle of minimizing the government's role over religious choices largely fits the Supreme Court's cases involving government speech of religious content. Government should refrain from expressing itself in favor of (or against) an explicitly religious message or a particular religious observance. That part is easy. The difficulty comes in determining when the content of the government's speech or observance is explicitly religious and when it is something else, such as honoring the sacrifices of the nation's war dead, as with the WWI memorial cross in *American Legion*. That is not to say that the meaning of a Latin cross to Christians is anything less than the atoning sacrifice of Jesus Christ. It is just that the state of Maryland did not have in mind this explicitly Christian message when it took over the maintenance of the memorial to soldiers who died in the Great War. This is not a difficult concept: Government can have a message by its sponsorship of a memorial or other symbol that is not religious, while at the same time there are those in the private sector that hear or see in that same symbol an explicitly religious message. The government is responsible only for its own messages and points of view. The Bill of Rights does not hold government to account for the multifarious interpretations of symbols by other viewers. The "not taking sides" principle enters into *American Legion* with the findings that Maryland neither intended to exclude non-Christians nor sought to disparage the faiths of others. *Town of Greece v. Galloway* is admittedly a harder case, but the municipality's reserving of time for local volunteers to pray was understood as an attempt by the town to solemnize the work of the council. Americans are still a religious people, and such a people instinctively elevates the seriousness of an occasion, crisis, or civic danger with prayer. And again, the "not taking sides" principle enters with the Court disallowing any government prayer that intentionally marginalizes other religions or disparages those who practice them.

The rule against civil authorities taking up the validity, importance, or meaning of religious questions, and the larger command to completely shield from regulation those discrete subjects of internal self-governance by churches, also work to minimize the government's role in private religious choices. However, the church autonomy doctrine is about more than religious choices. The breathing space reserved by the doctrine is about control over the leaders and propagators of a religious organization and their role in the ministry's operations, strategic planning, and vision for the future. There are a few things about religious institutions that have to be in their complete control, being essential not just to their present character, but also to their overall direction and destiny. Over the centuries of Western legal tradition, church and state have worked out their respective spheres of authority. It is a laudable mark of governmental modesty when the modern welfare state can pause to acknowledge that the long arm of its writ is not without boundaries.

The Status of Use-Based Exclusions & Educational Choice After *Espinoza*

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Other Views:

• Nelson Tebbe, *Five Thoughts on Espinoza*, 49 ACS Expert Forum, July 1, 2020, https://www.acslaw.org/expertforum/five-thoughts-on-espinoza/.

• Ira C. Lupu & Robert W. Tuttle, *Espinoza v. Montana Department of Revenue – Requiem for the Establishment Clause?*, Take Care Blog, July 1, 2020, https://takecareblog.com/blog/espinoza-v-montana-department-of-revenue-requiem-for-the-establishment-clause.

• Holly Hollman, *Symposium: What's "the use" of the Constitution's distinctive treatment of religion if it is disregarded as discrimination?*, SCOTUSblog, July 2, 2020, https://www.scotusblog.com/2020/07/symposium-whats-the-use-of-the-constitutions-distinctive-treatment-of-religion-if-it-is-disregarded-as-discrimination/.

The U.S. Supreme Court's recent decision in *Espinoza v. Montana Department of Revenue*[1] marks a watershed in America's educational choice movement. Since the Court's 2002 decision in *Zelman v. Simmons-Harris*,[2] it had been clear that educational choice programs—programs that empower parents to opt their children out of public schools and choose private, including religious, alternatives[3]—are perfectly permissible under the U.S. Constitution.[4] In the wake of *Zelman*, however, opponents of educational choice retrained their legal focus to state constitutions. Even if such programs are permissible under the federal Constitution, opponents insisted, they still contravene the "Blaine Amendments" (also known as "no-aid" provisions) that are found in a large majority of state constitutions and that, generally speaking, prohibit public funding of religious schools.[5]

In *Espinoza*, the Court shut down this line of attack, holding that the application of Montana's Blaine Amendment

1 207 L. Ed. 2d 679 (2020).

2 536 U.S. 639 (2002).

3 Educational choice programs come in a variety of forms. "Voucher" programs, which are the most commonly known, provide publicly funded scholarships to children to use at the private school of their parents' choice. "Tax credit scholarship" programs also provide scholarships for that purpose but are funded by private donations that the state merely incentivizes with a tax credit. And educational savings account ("ESA") programs provide deposits into a government-authorized savings account that parents can use to pay for a wide array of educational services and products—for example, tuition at a private school, tutoring, online curriculum, and special education services. ESA programs may operate on a publicly funded or tax credit incentivized basis. For an overview of the various types of programs, as well as an inventory of the many programs currently operating throughout the country, see EdChoice, The ABCs of School Choice (2020 ed.), *available at* https://www.edchoice.org/research/the-abcs-of-school-choice/.

4 Specifically, the Court held that so long as these programs operate on private choice (that is, parents, rather than government, select the schools their children will attend) and are neutral toward religion (meaning religious and non-religious schools alike are free to participate), they are consistent with the Establishment Clause of the First Amendment. *Zelman*, 536 U.S. at 649-53, 662-63.

5 "Although their language varies, and some interpretation is involved in classifying a provision as a Blaine Amendment, [the author] considers any provision that specifically prohibits state legislatures (and often other governmental entities) from appropriating funds to religious sects or institutions, including religious schools, to be a Blaine Amendment." Dick Komer et al., *Answers to Frequently Asked Questions About Blaine Amendments*, https://ij.org/issues/school-choice/blaine-amendments/answers-frequently-asked-questions-blaine-amendments/ (last visited July 20, 2020). There are 37 states with such provisions: Alabama, Alaska, Arizona, California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Virginia, Washington, Wisconsin, and Wyoming.

to bar religious schools from an educational choice program, solely because of the schools' religious status, violated the Free Exercise Clause of the U.S. Constitution.[6] In many ways, it was the bookend to *Zelman*: whereas *Zelman* had held that the Establishment Clause allows states to include religious schools in educational choice programs, *Espinoza* held that the Free Exercise Clause prohibits states from *excluding* them simply because of their religious character.

Espinoza was a tremendous victory for families who want to be able to choose the schools their children attend, and the opinion undoubtedly will lead to the adoption of new educational choice programs throughout the country.[7] But it was by no means the final legal battle over educational choice in the United States. Opponents of educational choice are a determined—and powerful[8]—lot, and they will continue mounting challenges, both legal and political, in America's courthouses and statehouses.

The next battles will likely turn on the religious *uses* to which educational choice programs may be put. While *Espinoza* held that religious schools may not be excluded from such programs simply because they *are* religious, it left open the possibility that certain religious *uses* of the scholarships provided by the programs may be barred. Working within the framework of *Trinity Lutheran Church of Columbia, Inc. v. Comer*,[9] in which it drew a distinction between discrimination based on religious status and discrimination based on religious use, the Court cabined Montana's exclusion to the former category.[10] It held that Montana's Blaine Amendment barred religious schools solely because of who they were—not because of any religious uses to which scholarships might be put—and that such religious status discrimination is plainly unconstitutional under *Trinity Lutheran*.[11] The Court thus did not resolve whether a state may, consistent with the Free Exercise Clause, prohibit the aid provided by an educational choice program from being used to procure a religious education. In the hours after the decision was released, commentators flagged this issue as one the Court left open—and one that might be the next legal line of attack against educational choice.[12]

While *Espinoza* left the question open, however, it points emphatically to an answer. Four aspects of the opinion indicate that the Court is prepared to either abandon the status/use distinction or apply a presumption of unconstitutionality to use-based exclusions similar to that which it applies to status-based exclusions. Either way, it seems likely that educational choice opponents will lose this next battle and that families who want alternatives to the public school system will win.

This article begins by providing a brief overview of the educational choice program at issue in *Espinoza*, followed by a discussion of the state court litigation that culminated in a Montana Supreme Court judgment invalidating the program under the state's Blaine Amendment. It then considers the U.S. Supreme Court's decision reversing that judgment, examining the majority opinion in detail and briefly surveying the three concurring and three dissenting opinions. Next, it considers some of the legal questions concerning educational choice programs that *Espinoza* did not resolve, including the question of whether religious use-based exclusions are constitutionally permissible in the educational choice context. Finally, the article highlights four facets of the *Espinoza* opinion that bear on the resolution of that question and that suggest the Court will ultimately hold such exclusions unconstitutional.

I. Montana's Tax Credit Scholarship Program

Espinoza concerned a modest tax credit scholarship program that the Montana legislature adopted in 2015 "to provide parental and student choice in education."[13] The program afforded Montana taxpayers a dollar-for-dollar, non-refundable tax credit, up to a maximum of $150, for contributions they make to participating student scholarship organizations ("SSOs").[14] The SSOs, in turn, used these private contributions to provide scholarships to Montana schoolchildren, who could use the scholarships to attend the private school—religious or non-religious—of their parents' choice.[15]

Shortly after the legislature adopted the program, the Montana Department of Revenue ("Department") promulgated a rule excluding religious schools from the program. Specifically, the rule provided that a "qualified education provider" (the operative statutory term describing a participating school) "may not be . . . owned or controlled in whole or in part by any church, religious

6 *Espinoza*, 207 L. Ed. 2d at 698.

7 Before *Espinoza*, some state courts had interpreted their states' Blaine Amendments to allow educational choice programs with religious options, reasoning that such programs aid students, not schools. *See, e.g.*, Oliver v. Hofmeister, 368 P.3d 1270, 1274, 1277 (Okla. 2016) (rejecting Blaine Amendment challenge to voucher program); Meredith v. Pence, 984 N.E.2d 1213, 1228-29 (Ind. 2013) (same); Jackson v. Benson, 578 N.W.2d 602, 620-23 (Wis. 1998) (same); Schwartz v. Lopez, 382 P.3d 886, 899-900, 902 (Nev. 2016) (rejecting Blaine Amendment challenge to publicly funded ESA program, but holding program had been improperly funded); *see also* Magee v. Boyd, 175 So. 3d 79, 119-26, 131-37 (Ala. 2015) (upholding, against Blaine Amendment challenge, a program that provided parents a refundable tax credit for expenses incurred in educating their own children in private schools). Courts in other states, however, had either: (1) interpreted their states' Blaine Amendments as imposing a legal barrier to educational choice programs; or (2) not reached the issue, leaving the legality of educational choice programs an open question.

8 Legal challenges to educational choice programs are commonly filed by public school teachers' unions, as well as organizations such as Americans United for Separation of Church and State and the ACLU.

9 137 S. Ct. 2012 (2017).

10 *See infra* text accompanying notes 54-55, 58-67.

11 *See Espinoza*, 207 L. Ed. 2d at 690, 696, 697.

12 *See infra* text accompanying notes 146-51.

13 2015 Mont. Laws 2168, §7.

14 Mont. Code Ann. §§ 15-30-3103(1), -3111(1).

15 *Id.* §§ 15-30-3102(7), -3103(1)(c). The program is similar to tax credit scholarship programs operating in eighteen other states: Alabama, Arizona, Florida, Georgia, Iowa, Illinois, Indiana, Kansas, Louisiana, New Hampshire, Nevada, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, and Virginia. *See* EdChoice, *School Choice in America Dashboard*, https://www.edchoice.org/school-choice/school-choice-in-america/ (last visited July 2, 2020). A number of other states have publicly funded (as opposed to tax credit-incentivized) voucher or ESA programs, and some states have multiple types of programs targeted at different student demographics. *See id.*; *see also supra* note 3.

sect, or denomination."[16] According to the Department, the rule was necessitated by Article X, section 6(1) of the Montana Constitution, which provides in relevant part:

> The legislature . . . shall not make any direct or indirect appropriation or payment from any public fund or monies . . . for any sectarian purpose or to aid any . . . school . . . controlled in whole or in part by any church, sect, or denomination.[17]

This provision is commonly referred to as a Blaine Amendment[18] or no-aid provision, and similar provisions are found in a large majority of state constitutions.[19]

The Department's rule eviscerated the program. The legislature, after all, had intended the program to be religiously neutral, offering religious and non-religious options alike, thus maximizing parental choice. But the Department jettisoned all religious schools, leaving participating families with secular private options only.

II. State Court Proceedings

In December 2015, three mothers with children eligible for the scholarship program challenged the Department's rule in state court.[20] They asserted that by excluding religious options from the program, the Department's rule, among other things: (1) exceeded the Department's authority, as it conflicted with the statute that it purported to implement;[21] and (2) contravened the Free Exercise Clause of the U.S. Constitution, because it discriminated against families who desire a religious school for their children.[22]

After preliminarily enjoining the Department's rule,[23] the state trial court granted summary judgment in favor of the mothers.[24] It concluded that the Department's justification for the rule—avoiding appropriations or expenditures of public funds for religious schools—was based on a mistake of law.[25] "Non-refundable tax credits," the court held, "simply do not involve the expenditure of money that the state has in its treasury; they concern money that is not in the treasury and not subject to expenditure."[26] Having concluded that the rule was based on a mistake of law, "the Court decline[d] to address the constitutionality of the Rule."[27]

The Department appealed, and the Montana Supreme Court, on December 12, 2018, reversed the trial court's judgment.[28] The Montana Supreme Court agreed with the trial court that the Department's rule conflicted with the statute and thus exceeded the Department's rulemaking authority.[29] However, it disagreed with the trial court's holding that Montana's Blaine Amendment was not implicated by a program funded by private, tax credit incentivized donations rather than public money.

"The Tax Credit Program," the Montana Supreme Court held, "permits the Legislature to indirectly pay tuition at private, religiously-affiliated schools,"[30] and "[w]hen the Legislature indirectly pays general tuition payments at sectarian schools, the Legislature effectively subsidizes the sectarian school's educational

16 Mont. Admin. R. 42.4.802(1)(a).

17 Mont. Const. art. X, § 6(1).

18 The term "Blaine Amendment" comes from a failed federal constitutional amendment proposed by then-Representative James G. Blaine of Maine in December 1875. *See* John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279, 301-02 (2001). Blaine's federal amendment passed the House of Representatives handily but failed to gain the supermajority required in the Senate for referral to the states. *Id.* In time, however, many states adopted constitutional provisions inspired by Blaine's federal proposal, *id.* at 305, and they came to be known as Blaine Amendments. The federal proposal and its state counterparts are widely acknowledged as rooted in 19th-century nativism and anti-Catholic bigotry: their object was to preserve the non-denominationally Protestant character of the era's public schools, while denying aid to the nascent Catholic schools. *See generally id.* at 297-305; Steven K. Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Legal Hist. 38 (1992); Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 Harv. J.L. & Pub. Pol'y 657, 661-75 (1998). The language of Montana's provision serves that end. After all, 19th-century public schools, while overtly religious, were not "controlled in whole or in part by any church, sect, or denomination," nor was their curriculum considered "sectarian." Mont. Const. art. X, § 6(1). Catholic schools, on the other hand, checked both boxes, bringing them squarely within the provision's proscriptions.

19 *See supra* note 5.

20 *See* Complaint for Declaratory & Injunctive Relief, Espinoza v. Mont. Dep't of Revenue, No. DV-15-1152C (Mont. 11th Jud. Dist., Flathead Cty. Dec. 15, 2015), https://ij.org/wp-content/uploads/2015/12/2015-12-15-Complaint-for-Declaratory-and-Injunctive-Relief.pdf.

21 *Id.* ¶¶ 113-31.

22 *Id.* ¶¶ 138-44.

23 *See* Espinoza v. Mont. Dep't of Revenue, No. DV-15-1152C, 2017 WL 11317587, at *3 (Mont. 11th Jud. Dist., Flathead Cty. May 23, 2017) ("Plaintiffs moved for a preliminary injunction to enjoin [the Department] from enforcing Rule 1 and Judge Ortley granted the motion on March 31, 2016."), *rev'd*, 2018 MT 306, 435 P.3d 603, *rev'd*, 207 L. Ed. 2d 679 (2020).

24 *Id.* at *1.

25 *Id.* at *4.

26 *Id.* For the same reason, the Court rejected the Department's additional contention that the rule was necessitated by Article V, section 11(5) of the Montana Constitution, which provides that "[n]o appropriation shall be made for religious, charitable, industrial, educational, or benevolent purposes to any private individual, private association, or private corporation not under control of the state." Mont. Const. art. V, § 11(5). As the court held,

> Since the plain language of Article V, Section 11(5) and Article X, Section 6(1) of the Montana Constitution prohibit appropriations, not tax credits, the Department's Rule 1 is based on an incorrect interpretation of the law. The Court concludes that the term "appropriation" used in Article V, Section 11(5) and in Article X, Section 6(1) does not encompass tax credits.

Espinoza, 2017 WL 11317587, at *4.

27 *Espinoza*, 2017 WL 11317587, at *4.

28 Espinoza v. Mont. Dep't of Revenue, 2018 MT 306, ¶ 45, 435 P.3d 603, 615, *rev'd*, 207 L. Ed. 2d 679 (2020).

29 *Id.* ¶¶ 41, 43, 435 P.3d at 615 (holding that the Department's rule "significantly narrowed the scope of the schools" eligible to participate in the scholarship program, "conflict[ed] with the Legislature's broad definition" of "qualified education provider," and "exceeded the Legislature's grant of rulemaking authority").

30 *Id.* ¶ 32, 435 P.3d at 612.

program."[31] "That type of government subsidy in aid of sectarian schools is precisely what the Delegates intended Article X, Section 6, to prohibit," the court added,[32] and the scholarship program therefore "cannot . . . be construed as consistent with Article X, Section 6."[33] In this light, the court invalidated the program in its entirety—even as to non-religious private schools—because there was "simply no mechanism within the Tax Credit Program itself that operate[d] to ensure" that funds would not be used at religious schools.[34]

Finally, the Montana Supreme Court held that its invalidation of the scholarship program because of its inclusion of religious options did not discriminate against religion in contravention of the *federal* Constitution, as the plaintiffs had contended. While the court recognized that "an overly-broad analysis of Article X, Section 6, could implicate free exercise concerns," and that "there may be a case . . . where prohibiting . . . aid" under that provision "would violate the Free Exercise Clause," the court concluded that "this is not one of those cases."[35]

III. SCOTUS Steps In

It turns out this *was* one of those cases. The plaintiffs petitioned the U.S. Supreme Court for certiorari on the federal question presented by the Montana Supreme Court's judgment:

> Does it violate the Religion Clauses or Equal Protection Clause of the United States Constitution to invalidate a generally available and religiously neutral student-aid program simply because the program affords students the choice of attending religious schools?[36]

The Court granted certiorari[37] and, on June 30, 2020, answered that question in the affirmative. In an opinion authored by Chief Justice John Roberts and joined by Justices Clarence Thomas, Samuel Alito, Neil Gorsuch, and Brett Kavanaugh, the Court held that the Montana Supreme Court's application of the state's Blaine Amendment to invalidate the scholarship program violated the federal Free Exercise Clause.[38]

The Court began its analysis by noting that the Montana legislature's decision to *include* religious options in the program was perfectly permissible under the federal Constitution. Citing its 2002 decision in *Zelman v. Simmons-Harris*,[39] which upheld a voucher program against an Establishment Clause challenge, the Court stressed that the Montana program was originally "neutral" toward religion (meaning religious and non-religious schools alike were allowed to participate) and operated on private choice (meaning money "ma[de] its way to religious schools only as a result of Montanans independently choosing to spend their scholarships at such schools").[40] Nevertheless, the Montana Supreme Court had "held as a matter of state law that even such indirect government support qualified as 'aid' prohibited under the Montana Constitution."[41] That conclusion, in turn, gave rise to the federal constitutional question the U.S. Supreme Court was tasked with resolving: "[W]hether the Free Exercise Clause precluded the Montana Supreme Court from applying Montana's no-aid provision to bar religious schools from the scholarship program."[42]

31 *Id.* ¶ 34, 435 P.3d at 613. On this score, the Montana Supreme Court's decision conflicted with those of state courts that have held that tax credit scholarship programs do not implicate Blaine Amendments because such programs do not involve appropriations of public funds. *See, e.g.*, Gaddy v. Ga. Dep't of Revenue, 802 S.E.2d 225, 229 (Ga. 2017) (holding plaintiffs lacked standing to challenge tax credit scholarship program: "Plaintiffs also assume that the tax credits amount to an unconstitutional expenditure of public funds because these funds actually represent tax revenue, or because the revenue department bears the costs of administratively processing these credits. But these premises are false."); *Magee*, 175 So. 3d at 126 (upholding tax credit scholarship program: "[W]e conclude that the circuit court's construction of the term 'appropriation' to include the tax credits provided by [the scholarship program] is contrary to the Alabama Constitution, existing caselaw, and the commonly accepted definition of the term appropriation."); Kotterman v. Killian, 972 P.2d 606, 620 (Ariz. 1999) (upholding tax credit scholarship program: "[W]e disagree with petitioners' characterization of this credit as public money or property within the meaning of the Arizona Constitution."); McCall v. Scott, 199 So. 3d 359, 370 (Fla. Dist. Ct. App. 2016) (holding plaintiffs lacked standing to challenge tax credit scholarship program: "The plain language of the no-aid provision imposes no limitation on the Legislature's taxing authority. And although the no-aid provision expressly limits the Legislature's spending authority by prohibiting the appropriation of state revenues to aid any sectarian institution, Appellants identify no such appropriation connected with the [scholarship program]."); *cf.* Duncan v. State, 102 A.3d 913, 925-288 (N.H. 2014) (holding plaintiffs lacked standing to challenge tax credit scholarship program).

32 *Espinoza*, 2018 MT at ¶ 34, 435 P.3d at 466.

33 *Id.* ¶ 36, 435 P.3d at 466-67.

34 *Id.* ¶ 36, 435 P.3d at 466.

35 *Id.* ¶ 40, 435 P.3d at 468.

36 Petition for Certiorari at i, *Espinoza v. Mont. Dep't of Revenue*, No. 18-1195 (U.S. Mar. 12, 2019), https://www.supremecourt.gov/DocketPDF/18/18-1195/91749/20190312143801341_Cert%20Petition_FINAL.pdf.

37 Espinoza v. Mont. Dep't of Revenue, 139 S. Ct. 2777 (mem.).

38 *Espinoza*, 207 L. Ed. 2d at 697, 698.

39 536 U.S. 639.

40 *Espinoza*, 207 L. Ed. 2d at 689.

41 *Id.* As discussed *supra* note 26 & accompanying text, the mothers challenging the Department's rule had previously argued—and the state trial court had held—that there was no "aid" as that term is used in Montana's Blaine Amendment because tax credits are not public funds. For this proposition, the mothers had invoked the U.S. Supreme Court's decision in *Arizona Christian School Tuition Organization v. Winn*, which, for federal standing purposes, distinguished tax credits from public expenditures. 563 U.S. 125, 142 (2011) ("[T]ax credits and governmental expenditures do not both implicate individual taxpayers in sectarian activities. . . . When the government declines to impose a tax, . . . there is no . . . connection between dissenting taxpayer and alleged establishment."). The Montana Supreme Court, however, rejected that interpretation of the state's Blaine Amendment, and the U.S. Supreme Court was bound to accept that determination as a matter of state law. *Espinoza*, 207 L. Ed. 2d at 689 ("[W]e accept the Montana Supreme Court's interpretation of state law—including its determination that the scholarship program provided impermissible 'aid' within the meaning of the Montana Constitution . . . .").

42 *Espinoza*, 207 L. Ed. 2d at 689.

A. *The Jurisprudential Set-Up:* Locke *and* Trinity Lutheran

The answer to that question would turn on the interaction of two U.S. Supreme Court precedents: *Locke v. Davey*[43] and *Trinity Lutheran Church of Columbia, Inc. v. Comer*.[44] Whereas *Locke* upheld a religious exclusion from a state public benefit program, *Trinity Lutheran* invalidated one. The resolution of *Espinoza* would come down to which of these two cases the Court found more analogous to Montana's bar on religious options.

In *Locke*, Washington had relied on its state constitution to exclude "devotional theology" majors[45]—that is, students pursuing a degree in "religious instruction that will prepare [them] for the ministry"[46]—from a publicly funded, postsecondary scholarship program. The Supreme Court held that this exclusion did not violate the federal Free Exercise Clause. The scholarship program, the Court noted, went "a long way toward *including* religion in its benefits," allowing students to "attend pervasively religious schools" and even "take devotional theology courses."[47] The only thing scholarship recipients could not do was pursue a degree in devotional theology, and states, according to the Court, had a "historic and substantial state interest"[48] in "not funding the religious training of clergy."[49] As the Court noted, "[m]ost States that sought to avoid an establishment of religion around the time of the founding placed in their constitutions formal prohibitions against using tax funds to support the ministry,"[50] and this history justified the state in "deal[ing] differently with religious education for the ministry."[51]

The other precedent that the Court had to confront in *Espinoza* was *Trinity Lutheran*. There, the Court had held that Missouri violated the Free Exercise Clause when it relied on its Blaine Amendment to exclude a church-run preschool from a publicly funded playground resurfacing program solely because of the church's religious status.[52] "The Free Exercise Clause," the Court held in that case, "'protect[s] religious observers against unequal treatment' and subjects to the strictest scrutiny laws that target the religious for 'special disabilities' based on their 'religious status.'"[53] The Court distinguished its earlier decision in *Locke* by noting that the plaintiff in that case "was not denied a scholarship because of who he *was*; he was denied a scholarship because of what he proposed *to do*—use the funds to prepare for the ministry."[54] The church in *Trinity Lutheran*, by contrast, was being denied a playground resurfacing grant "simply because of what it is—a church."[55] Compliance with Missouri's Blaine Amendment could not justify such discrimination based on religious status, or identity,[56] and the Court thus concluded that "the exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution . . . and cannot stand."[57]

B. *Status Discrimination,* Trinity Lutheran*-Style*

As noted above, the resolution of *Espinoza* would turn on the Court's reconciliation of *Locke* and *Trinity Lutheran* in the specific context of an educational choice program. Was barring religious schools from an elementary and secondary scholarship program more akin to excluding a church-run preschool from a playground resurfacing grant program or to excluding a devotional theology major from a postsecondary scholarship program? Put differently, by barring religious schools, did the Montana Supreme Court impermissibly discriminate based on the religious *status* of schools and the families who choose them, or did it merely prohibit scholarships from being put to a particular religious *use*—namely, procuring an essentially religious education?

According to Chief Justice Roberts and the majority opinion, the proper resolution of *Espinoza* was a straightforward application of *Trinity Lutheran*: the Montana's Supreme Court's judgment unquestionably discriminated based on the religious status of schools. As in *Trinity Lutheran*, the Court held, Montana's Blaine Amendment: (1) "bars religious schools from public benefits solely because of the religious character of the schools"; and (2) "bars parents who wish to send their children to a religious school from those same benefits, again solely because of the religious character of the school."[58] "This is apparent," the Court noted, from "the plain text" of the provision, which "bars aid to any school 'controlled in whole or in part by any church, sect, or denomination,'"[59] as well as the Montana Supreme Court's opinion, which "explained that the provision forbids aid to any school that is 'sectarian,' 'religiously affiliated,' or 'controlled in whole or in part by churches.'"[60] Thus, schools were "plainly exclude[d] . . . from government aid solely because of religious status," in violation of *Trinity Lutheran*.[61]

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43 540 U.S. 712 (2004).

44 137 S. Ct. 2012.

45 *Locke*, 540 U.S. at 715.

46 *Id.* at 719.

47 *Id.* at 724-25 (emphasis added).

48 *Id.* at 725.

49 *Id.* at 722 n.5.

50 *Id.* at 723.

51 *Id.* at 721.

52 *Trinity Lutheran*, 137 S. Ct. at 2019, 2025.

53 *Id.* at 2019 (alteration in original) (quoting Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 533, 542 (1993)).

54 *Id.* at 2023.

55 *Id.* In an opinion concurring in part, Justice Gorsuch, joined by Justice Thomas, criticized the majority for "leav[ing] open the possibility [that] a useful distinction might be drawn between laws that discriminate on the basis of religious *status* and religious *use*." *Id.* at 2025 (Gorsuch., J., concurring in part). "I don't see why it should matter," Justice Gorsuch observed, "whether we describe that benefit, say, as closed to Lutherans (status) or closed to people who do Lutheran things (use). It is free exercise either way." *Id.* at 2026.

56 *Id.* at 2024-25 (majority opinion).

57 *Id.* at 2025.

58 *Espinoza*, 207 L. Ed. 2d at 690.

59 *Id.* (quoting Mont. Const., art. X, § 6(1)).

60 *Id.* (quoting *Espinoza*, 2018 MT 306, ¶¶ 32, 34-37, 435 P.3d at 612-13).

61 *Id.*

Of course, the Department had attempted to fit the case into the category of discrimination based on religious *use*, rather than status, by arguing that Montana's Blaine Amendment "applies not because of the religious character of the recipients, but because of how the funds would be used—for 'religious education.'"[62] In support of its contention, the Department had "point[ed] to some language" in the Montana Supreme Court's decision "indicating that the no-aid provision has the goal or effect of ensuring that government aid does not end up being used for 'sectarian education' or 'religious education.'"[63] Relatedly, the Department had made much of the *nature* of the aid in question, arguing that unlike the "'completely non-religious' benefit of playground resurfacing in *Trinity Lutheran*,"[64] the "unrestricted tuition aid at issue" in *Espinoza* "could be used for religious ends by some recipients, particularly schools that believe faith should '*permeate*[]' everything they do."[65] But the Court roundly rejected the Department's attempt to place the case in the use discrimination box, holding that "those considerations were not the Montana Supreme Court's basis for applying the no-aid provision to exclude religious schools; that hinged solely on religious status."[66] And the Court went on to stress that even if the Montana Department of Revenue or Montana Supreme Court had aimed to prevent religious *uses* of scholarship monies, the application of the Blaine Amendment still turned on the religious *status* of the schools that parents selected.[67]

While the Court concluded that the Montana Supreme Court's application of the state's Blaine Amendment turned on religious status, rather than use, it went out of its way to make clear that it was not suggesting the outcome would have been different if discrimination based on use had been in play. "None of this is meant to suggest," the Court stated, "that we agree with the Department that some lesser degree of scrutiny applies to discrimination against religious uses of government aid."[68] In fact, pointing to Justice Gorsuch's concurring opinion in *Trinity Lutheran*, the Court stressed that some of its members "have questioned whether there is a meaningful distinction between discrimination based on use or conduct and that based on status."[69] But while it "acknowledge[d] the point," the Court determined that it did not "need [to] examine it" in *Espinoza*, "because Montana's no-aid provision discriminates based on religious status," and "strict scrutiny [therefore] applie[d] under *Trinity Lutheran*."[70]

C. No Refuge in Locke

As for *Locke*, the Court explained that it "differ[ed] from" *Espinoza* "in two critical ways."[71] First, *Locke* involved an extremely narrow exclusion that focused on the use to which a scholarship was put—not the status of the school at which it was used. As the Court explained, "Washington had 'merely chosen not to fund a distinct category of instruction': the 'essentially religious endeavor' of training a minister 'to lead a congregation.'"[72] The plaintiff was thus "denied a scholarship because of what he proposed *to do*—use the funds to prepare for the ministry."[73] Montana's Blaine Amendment, by contrast, "does not zero in on any particular 'essentially religious' course of instruction," but rather "bars all aid to a religious school 'simply because of what it is.'"[74]

Moreover, the narrow, use-based exclusion in *Locke* was supported by a "'historic and substantial' state interest"—namely, in "not funding the training of clergy."[75] Montana, on the other hand, had no comparable interest in denying scholarships to children attending religious schools.[76] In fact, the Court noted that governments often provided "financial support to private schools, including denominational ones," during the founding era and early 19th century.[77] Thus, Montana's hostility to religious schools was not a substantial, founding-era tradition. Rather, this "tradition *against* state support for religious schools arose in the second half of the 19th century," resulting in the adoption of state constitutional provisions akin to Montana's in "more than 30 States."[78] Many of these provisions, the Court emphasized,

62 *Id.* (quoting Brief for Respondents at 38, Espinoza v. Mont. Dep't of Revenue, 207 L. Ed. 2d 679 (No. 18-1195)).

63 *Espinoza*, 207 L. Ed. 2d at 691 (quoting *Espinoza*, 2018 MT 306, ¶¶ 20, 38, 435 P.3d at 609, 613-14).

64 *Id.* (quoting Transcript of Oral Argument at 31, Espinoza v. Mont. Dep't of Revenue, 207 L. Ed. 2d 679 (No. 18-1195)).

65 *Id.* (alteration in original) (quoting Brief for Respondents at 39, *Espinoza*, 207 L. Ed. 2d 679 (No. 18-1195)).

66 *Id.*

67 *Id.* ("Status-based discrimination remains status based even if one of its goals or effects is preventing religious organizations from putting aid to religious uses.").

68 *Id.* at 692 (citation omitted). In support of this statement, the Court cited *Church of the Lukumi Babalu Aye*, in which it invalidated an ordinance banning ritualistic animal slaughter and held that a law "target[ing] religious conduct for distinctive treatment or advanc[ing] legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases." 508 U.S. at 546.

69 *Espinoza*, 207 L. Ed. 2d at 692 (citing *Trinity Lutheran*, 137 S. Ct. at 2025 (Gorsuch, J., concurring in part)).

70 *Id.*

71 *Id.*

72 *Id.* (quoting *Locke*, 540 U.S. at 721)

73 *Id.* (quoting *Trinity Lutheran*, 137 S. Ct. at 2023).

74 *Id.* at 693 (quoting *Trinity Lutheran*, 137 S. Ct. at 2023).

75 *Id.* (quoting *Locke*, 540 U.S at 725).

76 *Id.* ("[N]o comparable 'historic and substantial' tradition supports Montana's decision to disqualify religious schools from government aid." (quoting *Locke*, 540 U.S. at 725)); *id.* at 695 ("[T]here is no 'historic and substantial' tradition against aiding [religious] schools comparable to the tradition against state-supported clergy invoked by *Locke*." (quoting *Locke*, 540 U.S. at 725)).

77 *Id.* at 693. "[E]arly state constitutions and statutes actively encouraged this policy," the Court noted. *Id.* (quoting L. Jorgenson, The State and the Non-Public School, 1825-1925 4 (1987)). The Court also noted that during the post-bellum era, the federal government, through the Freedmen's Bureau, provided for the education of the freedmen "by supporting denominational schools," *id.*—a fact that "reinforce[d]" the tradition in the early states. *Id.* at 694.

78 *Id.* (citing Brief for Respondents at 40-42 & app. D, *Espinoza*, 207 L. Ed. 2d 679 (No. 18-1195)).

"belong to a more checkered tradition shared with the Blaine Amendment of the 1870s"[79]—a provision "born of bigotry" that "arose at a time of pervasive hostility to the Catholic Church and to Catholics in general."[80] Such provisions, the Court held, "hardly evince a tradition that should inform our understanding of the Free Exercise Clause."[81]

D. Failing Strict Scrutiny

Having concluded that the Montana Supreme Court's application of its Blaine Amendment discriminated based on religious status—not use, as in *Locke*—the Court, in accordance with *Trinity Lutheran*, applied strict scrutiny, which, it concluded, was not satisfied.[82] The Court addressed three asserted state interests, none of which rose to the level of compelling.

First, the Court rejected the Montana Supreme Court's claim that the state's interest in "separating church and State 'more fiercely' than the Federal Constitution" justified its application of the Blaine Amendment.[83] In fact, the Court had already concluded, in *Trinity Lutheran*[84] and *Widmar v. Vincent*[85] before it, that such an interest is not compelling, because "[a] State's interest 'in achieving greater separation of church and State than is already ensured under the Establishment Clause . . . is limited by the Free Exercise Clause.'"[86]

Second, the Court rejected the Department's claim that application of the Blaine Amendment to invalidate the scholarship program served the compelling interest of "promot[ing] religious freedom."[87] Specifically, the Department had maintained that the state constitutional provision: (1) "protect[ed] the religious liberty of taxpayers by ensuring that their taxes are not directed to religious organizations"; and (2) "safeguard[ed] the freedom of religious organizations by keeping the government out of their operations."[88] But as the Supreme Court retorted, "[a]n infringement of First Amendment rights . . . cannot be justified by a State's alternative view that the infringement advances religious liberty."[89] As for protecting religious organizations from governmental entanglement, the Court noted that a school's participation in the scholarship program was entirely voluntary and thus that a school concerned about such entanglement could simply "decide for itself not to participate."[90] The Court, moreover, emphasized the fact that it was not simply religious *schools* (or organizations) that were impacted by Montana's Blaine Amendment; parents who would choose religious schools for their children were equally impacted,[91] and these parents have a fundamental right to direct the upbringing and education of their children, including by selecting a religious school for them.[92] Montana's Blaine Amendment, the Court stressed, "penalizes that decision by cutting families off from otherwise available benefits if they choose a religious private school rather than a secular one."[93]

Finally, the Court rejected the Department's assertion that the Blaine Amendment served to protect Montana's public schools by preventing the diversion of money intended for them to private schools.[94] As the Court explained, the state's Blaine Amendment is "fatally underinclusive" to serve any such interest, because it prohibits public funding of religious schools only—not all private schools.[95]

In short, none of the allegedly compelling interests identified by the Department or the Montana Supreme Court could support applying Montana's Blaine Amendment to bar religious schools from an educational choice program. While the Court made clear that a state is not required to have such a program, "once [it] decides to do so, it cannot disqualify some private schools solely because they are religious."[96]

E. Rejecting the "No Program, Nobody Gets Hurt" Argument

Before concluding its opinion, the Court disposed of a final argument asserted by the Department: that there could be no religious status discrimination (and thus no free exercise violation) because the Montana Supreme Court had invalidated the scholarship program in its entirety—not with respect to religious private schools only.[97] While that court did eliminate the

79 *Id.*

80 *Id.* (quoting Mitchell v. Helms, 530 U.S. 793, 828 (2000) (plurality opinion)). For a discussion of the proposed federal amendment, *see supra* note 18.

81 *Espinoza*, 207 L. Ed. 2d at 694.

82 *Id.* at 696. Specifically, the Court required the Department to demonstrate that the application of Montana's Blaine Amendment "advance[d] 'interests of the highest order'" and was "'narrowly tailored in pursuit of those interests.'" *Id.* (quoting *Church of the Lukumi Babalu Aye*, 508 U.S. at 546).

83 *Id.* (quoting *Espinoza*, 2018 Mont. 306, ¶ 39, 435 P.3d at 614).

84 137 S. Ct. at 2024.

85 454 U.S. 263, 276 (1981).

86 *Espinoza*, 207 L. Ed. 2d at 696 (omission in original) (quoting *Trinity Lutheran*, 137 S. Ct. at 2024); *cf. Widmar*, 454 U.S. at 276 ("In this constitutional context, we are unable to recognize the State's interest as sufficiently 'compelling' to justify content-based discrimination against respondents' religious speech.").

87 *Espinoza*, 207 L. Ed. 2d at 696.

88 *Id.*

89 *Id.*

90 *Id.*

91 *Id.* at 697 ("[T]he prohibition before us today burdens not only religious schools but also the families whose children attend or hope to attend them.").

92 *Id.* (citing Wisconsin v. Yoder, 406 U.S. 205, 213-14 (1972); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925)).

93 *Id.*

94 *Id.* ("According to the Department, the no-aid provision safeguards the public school system by ensuring that government support is not diverted to private schools.").

95 *Id.*; *see also id.* ("A law does not advance 'an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited.'") (quoting *Church of the Lukumi Babalu Aye*, 508 U.S. at 547).

96 *Id.*

97 *Id.* ("According to the Department, now that there is no program, religious schools and adherents cannot complain that they are excluded from any generally available benefit.").

program in its entirety, the U.S. Supreme Court noted, it did so "not based on some innocuous principle of state law," but rather "pursuant to a state law provision that expressly discriminates on the basis of religious status."[98] The Montana Supreme Court applied this state constitutional provision to bar religious schools from the program and only proceeded to invalidate the program in its entirety because the program contained no "'mechanism' to make absolutely sure that religious schools received no aid."[99] The "error of federal law occurred at the beginning": "When the Court was called upon to apply a state law no-aid provision to exclude religious schools from the program, it was obligated by the Federal Constitution to reject the invitation."[100]

F. (Lots of) Concurring Opinions

Although Chief Justice Roberts' majority opinion was joined in full by four other Justices (Thomas, Alito, Gorsuch, and Kavanaugh), three of those four authored separate concurring opinions. Each concurrence focused on a distinct aspect of the case.

Justice Thomas, in an opinion joined by Justice Gorsuch, explained how, in his view, it is the Court's misguided Establishment Clause jurisprudence that has allowed Free Exercise Clause violations like those suffered by the *Espinoza* plaintiffs to proliferate.[101] In Justice Thomas's (and Gorsuch's) opinion, the Court's Establishment Clause jurisprudence has taken two misguided turns: (1) the Court's incorporation of the clause against the states contravenes the original meaning of the clause (and likely that of the Fourteenth Amendment, through which the clause was incorporated);[102] and, in any event, (2) interpreting the clause to preclude government's favoring or promotion of religion—as Justice Thomas calls it, the "separationist view"[103]—contravenes the original understanding of the clause.[104] "[T]he Court's wayward approach to the Establishment Clause"—that is, its "overly expansive understanding of the . . . Clause"—"has led to a correspondingly cramped interpretation of" the Free Exercise Clause.[105] Thus, "[r]eturning the Establishment Clause to its proper scope," in Justice Thomas's view, "will go a long way toward allowing free exercise of religion to flourish as the Framers intended."[106]

Justice Alito, meanwhile, focused on the nativist, anti-Catholic bigotry that undergirded the Blaine movement of the mid- to late-19th century and that inspired state constitutional provisions like Montana's. Consideration of this history, according to Justice Alito, was required by the Court's recent decision in *Ramos v. Louisiana*,[107] in which the Court confronted the bigoted origins of a Louisiana state constitutional provision that allowed for less-than-unanimous jury convictions.[108] Justice Alito's concurrence provides a compelling historical account of how provisions like Montana's came to be and, in an unusual turn for a judicial opinion, includes a reproduction of a political cartoon: the infamous Thomas Nast depiction of the supposed Catholic threat to the public school system, which appeared in *Harper's Weekly* in 1871.[109]

Finally, Justice Gorsuch authored a concurring opinion that further developed a point he had made in his *Trinity Lutheran* concurrence, discussed above in note 55 and the text accompanying note 69: that the supposed distinction between discrimination based on religious status and discrimination based on religious use is illusory, unworkable, and ultimately irrelevant in Free Exercise Clause jurisprudence.[110] First, Justice Gorsuch stressed that the record demonstrated how Montana's Blaine Amendment *did* discriminate based on "religious activity, uses, and conduct."[111] "Maybe it's possible to describe what happened here as status-based discrimination," Justice Gorsuch opined, "[b]ut it seems equally, and maybe more, natural to say that the State's discrimination focused on what religious parents and schools *do*—teach religion."[112] At the end of the day, however, it did not matter to Justice Gorsuch how the discrimination was described, because "it is not as if the First Amendment cares."[113] "The Constitution," he explained, "forbids laws that prohibit the free exercise of religion," and "[t]hat guarantee protects not just the right to *be* a religious person, holding beliefs inwardly and secretly; it also protects the right to *act* on those beliefs outwardly and publicly."[114] Justice Gorsuch supported his point with discussion

98 *Id.* at 697-98.

99 *Id.* at 698 (quoting *Espinoza*, 2018 Mont. 306, ¶ 36, 435 P.3d at 613).

100 *Id.*; *see also id.* ("Because the elimination of the program flowed directly from the Montana Supreme Court's failure to follow the dictates of federal law, it cannot be defended as a neutral policy decision, or as resting on adequate and independent state law grounds.").

101 *See id.* at 699 (Thomas, J., concurring).

102 *Id.*

103 *Id.* at 702.

104 *Id.* at 700, 702-04.

105 *Id.* at 700.

106 *Id.* at 704.

107 140 S. Ct. 1390 (2020).

108 *Espinoza*, 207 L. Ed. 2d at 704 (Alito, J., concurring). *See also Ramos*, 140 S. Ct. at 1394; *id.* at 1417-18 (Kavanaugh, J., concurring in part).

109 *Espinoza*, 207 L. Ed. 2d at 706 (Alito, J., concurring). The cartoon, titled "The American River Ganges," depicts Catholic bishops ominously approaching American shores, prostrate in the water with their mitres and copes giving them the appearance of invading crocodiles. On the shore, a building labeled "U.S. Public School" lies in ruins, with the United States flag flying upside down to signal distress. A Protestant clergyman, with Bible close to his chest, shields American public-school children on the shore from the approaching invaders, and the Vatican, from which the invaders came, looms large in the background across the sea.

110 *Id.* at 711-16 (Gorsuch, J., concurring).

111 *Id.* at 712.

112 *Id.* at 713.

113 *Id.*; *see also id.* ("So whether the Montana Constitution is better described as discriminating against religious status or use makes no difference: It is a violation of the right to free exercise either way, unless the State can show its law serves some compelling and narrowly tailored governmental interest, conditions absent here for reasons the Court thoroughly explains.").

114 *Id.*

of the original public meaning of the term "exercise,"[115] as well as the Court's own jurisprudence, which has long protected religious "actions" and "conduct."[116]

Justice Gorsuch also discussed the practical reason the First Amendment protects religious uses:

> Often, governments lack effective ways to control what lies in a person's heart or mind. But they can bring to bear enormous power over what people say and do. The right to *be* religious without the right to *do* religious things would hardly amount to a right at all.[117]

Under such a rule of law, Justice Gorsuch noted, "[t]hose apathetic about religion or passive in its practice would suffer little," but "those with a deep faith that requires them to do things [that] passing legislative majorities might find unseemly or uncouth" would suffer greatly.[118] And while the stakes may not be quite so great when it comes to discrimination in public benefits—a context in which "[t]he government does not put a gun to the head, [but] only a thumb on the scale"[119]—it is discrimination nonetheless. According to Justice Gorsuch, "[c]alling it discrimination on the basis of religious status or religious activity makes no difference: It is unconstitutional all the same."[120]

G. (Lots of) Dissenting Opinions

There were also three dissenting opinions. Justice Ruth Bader Ginsburg, joined by Justice Elena Kagan, did not see a free exercise violation in the application of Montana's Blaine Amendment. In her view, the case was "missing th[e] essential component" of "differential treatment based on . . . religion," because the Montana Supreme Court had invalidated the scholarship "in its entirety," thereby rendering "secular and sectarian schools alike . . . . ineligible for benefits."[121] Thus, "[t]he only question" for the Court to resolve was "whether application of" Montana's Blaine Amendment "to bar all state-sponsored private-school funding violate[d] the Free Exercise Clause."[122] In her view, "it d[id] not."[123]

Justice Sonia Sotomayor saw things similarly, but she concluded that the Court was wrong to decide the case at all. The Montana Supreme Court, she reasoned, "remedied the only potential harm of discriminatory treatment by striking down the program altogether" on "state-law grounds," and it thereby "declined to resolve federal constitutional issues."[124] Accordingly, there was no federal question for the Court to review in her eyes.[125]

Finally, Justice Stephen Breyer, in an opinion joined in part by Justice Kagan, disagreed with the majority on the merits, but also with its methodology—specifically, what he called its "overly rigid application of the [Religion] Clauses."[126] There is, Justice Breyer explained, "constitutional room, or 'play in the joints,' between 'what the Establishment Clause permits and the Free Exercise Clause compels,"[127] and the states are free to act within this area.[128] Discerning the boundaries of that area—and determining "whether a particular state program falls within that space"[129]—requires "the exercise of legal judgment,"[130] he explained, and "depends upon the nature of the aid at issue, considered in light of the Clauses' objectives."[131] According to Justice Breyer, *Espinoza*, like *Locke*, fell within this play in the joints. The application of Montana's Blaine Amendment, he maintained, simply prohibited a particular religious "use" of scholarships—"obtain[ing] a religious education"[132]—and did not discriminate based on religious status.[133] That prohibition, moreover, was supported by historic and substantial interests similar to those that justified the religious exclusion in *Locke*.[134] Accordingly, he saw no violation of the Free Exercise Clause.

IV. What *Espinoza* Resolves for Educational Choice, and What It Does Not

Espinoza is a landmark decision for the educational choice movement and the millions of children whose parents want the right to choose the education that will work best for them. After *Zelman* held that educational choice programs are permissible under the federal Establishment Clause, the biggest remaining legal question was whether state Blaine Amendments would

115 *See id.* at 713.

116 *See id.* at 713-14.

117 *Id.* at 715. To illustrate his point, Justice Gorsuch offered the example of Oliver Cromwell, who promised Catholics in Ireland, "As to freedom of conscience, I meddle with no man's conscience; but if you mean by that, liberty to celebrate the Mass, I would have you understand that in no place where the power of the Parliament of England prevails shall that be permitted." *Id.* (quoting McDaniel v. Paty, 435 U.S. 618, 631 n.2 (Brennan, J., concurring in judgment)).

118 *Id.*

119 *Id.*

120 *Id.* at 716.

121 *Id.* at 717 (Ginsburg, J., dissenting).

122 *Id.* at 718.

123 *Id.* at 719.

124 *Id.* at 731, 732 (Sotomayor, J., dissenting); *see also id.* at 734 ("[T]he Montana Supreme Court remedied a state constitutional violation by invalidating a state program on state-law grounds, having expressly declined to reach any federal issue.").

125 *See id.* at 731 (opining that "the Court [was] wrong to decide this case at all"). Even if there was a federal question warranting the Court's review, however, Justice Sotomayor would have concluded that the alleged discrimination was supported by "'historic and substantial' antiestablishment concerns" and, thus, authorized by *Locke. Id.* at 736 (quoting *Locke*, 540 U.S. at 725).

126 *Id.* at 719 (Breyer, J., dissenting).

127 *Id.* (quoting *Trinity Lutheran*, 137 S. Ct. at 2019).

128 *Id.* at 731.

129 *Id.* at 719.

130 *Id.* at 731 (quoting Van Orden v. Perry, 545 U.S. 677, 700 (2005) (Breyer, J., concurring in judgment)).

131 *Id.* at 719.

132 *Id.* at 723.

133 *Id.* ("[T]his case does not involve a claim of status-based discrimination.").

134 *See id.* at 723-27.

nevertheless force the exclusion of religious schools from them. *Espinoza* has now answered that question: A state need not adopt an educational choice program, "[b]ut once [it] decides to do so, it cannot disqualify some private schools solely because they are religious."[135]

Of course, that was not the *only* remaining legal question hanging over educational choice, and opponents have signaled that they will resort to any available argument to prevent state support for alternatives to public schools. As Robert Chanin, then chief counsel for the National Education Association, vowed after *Zelman* held that educational choice programs are permissible under the federal Constitution, choice opponents will continue their attacks under any "Mickey Mouse provisions" they can find in state constitutions.[136] That is as true today, in the wake of *Espinoza*, as it was in the wake of *Zelman* eighteen years ago.

Thus, we can expect challenges under the unique education funding provisions found in many state constitutions (and statutes), as well as state "uniformity clauses," which require provision for a uniform system of public schools. Such challenges have previously succeeded in a handful of instances,[137] and educational choice opponents presumably will dust these provisions off in the post-*Espinoza* era.

Another expected avenue of attack will focus on allegedly discriminatory hiring or admissions practices of participating schools. If opponents of choice cannot kill programs outright, they will attempt to neuter the programs by excluding—through litigation or legislation—schools that consider religion, sexual orientation, gender identity, or other factors in hiring or admissions. Indeed, a Christian school in Maryland is currently challenging its expulsion from that state's voucher program for allegedly violating the program's "nondiscrimination provision."[138] The school maintains that its expulsion from the program (which appears to be driven by its traditional view of marriage and its understanding of sex as biologically determined) violates, among other things, its rights under the Free Exercise and Free Speech Clauses of the U.S. Constitution.[139] The extent to which nondiscrimination provisions like Maryland's can, consistent with the federal Constitution, be used to bar or expel religious schools from educational choice programs is largely an open question,[140] which all but guarantees that opponents of educational choice will employ such provisions to challenge choice programs in the coming years.[141]

Espinoza has nothing to say about education funding provisions, uniformity clauses, and nondiscrimination provisions, much less how they bear on the legality of educational choice programs. But the opinion does note an unresolved issue that opponents of such programs may try to take advantage of in the coming years: Opponents will attempt to invalidate educational choice programs on the theory that they allow public funds to be put to religious uses.

As discussed above, Chief Justice Roberts' opinion for the Court in *Espinoza* (and in *Trinity Lutheran* before it) distinguished between discrimination based on religious status and discrimination based on religious use. Those opinions make clear that religious status-based exclusions in public benefit programs are virtually per se unconstitutional. But the opinions do not resolve the constitutionality of religious use-based exclusions. *Locke*, meanwhile, provides one example of a use-based exclusion that the Court allowed.

Educational choice opponents will almost certainly try to exploit this opening in future litigation. Even if schools cannot be barred from educational choice programs because of who they

135 *Id.* at 697 (majority opinion). A few state Blaine Amendments prohibit funding of religious *and* non-religious private schools. *E.g.*, Alaska Const. art. VII, § 1; Ariz. Const. art. IX, § 10; Haw. Const. art. X, § 1; Mich. Const. art. VIII, § 2; N.M. Const. art. XII, § 3; S.C. Const. art. XI, § 4.1. Arizona has such a provision, and the state's courts have interpreted it to prohibit voucher programs but allow publicly funded ESA programs, because the aid provided by the latter need not be used to pay tuition at a private school. *Compare* Cain v. Horne, 202 P.3d 1178, 1184-85 (Ariz. 2009) (invalidating voucher programs), *with* Niehaus v. Huppenthal, 310 P.3d. 983, 988 (Ariz. Ct. App. 2013) (upholding ESA program). The New Mexico Supreme Court, meanwhile, has recognized that even a Blaine Amendment that is facially neutral—that is, that bars aid to religious and non-religious private school alike—can still run afoul of the Free Exercise Clause if it was adopted with anti-religious motives. *See* Moses v. Ruszkowski, 2019-NMSC-003 ¶¶ 34-35, 458 P.3d 406, 416-17. Because "anti-Catholic sentiment tainted . . . adoption" of that state's Blaine Amendment, *id.* ¶ 43, 458 P.3d at 419, the court, in order to "avoid a construction that raises concerns under the federal constitution," interpreted the provision to allow state lending of secular textbooks to students attending private schools. *Id.* ¶¶ 45, 46, 458 P.3d at 420. Such reasoning is supported by Justice Alito's concurrence in *Espinoza* and its recognition that the "original motivation for" Blaine Amendments "matter[s]." *Espinoza*, 207 L. Ed. 2d at 704 (Alito, J., concurring).

136 Clint Bolick, David's Hammer: The Case for an Activist Judiciary 138 (2007).

137 *E.g.*, *Schwartz*, 382 P.3d at 902 (rejecting Blaine Amendment challenge to ESA program but holding that the use of funds appropriated to support public schools, in the absence of a separate appropriation for the ESA program, violated at least two clauses in the Education Article of the Nevada Constitution, Nev. Const. art. XI, §§ 2, 6); La. Fed'n of Teachers v. State, 2013-0120, p. 26 (La. 5/7/13), 118 So. 3d 1033, 1050-51 (holding voucher program could not be funded through a constitutional budget mechanism designed exclusively for funding public schools); Bush v. Holmes, 919 So. 2d 392, 409 (Fla. 2006) (invalidating voucher program under Florida's Uniformity Clause, Fla. Const. art. IX, § 1(a)); *but see* Jackson v. Benson, 578 N.W.2d 602, 627-28 (Wis. 1998) (rejecting Uniformity Clause challenge to voucher program).

138 *See* Bethel Ministries, Inc. v. Salmon, No. SAG-19-01853, 2020 WL 292055, at **2-3 (D. Md. Jan. 21, 2020) (order denying preliminary injunction). The school maintains that it does not discriminate in admissions on any protected ground. *See id.*

139 *Id.* at *3.

140 It is clear, however, that there is a constitutionally mandated "ministerial exception" to employment discrimination claims brought by certain employees, including certain teachers, of religious schools. *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, Nos. 19-267, 19-348, 2020 WL 3808420, at *40 (U.S. July 8, 2020) (applying ministerial exception to bar claims brought by former elementary teachers at Catholic schools); Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 177-78, 196 (2012) (applying ministerial exception to bar claim brought by former "called" teacher at a Lutheran school).

141 They may do so by attempting to enforce preexisting, generally applicable nondiscrimination laws against schools participating in educational choice programs or by attempting to legislatively insert nondiscrimination requirements as a sort of "poison pill" when new educational choice programs are adopted.

are, the argument will go, they may still be excluded from such programs because of what they *do*.

A textual legal hook for such challenges will likely be the Blaine Amendments. In addition to barring public funding of religious schools (in the words of Montana's Blaine Amendment, schools "controlled in whole or in part by any church, sect, or denomination"[142]), many Blaine Amendments, Montana's included, also prohibit appropriations or payments of public funds for any "sectarian *purpose*."[143] Others are more specific, providing that "[n]o public money or property shall be appropriated for or applied to any religious *worship, exercise, or instruction*."[144]

Educational choice opponents will likely argue that any program that allows participating schools to provide religious instruction or engage in religious worship or exercises runs afoul of such language, not because of who the schools are but because of what they do—i.e., because of the use to which they put the aid they receive. Thus, educational choice opponents will invite courts to invalidate programs (or exclude schools engaging in such activities[145]) because (1) a state restriction on a religious use of public benefits was upheld in *Locke* and (2) *Locke* was left undisturbed by *Espinoza*.

In fact, in the days—even hours—after the Court handed down the *Espinoza* decision, more than a few commentators—academics and advocates alike—flagged this very issue. Ron Meyer, an attorney who represented the Florida Education Association in legal challenges to educational choice programs in that state, announced that "Roberts' opinion simply finds that because the benefits of the tax credit vouchers were being withheld solely because of the religious character of the school, it violated the free exercise clause of the First Amendment," and that it "didn't reach into whether those monies were used to inculcate students."[146] Similarly, Professor Steven Green, who has served as both an attorney and expert witness for educational choice opponents, acknowledged that "[t]he majority opinion effectively says [Blaine Amendments] cannot be enforced, at least when they are directed at preventing aid based on the character or status of the recipient," but he insisted that "one can interpret the language of these provisions as directed at use, not necessarily status."[147] (He predicted, however, that "most lower courts will read the majority opinion otherwise."[148])

Even commentators not hostile to educational choice identified the use argument as the next likely legal avenue of attack for educational choice opponents. Mark Scarberry, a law professor at Pepperdine, explained that "[Chief Justice] Roberts's decision could be interpreted to require Montana to include religious schools in its scholarship tax credit program only to the extent of the schools' religious status, as opposed to their conduct in providing religious education or their use of the funds for providing religious education."[149] "A lower court might well seize on that ambiguity," he predicted, "to limit Espinoza."[150] And Andy Smarick of the Manhattan Institute predicted that "[f]uture cases could preserve the status-use distinction by requiring that faith-based groups be able to participate in public programs while permitting specific state limits on their use of

142 Mont. Const. art. X, § 6(1).

143 *Id.* (emphasis added) (prohibiting appropriations and payments of public funds for any "sectarian purpose"); *see also* Cal. Const. art. XVI, § 5 (same); Colo. Const. art. IX, § 7 (same); Ill. Const. art. X, § 3 (same); Mo. Const. art. IX, § 8 (same); Nev. Const. art. XI, § 10 (prohibiting "use[]" of public funds for "sectarian purpose"); *cf.* Idaho Const. art. IX, § 5 (prohibiting payments or appropriations "for any sectarian or religious purpose"). The use of the term "sectarian", rather than "religious," in modifying "purpose" seems deliberate. The public schools during the Blaine era were overtly religious, practicing a kind of generic Protestantism, but they were not "sectarian" as that term was used at the time. *See Espinoza*, 207 L. Ed. 2d at 708-10 (Alito, J., concurring). Thus, by prohibiting public appropriations for "sectarian purposes," these provisions were not targeting religious exercises that were common in the 19th-century public schools; they were targeting the so-called "sectarian" practices common in Catholic schools. *See id.* at 707 (noting that "sectarian" was used at the time to describe dissident or heretical churches, including the Catholic Church specifically). Use of the terminology "controlled in whole or in part by any church, sect, or denomination" in describing the *schools* for which public funds could not be appropriated, *e.g.*, Mont. Const. art. X, §6(1), was equally deliberate. As noted *supra* note 18, the public schools, while religious, were not "controlled in whole or in part by any church, sect, or denomination." Catholic schools, on the other hand, were.

144 Ariz. Const. art. II, § 12; Utah Const. art. I, § 4; Wash. Const. art. I, § 11. Another textual hook for such challenges might be the "compelled support" clauses found in many state constitutions. Generally speaking, these provisions protect persons from being compelled to attend or support any "place of worship" or "ministry." *E.g.*, Pa. Const. art. 1, § 3 ("[N]o man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent . . . ."). In fact, the Vermont Supreme Court held that allowing religious schools to participate in that state's "tuitioning" program, through which students from towns without a public school receive money to attend another town's public school or a private school of their choice, violated Vermont's Compelled Support Clause because there were not "adequate safeguards against the use of such funds for religious worship." Chittenden Town Sch. Dist. v. Dep't of Educ., 738 A.2d 539, 541-42 (Vt. 1999).

145 Alternatively, educational choice opponents may attempt to include "poison pill" provisions in new programs, statutorily prohibiting religious exercises, worship, instruction, etc.

146 Mary Ellen Klas, *Ruling on religious schools could steer more public money to private schools*, Tampa Bay Times, July 1, 2020, https://www.tampabay.com/florida-politics/buzz/2020/06/30/ruling-on-religious-schools-could-steer-more-public-money-to-private-schools/.

147 Steven Green, *RIP state "Blaine Amendments"*—Espinoza *and the "no-aid" principle*, SCOTUSblog (June 30, 2020, https://www.scotusblog.com/2020/06/symposium-rip-state-blaine-amendments-espinoza-and-the-no-aid-principle/#more-294819.

148 *Id.*

149 Mark Scarberry, *Ambiguity in today's Espinoza decision: status versus conduct/use*, posting to Law & Religion Issues for Law Academics listserv, religionlaw@lists.ucla.edu (June 30, 2020) (on file with author).

150 *Id.* Professor Scarberry went on to explain that "a modest application of" the status/use distinction "could allow a state to require a school somehow to segregate activities so that scholarship funds are used only for supposedly non-religious purposes." *Id.* "A strong application," however, "could allow a state to disqualify a religious school that does not provide a completely secular education. Functionally, that would disqualify all schools that have a religious character." *Id.*

government funds. In the next few years, the court will almost certainly face a number of questions along these lines."[151]

There are, to be sure, several obvious counterarguments to this expected next line of attack. First, educational choice programs do not aid schools engaging in religious activities—they aid students—and no money finds its way to any school, religious or non-religious, apart from the private and independent choices of parents. Thus, the argument goes, Blaine Amendments are not even implicated by choice programs. But the Montana Supreme Court (unlike courts in some other states) rejected that argument in *Espinoza*, holding that the program there aided schools in a way that implicated the state's Blaine Amendment,[152] and the U.S. Supreme Court was obligated to accept that determination of state law on certiorari.[153]

Another possible counterargument—again, under the text of the Blaine Amendments themselves—is that the *purpose* of an educational choice program is entirely secular: to facilitate the general education of children. Any religious education that takes place is incidental to parental choice. There is, in other words, no payment or appropriation for a "sectarian purpose."[154] But here again, the resolution of the question will be one of state law, and different state courts may well come to different conclusions.

It is quite possible, then, that some state courts will conclude that educational choice programs violate Blaine Amendments insofar as the programs allow public funds to be used for "sectarian purposes" or to support "religious worship, exercise, or instruction." The question would then become whether invalidating a program (or excluding schools from a program) on that basis is permissible under the Free Exercise Clause of the U.S. Constitution. That is a question that *Espinoza* did not answer.

Of course, the Court *could have* answered that question in *Espinoza* by adopting the position set out in Justice Gorsuch's concurring opinion. In his view, whether a Blaine Amendment "is better described as discriminating against religious status or use makes no difference: It is a violation of the right to free exercise either way, unless the State can show [that the provision] serves some compelling and narrowly tailored governmental interest."[155] But Chief Justice Roberts, famous for his incrementalist jurisprudence,[156] said only what he needed to say in order to resolve the case before the Court: that the application of Montana's Blaine Amendment in that case discriminated based on religious status, and discrimination based on religious status is prohibited by *Trinity Lutheran*.

V. What *Espinoza* Portends for Religious Use-Based Attacks on Educational Choice Programs

Although *Espinoza* does not answer the religious use question, there are several indications in the Chief Justice's opinion for the Court of how he (and a majority of the Court) might resolve the federal constitutionality of excluding schools from educational choice programs because of the religious uses to which scholarship monies might be put. And those indications strongly suggest that the Court would find such an exclusion just as constitutionally problematic as excluding a school because of its religious status.

A. Status and Use Discrimination Are Not Mutually Exclusive

First, the Court's opinion makes clear that discrimination based on religious status and discrimination based on religious use are not mutually exclusive. While the opinion insisted that "the Montana Supreme Court's basis for applying the no-aid provision to exclude religious schools . . . hinged solely on religious status"—not a desire to "ensur[e] that government aid does not end up being used for 'sectarian education' or 'religious education'"—the Court nevertheless held that "[s]tatus-based discrimination remains status based *even if* one of its goals or effects is preventing religious organizations from putting aid to religious uses."[157]

This holding makes clear that the religious status versus religious use question is not the binary inquiry that *Trinity Lutheran* might have suggested it is. A regulation, in other words, can have twin goals—or twin effects—of discriminating based on religious status *and* religious use. The plaintiffs in *Espinoza* made this point in their briefing to the Court. As they noted, "many . . . families are *required* by their religious status to place their children in full-time religious schooling."[158] "Catholics, for example, have a 'duty'—set forth in canon law and stressed by the Second Vatican Council—'of entrusting their children to Catholic schools wherever and whenever it is possible.'"[159] Barring such families from an educational choice program based

151 Andy Smarick, *What the* Espinoza *Decision Means for Other Aspects of Religious Freedom*, The Dispatch (July 7, 2020), https://thedispatch.com/p/what-the-espinoza-decision-means.

152 *Espinoza*, 2018 MT 306, ¶ 28, 435 P.3d at 612 ("We ultimately conclude the Tax Credit Program aids sectarian schools in violation of Article X, Section 6 . . . ."). As noted *supra* note 7, other state courts of last resort have come to the opposite conclusion.

153 *Espinoza*, 207 L. E. 2d at 689 ("The Montana Supreme Court . . . held as a matter of state law that even such indirect government support qualified as 'aid' prohibited under the Montana Constitution.").

154 The Nevada Supreme Court held as much in rejecting the claim that a publicly funded ESA program violated the state's Blaine Amendment. *See Schwartz*, 382 P.3d at 899.

155 *Espinoza*, 207 L. Ed. 2d at 713 (Gorsuch, J., concurring).

156 *See, e.g.*, Robert Barnes, *Roberts Court Moves Right, but with a Measured Step*, Wash. Post, Apr. 20, 2007, at A3 ("A view of incremental change is more in tune with Roberts's stated goals of narrow decisions and more consensus."); Tom Curry, *Roberts's Rule: Conservative but incremental*, NBCNews.com, June 25, 2007, http://www.nbcnews.com/id/19415777/ns/politics/t/robertss-rule-conservative-incremental/ (noting how Chief Justice Roberts has "tak[en] an incremental approach to curbing some of the court's precedents").

157 *Espinoza*, 207 L. Ed. 2d at 691 (emphasis added) (quoting *Espinoza*, 2018 Mont. 306, ¶¶ 8, 36, 38, 435 P.3d at 609, 613-14).

158 Brief for Petitioners at 18, *Espinoza*, 207 L. Ed. 2d 679 (No. 18-1195).

159 *Id.* at 18-19 (quoting Vatican Council II, Gravissimum educationis (1965)); *see also* Codex Iuris Canonici 1983 c.798 (stating that "[p]arents are to entrust their children to those schools which provide a Catholic education" so long as they are able); Brief for Petitioners at 19, *Espinoza*, 207 L. Ed. 2d 679 (No. 18-1195) ("Likewise, many Orthodox Jews believe there is an obligation (mitzvah) to ensure their children receive a Jewish education, rooted in study of the Torah, which can only be fully accomplished by sending their children to full-time Orthodox Jewish schools." (citing Brief for Agudath Israel of America as Amicus Curiae

on the religious *use* to which they would put their aid necessarily discriminates based on their religious *status*, as well. Again, status and use are not binary concepts.[160]

The Court's recognition that the same regulation can have these twin goals or effects suggests, at a minimum, that it will examine future regulations closely to flush out status discrimination that is masked as use discrimination. Alternatively, it could indicate sympathy for Justice Gorsuch's position that status and use ultimately collapse into each other—that they are two sides of the same coin.

B. The Status/Use Distinction May Be Meaningless

Another passage in the *Espinoza* opinion suggests that a majority of the Court might be willing to go where Justice Gorsuch has already gone. Referring to Justice Gorsuch's concurrence (joined by Justice Thomas) in *Trinity Lutheran*, the Court noted that "[s]ome Members of the Court . . . have questioned whether there is a meaningful distinction between discrimination based on use or conduct and that based on status."[161] The Court immediately followed that observation by stating, "We acknowledge the point but need not examine it here."[162]

If there was no need for the Court to examine that point in *Espinoza*, then there was certainly no reason to flag it either. Yet the Court did flag it, and it is commonly recognized that the Court sometimes signals open questions of law that it might see the need—and have the desire—to resolve in an appropriate future case.[163] Thus, the Court's statement may evince a readiness to consider "whether there is a meaningful distinction between discrimination based on use or conduct and that based on status"[164]—depending, of course, on how the lower courts apply *Espinoza* to status and use issues going forward.[165]

C. Even if There Is a Distinction to Be Made Between Status and Use Discrimination, Both May Be Subject to Strict Scrutiny

But even if the Court is not prepared to abandon the status/use distinction, *Espinoza* suggests that the Court will apply the same searching scrutiny to laws that discriminate based on religious use as it does to those that discriminate based on religious status. In reviewing the latter category, the Court applies strict scrutiny,[166] requiring that the law be narrowly tailored to a compelling governmental interest.[167] And while the Court in *Espinoza* spent much time explaining exactly *how* the case involved status discrimination and thus required strict scrutiny,[168] it pointedly added that "[n]one of this is meant to suggest that we agree with the Department that some lesser degree of scrutiny applies to discrimination against religious uses of government aid."[169]

This statement is significant, because in upholding the religious use-based exclusion in *Locke v. Davey*, the Court applied what many lower courts and commentators considered a standard short of strict scrutiny.[170] While the majority in *Locke* "refrained from stating what level of scrutiny it was applying"[171]—a point not lost on the dissent in that case[172]—its description of the state's

Supporting Appellees at 1, 8, Espinoza v. Mont. Dep't of Revenue, 2018 Mont. 306, 435 P.3d 603 (No. 17-0492))).

160 Relatedly, in *Morrissey-Berru*, decided just a week after *Espinoza*, the Supreme Court seemed to recognize that engaging in religious conduct—specifically, "educating young people in their faith, inculcating [the church's] teachings, and training them to live their faith"—is part and parcel of *being* a religious school. 2020 WL 3808420, at *10. As the Court put it, these "are responsibilities that lie at the very core of the mission of a private religious school." *Id.*

161 *Espinoza*, 207 L. Ed. 2d at 692 (citing *Trinity Lutheran*, 137 S. Ct. at 2026 (Gorsuch, J., concurring in part)).

162 *Id.*

163 *See* Vanessa A. Baird, Answering the Call of the Court: How Justices and Litigants Set the Supreme Court Agenda (2007) (arguing that the Court sends signals to litigants indicating issues that are important to a majority of the Justices, and that these signals, in turn, prompt litigants to develop cases presenting those issues to the Court).

164 *Espinoza*, 207 L. Ed. 2d at 692.

165 If lower courts split on the question of whether there is a meaningful distinction to be made, the likelihood of the Supreme Court's resolving the question would, of course, go up significantly.

166 *Espinoza*, 207 L. Ed. 2d at 692 ("Such status-based discrimination is subject to 'the strictest scrutiny.'") (quoting *Trinity Lutheran*, 137 S. Ct. at 2022); *id.* at 695 ("When otherwise eligible recipients are disqualified from a public benefit 'solely because of their religious character,' we must apply strict scrutiny.") (quoting *Trinity Lutheran*, 137 S. Ct. at 2021).

167 *See id.* at 696.

168 *Id.* at 690-91.

169 *Id.* at 692 (citation omitted). As noted *supra* note 68, the Court followed this statement with a citation to *Church of the Lukumi Babalu Aye*, in which it invalidated a law banning ritualistic animal slaughter and stated that a law "target[ing] religious conduct for distinctive treatment or advanc[ing] legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases." 508 U.S. at 546.

170 *See, e.g.*, Colo. Christian Univ. v. Weaver, 534 F.3d 1245, 1267 (10th Cir. 2008) ("*Locke v. Davey* introduces some uncertainty about the level of scrutiny applicable to discriminatory funding. The majority opinion refrained from stating what level of scrutiny it was applying to Joshua Davey's First Amendment claim, but dropped two hints that the proper level of scrutiny may be something less than strict."); Susanna Dokupil, *Function Follows Form:* Locke v. Davey*'s Unnecessary Parsing*, 2004 Cato Sup. Ct. Rev. 327, 347 (stating that the Court "dispens[ed] with strict scrutiny"); Mark Strasser, *Free Exercise and* Comer*: Robust Entrenchment or Simply More of A Muddle?*, 52 U. Rich. L. Rev. 887, 916 (2018) ("*Locke* rejected that strict scrutiny was triggered merely because a religious program was receiving less favorable treatment . . . .").

171 *Colo. Christian Univ.*, 534 F.3d at 1267; *see also* Nelson Tebbe, *Free Exercise and the Problem of Symmetry*, 56 Hastings L.J. 699, 729 (2005) (stating that the Court "duck[ed] the issue"); Dokupil, *supra* note 170, at 346 ("[O]ne would expect the Court to apply 'strict scrutiny.' Yet the Court punts. It never squarely identifies the appropriate level of scrutiny for Davey's free exercise claims, much less applies the strict scrutiny mandated by *Lukumi*.").

172 *See Locke*, 540 U.S. at 730 (Scalia, J., dissenting) ("The Court never says whether it deems this interest compelling (the opinion is devoid of any mention of standard of review) but, self-evidently, it is not."); *see also id.* at 730 n.2 (suggesting the Court required only a rational basis to support the exclusion, rather than a compelling interest).

interest as "historic and substantial,"[173] rather than compelling, and its dearth of discussion regarding the tailoring of the use-based exclusion to the state's interest were commonly seen as a departure from earlier cases, such as *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, that had applied strict scrutiny to laws targeting religious uses or conduct for disfavored treatment. That the Court in *Espinoza* went out of its way to stress that it was not "suggest[ing]" agreement "that some lesser degree of scrutiny applies to discrimination against religious uses of government aid"[174] may well indicate a discomfort with *Locke* and its seeming abandonment of strict scrutiny in at least some cases where religious uses are targeted for unfavorable treatment.

But even if that is too much to read into the Court's statement and the Court ultimately stands by *Locke*, there is another aspect of the *Espinoza* majority opinion that provides some insight into how the Court will likely apply *Locke* in future religious use discrimination cases. *Locke* had noted that the substantial interest that supported Washington's devotional theology exclusion was also a historic interest—one dating back to the founding era.[175] But *Locke* did not clearly hold that this temporal characteristic of the state's interest was *required* to sustain a law that discriminates against religious use.[176] *Espinoza*, on the other hand, comes close to holding precisely that. The Court rejected the Department's attempt to justify the application of Montana's Blaine Amendment under *Locke*, holding that "no comparable 'historic and substantial' tradition supports Montana's decision to disqualify religious schools from government aid."[177] And while the Department (and Justice Sotomayor, in dissent) "argue[d] that a tradition against state support for religious schools arose" a bit later—"in the second half of the 19th century," with the adoption of the Blaine Amendments themselves—the majority held that "such evidence . . . cannot create" an "early practice" or "establish an early American tradition" as contemplated in *Locke*.[178]

Thus, even if the Court, in future cases, concludes that a substantial, rather than compelling, interest is sufficient to justify religious use-based discrimination, it seems clear that any old substantial interest will not do. Rather, it must be an interest rooted in early American tradition—a "*consistent* early tradition" at that[179]—dating back specifically to the founding era. In that respect, this standard could be viewed as *more* demanding than strict scrutiny, which may require a weightier (i.e., compelling) governmental interest but does not require that the interest be temporally rooted in the nation's founding.

D. In Distinguishing Between Status and Use Discrimination, Use Must Be Construed Narrowly

Finally, even if the Court is not prepared to abandon the status/use distinction, and even if it subjects use-based exclusions to a degree of scrutiny less searching than that by which it judges exclusions based on status, the majority's opinion in *Espinoza* nevertheless suggests that the Court will look at purportedly use-based exclusions with a suspicious eye and be especially reluctant to treat broad, wholesale exclusions as use-based. The broader an exclusion, it seems, the more likely the Court will be to treat it as one targeting religious status.

In distinguishing the devotional theology exclusion in *Locke* from the wholesale exclusion of religious schools in *Espinoza*, the Court repeatedly stressed the narrowness of the exclusion in *Locke*. "Washington," it said, "had 'merely chosen not to fund a distinct category of instruction': the 'essentially religious endeavor' of training a minister 'to lead a congregation.'"[180] "Apart from that *narrow* restriction," the Court explained, "Washington's program allowed scholarships to be used at 'pervasively religious schools' that incorporated religious instruction throughout their classes."[181] "By contrast," the Court noted, "Montana's Constitution does not *zero in on* any particular '*essentially* religious' course of instruction at a religious school."[182] Rather, the Montana Constitution "bar[red] all aid to a religious school 'simply because of what it is.'"[183]

The italicized language in the quoted sentences above suggests that, going forward, the Court will carefully examine purportedly use-based exclusions to ensure they are indeed use-based, and that only "narrow" exclusions that "zero in on" an "essentially" religious activity will qualify. In other words, if the status/use distinction survives, the Court will be quick to expose status-based discrimination that comes in use-based clothing.

VI. Conclusion

Espinoza is a landmark education decision, clearing the legal path for expanded educational opportunity for hundreds of thousands of schoolchildren throughout the country. The decision will prevent courts from invalidating educational choice programs simply because they include religious options, as the Montana Supreme Court had done. It will likewise prevent legislatures and agencies from affirmatively excluding schools from educational

173 *Id.* at 725 (majority opinion).

174 *Espinoza*, 207 L. Ed. 2d at 692.

175 *Locke*, 540 U.S. at 725; *see also id.* at 722 ("Since the founding of our country, there have been popular uprisings against procuring taxpayer funds to support church leaders, which was one of the hallmarks of an 'established' religion.); *id.* at 723 ("Most States that sought to avoid an establishment of religion around the time of the founding placed in their constitutions formal prohibitions against using tax funds to support the ministry.").

176 *See Colo. Christian Univ.*, 534 F.3d at 1255 ("[*Locke*] suggests, even if it does not hold, that the State's latitude to discriminate against religion is confined to certain 'historic and substantial state interest[s]' . . . ." (alteration in original) (quoting *Locke*, 540 U.S. at 725)).

177 *Espinoza*, 207 L. Ed. 2d at 693 (quoting *Locke*, 540 U.S. at 725).

178 *Id.* at 694 (emphasis omitted).

179 *Id.* at 693 n.3 (emphasis added) (noting that Justice Breyer, in dissent, had "not identif[ied] a consistent early tradition, of the sort invoked in *Locke*, *against* support for religious schools").

180 *Id.* at 692 (quoting *Locke*, 540 U.S. at 721).

181 *Id.* at 692-93 (emphasis added) (quoting *Locke*, 540 U. S. at 724-25).

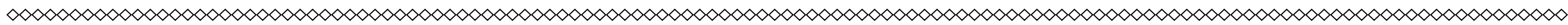
182 *Id.* at 693 (emphasis added) (quoting *Locke*, 540 U.S. at 721).

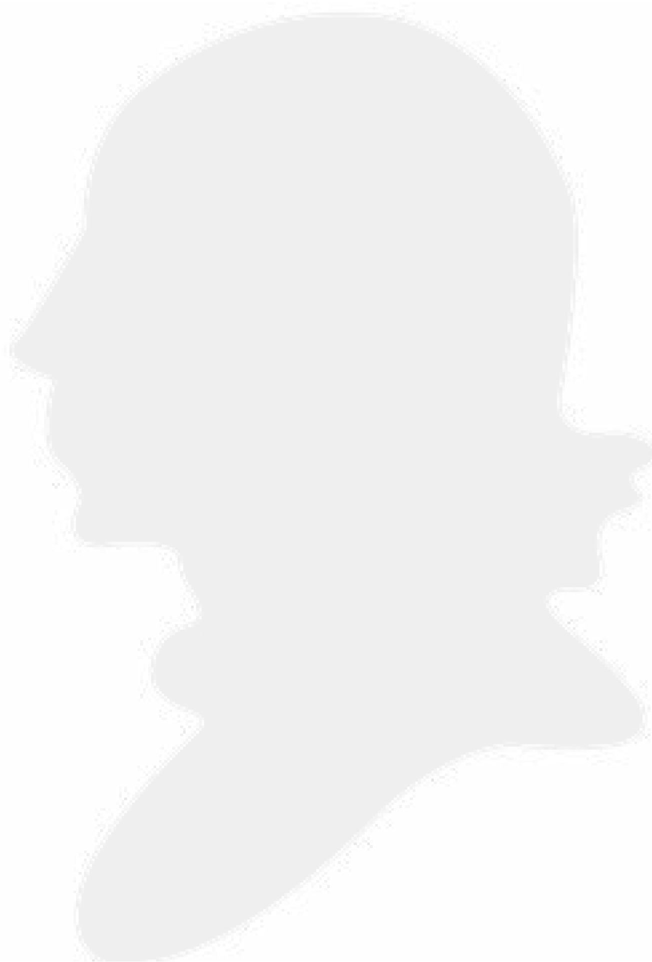
183 *Id.* (quoting *Trinity Lutheran*, 137 S. Ct. at 2023).

choice programs simply because of their religious status, as the Montana Department of Revenue did.

But educational choice opponents are a dogged bunch, and they will continue to attack educational choice programs—in statehouses and courthouses—on the theory that they permit public funds to be put to religious uses in violation of state Blaine Amendments. The Court could have headed off those attacks in *Espinoza*. Although it declined to do so, it did give a strong indication of how those future battles will end.

The Court may well be prepared to abandon the status/use distinction that has developed in its jurisprudence since *Trinity Lutheran* and treat all religion-based exclusions—whether targeted at status or use—as presumptively unconstitutional. But even if the Court decides to preserve the distinction, it seems clear that the Court will rigorously examine religious exclusions in educational choice and other public benefit programs, flushing out status-based discrimination that is masked as use-based. And even when dealing with a truly use-based exclusion, the Court will likely subject it to the same strict scrutiny applicable to status-based exclusions, or to some similarly demanding level of scrutiny that can only be satisfied if the exclusion is necessary to advance a narrow, specific governmental interest that is firmly rooted in a well-established, founding-era American tradition. One way or another, ostensibly use-based exclusions in educational choice programs are likely to suffer the same fate as the status-based exclusion in *Espinoza*.





How Can the FCC Improve Provision of Telecommunications Services for the Deaf and Hearing Impaired?

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Other Views:

• Coleman Bazelon & Brent Lutes, *IP CTS Costs and Reimbursement Rates*, The Brattle Group (July 14, 2020), *available at* https://ecfsapi.fcc.gov/file/1071646346737/Hamilton%20ex%20parte%20July%2016%202020.pdf.

• Martin Cave, *Encouraging Infrastructure Competition via the Ladder of Investment*, 30 Telecomm. Pol'y 223 (April 2006), https://www.sciencedirect.com/science/article/abs/pii/S0308596106000164.

• *In the Matter of Structure and Practices of the Video Relay Service Program*, Report and Order, FCC, July 6, 2017, https://docs.fcc.gov/public/attachments/FCC-17-86A1.pdf.

July 2020 marked the 30th anniversary of the Americans with Disabilities Act (ADA) and an opportunity to review its policy goals. Section IV of the ADA requires telecommunications providers to offer "functionally equivalent" services for consumers with hearing or speech disabilities. This provision was codified by adding Section 225 to the 1934 Communications Act.[1] It requires the FCC to ensure that the "interstate and intrastate" telecommunications relay service (TRS) market is available to the hearing impaired "to the extent possible and in the most efficient manner,"[2] and it directs the FCC to develop and enforce regulations that provide funding for the cost of the ADA-mandated communications services.[3]

Internet Protocol Captioned Telephone Service (IP CTS) is a captioning service for individuals such as seniors and veterans who have hearing loss that interferes with their ability to do something many of us take for granted: use the telephone. Under the ADA, this accommodation must support "functionally-equivalent" telephone service for individuals who are deaf or suffer hearing loss that impairs their ability to use the telephone. It is funded by a surcharge on telephone companies, many of whom pass it on to consumers on telephone and mobile bills. The Federal Communications Commission (FCC) administers the program, reimbursing approved providers for providing the service. IP CTS is now the most widely used of the FCC's relay services, having grown from 2.4 million minutes in 2009 to 511.6 million minutes in 2019 and comprising the lion's share of expenditures from the $1.6 billion TRS Fund.[4] At present, hard-of-hearing consumers choose among seven certified IP CTS service providers, most of which have been in the industry for at least a decade, delivering related products and services for the TRS market. The services offered use a combination of automated speech recognition (ASR), human communications assistants (CAs), and devices with screens for captioning (e.g., smartphones, tablets, caption phones).

The growing popularity of IP CTS and an earlier reimbursement methodology have ballooned the demands on the TRS Fund, increasing costs to mobile and telephone subscribers

1 47 U.S.C. § 225.

2 47 U.S.C. § 225(b)(1).

3 47 U.S.C. § 225(d)(3)(B).

4 *See Reforming IP Captioned Telephone Service Rates and Service Standards*, FCC, Draft IP CTS Order for Vote, Sept. 9, 2020, at Table 1, *available at* https://www.fcc.gov/document/reforming-ip-captioned-telephone-service-rates-and-service-standards (reporting level of 2019 IP CTS minutes) [hereinafter 2020 Draft Order]; Misuse of Internet Protocol (IP) Captioned Telephone Service; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, CG Docket Nos. 13-24 and 03-123, Report and Order, Declaratory Ruling, Further Notice of Proposed Rulemaking, and Notice of Inquiry, 33 FCC Rcd 5800, 5809, Table 1 (2018) (2018 Order, 2018 Declaratory Ruling, 2018 Further Notice, or 2018 Notice of Inquiry) (showing IP CTS minutes in 2009).

already chafing from other government fees tacked onto their bills. The FCC began to reduce the reimbursement rate for this program in 2018, which it says saved consumers $350 million.[5] The Commission will vote on September 30 to make further reductions, bringing the reimbursement rate to $1.30 per minute in 2021, a move projected to save another $200 million.[6] But the FCC has declined to implement reimbursement by reverse auction, a reform that would modernize the program with a proven market-based framework and transition it from outmoded regulatory ratemaking. Moreover, an ineffective framework remains in place for the other major FCC-supported relay service, video relay services (VRS) for the deaf. This ineffective framework perpetuates inefficient, high cost provision, and it is slated for further consideration in 2021.

Congress and the FCC should consider how ever-improving technology and market-based reimbursement can improve provision of deaf services, incentivizing high-quality service while reducing costs and meeting the communications needs of a growing number of consumers with hearing loss. This paper reviews the IP CTS program, assesses different models of reimbursement, and demonstrates that a reverse auction is the prudent way to incentivize the provision of IP CTS more efficiently and cost effectively.

I. Background

Most people experience some loss of hearing as they age. The Hearing Loss Association of America suggests some 48 million Americans have hearing challenges.[7] Some 4 million Americans need hearing aids, though only about 20 percent use them.[8] Notably, hearing loss tends to appear in older adults, affecting about 1 in 3 people aged 65-74, and almost half of all adults 75 and older.[9] Further, America's veterans suffer disproportionately from hearing loss at younger ages. In addition to other traumas, many return from service with ears damaged from explosions and gunfire.

To support implementation of the ADA's mandates, the FCC created what is known today as the TRS Fund,[10] which subsidizes captioning, speech translation with American Sign Language, speech-to-text conversion, and re-vocalization of speech. Captioned telephone service is used by people with hearing loss who generally have some residual hearing, but need help to ensure they are capturing the full meaning of a conversation.[11] IP CTS is enabled by a smartphone, tablet, or tabletop telephone with a built-in screen which displays for the individual with hearing loss real-time captions of the other party's speech. The service runs over a mobile wireless broadband connection or a traditional telephone line. IP CTS refers to those services incorporating internet protocol over broadband connections to deliver the captions to the phone, and increasingly to establish the voice connection too.

To further its statutory mandate, the FCC has sought comment on long-term solutions to satisfy the requirement for high-quality, functionally-equivalent services that meet the needs of a growing number of consumers who experience hearing loss. Some commenters have submitted proposals for tiered reimbursement rates that would compensate service providers that handle fewer minutes at higher average rates than ones that handle more minutes, using a series of volume-based compensation tiers. Tiering proponents might argue that, being smaller, they have smaller customer bases across which to cover their costs, so the tier helps improve their operating margin. These proposed solutions are incompatible with a technologically dynamic and efficient IP CTS marketplace, and the FCC should reject them. Instead, the FCC should implement a reverse auction to improve the efficient use of TRS funds.

II. Tiered Reimbursement Rates Don't Make Sense in a Technologically Dynamic Marketplace

Imposing tiered rates for reimbursements is out of place in a dynamic market undergoing technological change. Tiered rates are typically used to control demand. For example, to limit the consumption of water, prices are tiered to increase the cost of consuming more. In electricity, tiered time-of-day pricing is used to steer demand to less expensive off-peak periods with reduced loads. Tiers in the VRS market, however, are not used to curtail or shift demand. The end user price is already zero. IP CTS tier proponents would use tiers for an entirely different purpose—to sustain high cost provision. If the FCC's goal is to ensure service for eligible users more efficiently, providers should be incentivized to provide high-quality service at the lowest possible cost.

As the FCC considers reforms to IP CTS, four companies have submitted proposals for tiered reimbursements for service providers. These proposals do not argue that tiering is needed to promote market entry; indeed, the FCC itself controls market entry with certification. In fact, even tiering proponents recognize its inefficiency.[12] It appears that they promote tiering primarily to "avoid short-term over payment to low-cost providers."[13] The implicit corollary is that providers promoting tiering are high

5 2020 Draft Order, *supra* note 4.

6 *Id.*

7 *Hearing Loss - Facts and Statistics*, Hearing Loss Association of America (2018), *available at* https://www.hearingloss.org/wp-content/uploads/HLAA_HearingLoss_Facts_Statistics.pdf?pdf=FactStats.

8 *Id.*

9 *Hearing Loss: A Common Problem for Older Adults*, National Institute on Aging, NIH, https://www.nia.nih.gov/health/hearing-loss-common-problem-older-adults.

10 *Telecommunications Relay Services (TRS)*, FCC, Feb. 27, 2013, https://www.fcc.gov/trs. The money for the TRS Fund comes from a tax on mobile carriers, which choose to recover it in different ways. When surcharged, TRS fees go under a variety of names that the carriers choose and are not standard. Sometimes these fees are combined with other fees in a Carrier Recovery Charge. Some carriers (e.g., T-Mobile) don't break out taxes and fees.

11 *Captioned Telephone Service (CTS)*, FCC, July 16, 2020, https://www.fcc.gov/cts.

12 Coleman Bazelon & Brent Lutes, *IP CTS Costs and Reimbursement Rates*, The Brattle Group, at 3 (July 14, 2020), *available at* https://ecfsapi.fcc.gov/file/1071646346737/Hamilton%20ex%20parte%20July%2016%202020.pdf (attachment to letter from Wilkinson Barker Knauer, LLP, counsel for Hamilton Relay, Inc., to Marlene H. Dortch, Secretary at the FCC).

13 *Id.*

cost and need tiering to remain profitable without eliminating their inefficiencies. If the goal is to minimize overpayment to low cost providers, price caps and reverse auctions are the preferred policy instruments.[14] In any event, the FCC's draft IP CTS Order declined to adopt tiering for IP CTS that four firms requested. The Commission observed that there is little correlation between the number of minutes compensated and per minute cost in the TRS market, showing that the tiered structure offers no incentive to improve efficiency.[15]

III. A Cautionary Tale: Tiering in Video Relay Services

Tiering has been implemented for the provision of VRS, which allows those who are deaf to communicate via sign language with a video camera equipped device, broadband connection, and qualified interpreter who relays the message between the VRS caller and receiver.[16] An analysis of successive FCC VRS Orders from 2010, 2013, and 2017 shows that tiering has become a 13-year project of regulatory arbitrage which shows no sign of ending. The FCC will have the opportunity to reconsider VRS compensation tiers in 2021.

The FCC initiated volume-based VRS compensation tiers in 2007, characterized by setting different rates for each tranche of minutes handled by a provider within a given month. When tiers were first introduced, the differences in rates among the three tiers were relatively small, as were the number of minutes within the higher rate tiers. The lowest volume tier had a rate that was only seven percent lower than the rate for the highest volume tier, and the highest volume tier included only the first 50,000 IP CTS minutes handled by a provider in that month.[17] With a relatively small gap between the highest and lowest rates, the subsidy for inefficiency was relatively small. However, beginning in 2010, the FCC widened that gap. In 2010, the FCC adopted new tier rates that cut the rate for the lowest rate tier substantially, with lesser reductions on the rates for the two higher rate tiers. The subsidy for inefficiency expanded to nearly 20 percent.[18]

The FCC further expanded support for inefficiency in 2013, when it established a new four-year VRS rate schedule. In its first year, the 2013 order maintained a nearly 20 percent differential between the highest rate tier and the lowest rate tier, which dropped to 16 percent by 2017. However, the FCC also vastly increased the inefficiency subsidy by increasing the number of minutes under the highest rate tier ten-fold, from 50,000 to 500,000 per month, and by doubling the size of the second tier.[19]

In 2013, the FCC also recognized the frailty of administrative ratemaking, noting it "is inherently a contentious, complicated and imprecise process."[20] The FCC acknowledged that tiering had not accomplished the goal of moving high cost Tier I- or Tier II-only providers toward becoming low cost Tier III providers: "the FCC's existing rate-setting process inefficiently supports providers that have failed to achieve economies of scale."[21] The Commission thus issued a Further Notice of Proposed Rulemaking to move to setting rates through competitive bidding.[22] But when its four-year plan came to an end in 2017, the FCC had not progressed in implementing competitive bidding. The FCC had an opportunity to end the regulatory arbitrage, but instead it abandoned competitive bidding in favor of further administrative ratemaking, and it renewed its practice of subsidizing inefficient competition.

The FCC admitted that "the Commission's expectation that smaller VRS providers would be able to make substantial improvements in efficiency within the past four-year period was not fulfilled."[23] Nonetheless, the FCC actually increased the rate on the highest rate tier applicable to "non-emergent" providers by nearly 2 percent, while cutting the rate for the lowest rate tier. As a result, the differential among the tiers grew to over 33 percent. And over the course of the four-year plan, that differential grew to over 45 percent.[24]

The FCC will need to revisit its VRS rates with the end of the current rate schedule in June 2021. The FCC has not yet initiated its next review. It remains to be seen whether, after 13 years, the FCC can finally wean itself from its subsidies for inefficiency.

IV. Lessons from the Ladder of Investment

Tiering is an example of regulators attempting to artificially stimulate competition. It parallels Martin Cave's Ladder of Investment (LOI) regulatory theory, which suggests that as entrants gain market share, they climb the ladder and invest in their own network.[25] The LOI approach was tried in many European countries but largely discontinued after the 2008

14 *See, e.g.*, David E.M. Sappington & Dennis L. Weisman, *Price cap regulation: what have we learned from 25 years of experience in the telecommunications industry?*, 38 J. Reg. Econ. 227 (2010), *available at* https://link.springer.com/article/10.1007/s11149-010-9133-0.

15 2020 Draft Order, *supra* note 4.

16 *FCC Video Relay Services*, FCC, accessed September 9, 2020, https://www.fcc.gov/consumers/guides/video-relay-services.

17 *In the Matter of Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order and Declaratory Ruling, FCC, November 19, 2007, https://docs.fcc.gov/public/attachments/FCC-07-186A1.pdf. The FCC adopted three tiers, with the highest rate tier for the first 50,000 monthly minutes compensated at $6.77, and the lowest rate tier, for all minutes above 500,000 per month, at $6.30.

18 *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Order, FCC, June 28, 2010, https://docs.fcc.gov/public/attachments/FCC-10-115A1.doc. The volume boundaries on the tiers stayed the same, but the two higher rate tiers were $6.24 and $6.23 respectively, while the lowest rate tier dropped to $5.07.

19 *In the Matter of Structure and Practices of the Video Relay Service Program Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Order, FCC, June 7, 2013, at ¶¶ 213-215 https://docs.fcc.gov/public/attachments/FCC-13-82A1.pdf.

20 *Id.* at ¶ 217.

21 *Id.* at ¶ 5.

22 *Id.* at ¶ 223 et seq.

23 *In the Matter of Structure and Practices of the Video Relay Service Program*, Report and Order, FCC, July 6, 2017, at 16 [hereinafter 2017 VRS Order].

24 2017 VRS Order, *supra* note 23. As of July 1, 2019, the Tier I rate was $4.82, and the Tier III rate, $2.63.

25 Martin Cave, *Encouraging Infrastructure Competition via the Ladder of Investment*, 30 Telecomm. Pol'y 223 (April 2006).

financial crisis as it did not support meaningful investment in telecommunications infrastructure by entrant firms.[26] Tiering is similar to the LOI, theoretically giving smaller firms a leg up in the market by giving them higher reimbursement rates. A tiering proponent might argue that short-run benefit of artificial stimulation of competition is more important than setting the right structure for the program in the future.

But recent history disproves the need to create synthetic competition. This year, the FCC has certified two new captioned service providers that are using a new technological approach: fully automated captions that do not use a human captioner.[27] These providers decided to enter without the benefit of tiers and have not sought them. As more than a decade has shown in the VRS market, tiering proponents have not climbed the ladder, so to speak. They do not meaningfully expand volume, and tiers can discourage them from doing so by cutting their margins.

Moreover, the recent entry of new IP CTS providers exposes another danger of tiering: it can shield incumbents from the disruptive impacts of technological change. Tiering proponents have attempted to justify tiering based on caption quality, but in fact tiers have nothing to do with caption quality from a statutory perspective. The tiers are based on volume of minutes. In any case, captions are a differentiated product, and caption quality is one way that people with hearing loss choose among the seven IP CTS providers.

V. Implementing a Reverse Auction Is the Best Way to Improve Efficiency

The FCC declares in the IP CTS Order draft, "We recognize that a properly structured reverse auction could be an effective mechanism to ensure that compensation reflects market forces."[28] However, it claims that it wants to see how technological improvements and increased reliance on ASR impact the costs related to provision of this captioning service. The proposed order will likely give the FCC two years of data, offering sufficient information and time to inform an auction.

In any event, the FCC has proven success with a variety of auction models performed hundreds of times with thousands of telecom providers in different markets. Auctions resolve the biggest problem with administrative rate setting: regulators frequently get the price wrong. Auctions use the market to "true up" the real prices firms are willing to pay. It brings suppliers' private information about their own costs and projections of industry development into play. Moreover, auctions by their nature enable valuable competition. Through auctions, the FCC has issued hundreds of thousands of licenses to firms, non-profits, and individuals, showing that the model enables flexible participation by many players at different levels. By contrast, tiering cements a rigid structure of rate setting for years.

In recent years, the FCC has had significant success realizing social goals through reverse auctions.[29] In contrast to a forward auction in which a single seller offers an item for sale for which the buyers compete with increasing bids, a reverse auction is one in which a single buyer makes potential sellers aware of the good or service it wants and asks them to submit bids. In the case of IP CTS, the buyer (the FCC) is looking for sellers to provide a service (IP CTS) to the most eligible users at the lowest possible price; it also wants to ensure that the services delivered are of high quality and functionally equivalent to services enjoyed by the general population.

Ronald Coase laid the theoretical foundations for market-based regimes for telecommunications regulation and challenged the prevailing regulatory wisdom of administrative allocation of resources. His 1959 article *The Federal Communications Commission*[30] exposed the fallacy of central planning and argued for market-based prices. Coase's proposals were mocked by the policymakers of his day, but the Nobel Prize winning economist has been fully vindicated. The FCC's first auction took place 1994,[31] and there have been more than 100 since. Today, auctions are practiced around the world and are considered the gold standard for regulators to allocate resources.

The FCC now applies the auction model to other public policy programs, notably broadband subsidies for rural areas. Tens of billions of dollars of FCC subsidies have been refocused to areas with little to no network buildout and redeployed under a reverse auction model in which operators bid for the right to connect an area at the lowest cost.[32] The expected cost to connect more than 700,000 homes and businesses in 45 states had been $5 billion, but because the reverse auction model was used, the actual cost was $1.5 billion.[33] A similar model will be used for the $20.4 billion Rural Digital Opportunity Fund earmarked for 6 million underserved homes. An additional $9 billion is earmarked for the 5G Fund for Rural America, including $1 billion for precision agriculture. These auctions include innovative mechanisms to weight varying levels of service quality, so that the market can balance cost and quality.

In 2019, the IP CTS provider CaptionCall presented a reverse auction model to the FCC designed by Stanford University

26 Anders Henten & Morten Falch, *The future of telecom regulation: The case of Denmark* (2014), http://econstor.eu/bitstream/10419/101404/1/795227221.pdf (paper presented at ITS, Bruxelles, Belgium).

27 Among the CA-based providers, a CA repeats what is spoken by the person on the phone with the subscriber and ASR technology transcribes the CA's voice into captions. The CA makes corrections adds punctuation to the captions, which are then displayed on the captioning telephone. The two newly certified entities rely solely on ASR-generated captions.

28 2020 Draft Order, *supra* note 4.

29 *Reverse Auction*, FCC, accessed September 9, 2020, https://www.fcc.gov/tags/reverse-auction.

30 Ronald H. Coase, *The Federal Communications Commission*, 2 J.L. & Econ. 1 (1959), *available at* www.jstor.org/stable/724927 (accessed July 9, 2020).

31 Ronald H. Coase, *Comment on Thomas W. Hazlett: Assigning Property Rights to Radio Spectrum Users: Why Did FCC License Auctions Take 67 Years?*, 41 J.L. & Econ. 577 (1998), *available at* www.jstor.org/stable/10.1086/467403 (accessed July 16, 2020).

32 *Connect America Auction to Expand Broadband to 713,176 Rural Locations*, FCC, August 28, 2018, https://www.fcc.gov/document/connect-america-auction-expand-broadband-713176-rural-locations.

33 Ajit Pai, *Statement before the Subcommittee on Financial Services and General Government*, Committee on Appropriations, U.S. Senate, May 7, 2019, https://docs.fcc.gov/public/attachments/DOC-357354A1.pdf.

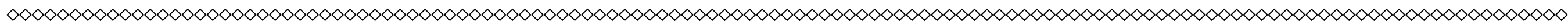
professor Andrzej Skrzypacz.[34] It is designed to incentivize low bids while preserving post-auction competitive choice by rewarding winning bidders with new customers to be reimbursed at the same rate. The auction starts with a reserve price (or the starting reimbursement rate), and bidders compete to drive down the price. The auction is designed to deliver multiple winners; those providers within the range of the winning bid also become winners. The proposal protects existing customers by allowing all providers to serve them at the winning rate. It also encourages new entrants by treating entrants like winners. The auction can be held at different intervals (annually, bi-annually) to allow the providers to rebid.

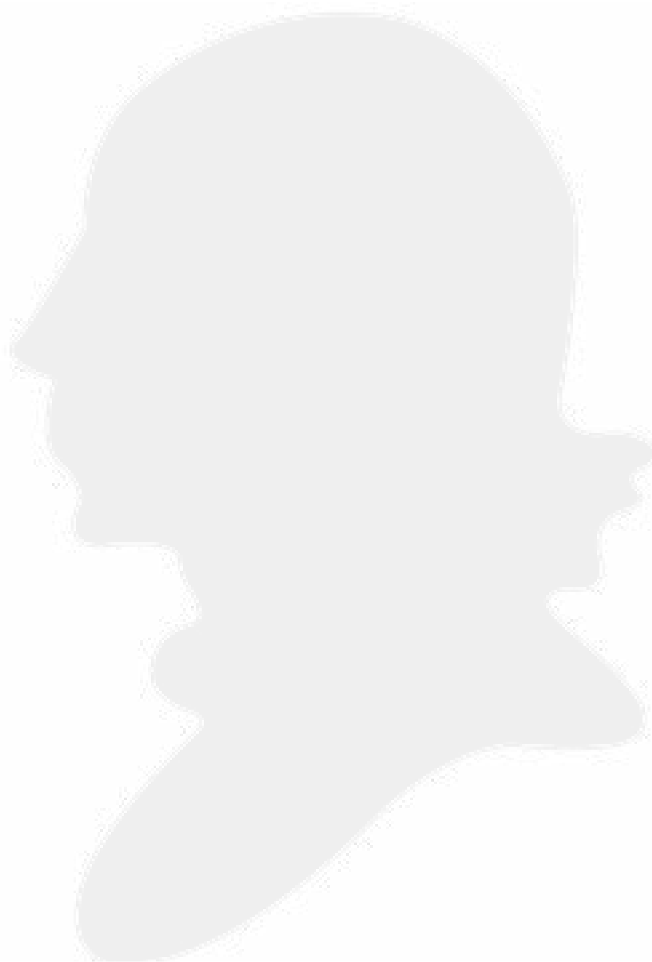
Professor Skrzypacz's proposal shows that, as with rural broadband, a reverse auction can be deployed to allow the market, rather than bureaucrats, to determine appropriate IP CTS compensation rates. This solution has proven to work well in other contexts, and it is superior to the status quo of rent-seeking regulation through the tiered reimbursement of IP CTS rates.

VI. Conclusion

On the 30th anniversary of the ADA, it is fitting to consider the valuable societal goals of ensuring that deaf and hard-of-hearing Americans can participate fully with telecommunications services, and to investigate whether the FCC is fulfilling its statutory mandate to ensure the rapid, efficient delivery of these services. This paper reviewed the FCC's IP CTS program and competing proposals to deliver services to the deaf and hearing impaired. It described how tiered reimbursement rates in the VRS market are antithetical to the goals of the ADA, rewarding high cost providers with counterproductive incentives not to improve the volume and efficiency of their service. The FCC is taking an interim step by reducing the reimbursement rate for IP CTS, but to ensure sustainability of IP CTS, it should adopt a reverse auction. This framework should be adopted for the VRS market as well. The FCC's objective should be to maximize the volume and efficiency of services for the deaf and people with hearing loss—and the ADA demands it.

34 Andrzej Skrzypacz, *Reverse Auction Proposal for Setting IP CTS Rates*, September 17, 2018, at Appendix A, https://ecfsapi.fcc.gov/file/10919156138279/CaptionCall_-_September_Rates_Ex_Parte%20(PUBLIC)_Redacted.pdf.





The Accidental Defender of the Constitution

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A Review of:

Defender in Chief: Donald Trump's Fight for Presidential Power, by John Yoo
https://us.macmillan.com/books/9781250269577

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Other Views:

• Julian E. Zelizer, *The Many Varieties of Donald Trump*, N.Y. Times, (Aug. 5, 2020), https://www.nytimes.com/2020/08/05/books/review/gerald-f-seib-we-should-have-seen-it-coming-john-yoo-stuart-stevens.html.

• Louis Fisher, *Defender in Chief: Donald Trump's Fight for Presidential Power*, LegBranch.org, (Aug. 12, 2020), https://www.legbranch.org/defender-in-chief-donald-trumps-fight-for-presidential-power/.

• Gene Healy, *Book Review: John Yoo: The Man Who Would Make the President King*, Cato, (Sept. 24, 2020), https://www.cato.org/publications/commentary/book-review-john-yoo-man-who-would-make-president-king.

• Jane Chong, *Donald Trump, Constitutional Grift, and John Yoo*, Wash. Monthly, (Sept. 11, 2020), https://washingtonmonthly.com/2020/09/11/donald-trump-constitutional-grift-and-john-yoo/.

• Matt Ford, *John Yoo's Twisted Path to Trumpism*, The New Republic, (July 22, 2020), https://newrepublic.com/article/158589/john-yoo-twisted-path-trumpism.

Decades from now, when historians assess Donald Trump's presidency with sobriety and dispassion, the ironies are apt to stand out most. Donald Trump is the populist who lost the popular vote, owing his ascendancy to the Electoral College, an institution designed to temper popular excesses and which Trump himself, while pondering a presidential bid in 2012, rebuked as "a disaster for democracy." Trump has been condemned as the Constitution's scourge by progressives for whom the Constitution is mostly a nuisance to evolve beyond, framed by white racists in a time before Wokeness. Trump is the president who upheld the rule of law by firing the FBI director. He submitted to investigation by a special counsel whom he reviled but who nevertheless cleared him. Trump was impeached anyway by Democrats who were pushed into the exercise by partisans. But Democratic partisanship proved so devoid of appeal outside the activist Left that impeachment, though it happened just a few months earlier, rated nary a mention in the Democratic National Convention.

Is it any wonder that these four years have aged most of us tenfold?

We're not through with the ironies, though. For present purposes, here is the most striking one: Through all of this, President Trump's most compelling defender may be John Yoo, a brilliant conservative thinker who appeared to have both feet firmly planted in Camp Never Trump when the president took office in 2017.

John Yoo is the Emanuel Heller Professor of Law at the University of California's Berkeley Law School, where it is not easy to be a conservative academic, but anti-Trumpers are welcome. Professor Yoo is a nonpareil scholar of the presidency—in particular, of executive power as conceived in the Constitution and practiced through more than two centuries. He is a prolific author, his grasp of his core concentration immeasurably enhanced by service as a high-ranking Justice Department official. He played a pivotal role in national security policy development in the post-9/11 era, when President George W. Bush grappled with the vexing challenges of international jihadism, often with ferocious partisan opposition in Congress.

It is fair to say that *Defender in Chief: Donald Trump's Fight for Presidential Power* is a book Yoo never thought he'd write. Fair because he says so himself, right up front: "If friends had told me on January 21, 2017, that I would write a book on Donald Trump as a defender of the Constitution, I would have questioned their sanity."

But write one he has, and it is stellar.

Impeachment is not the only reason that Donald Trump has had to fight for the right to wield the presidential power he won in 2016. He has had to fight for it against an opposition party that has labored to cast doubt on his legitimacy; against a judiciary teeming with progressive activists who have portrayed him as sui generis and thus without entitlement to the comity and presumption of regularity accorded to other presidents; and

against the sprawling administrative state, including executive branch agencies he nominally controls.

Yoo's thesis is that, by waging these battles, Trump has safeguarded the presidency as the Framers envisioned it when they crafted our founding law. Two things must be borne in mind about that.

The first is that this is not Trump's conscious objective. Even the most ardent Trump supporters acknowledge that their man, a non-lawyer, is no expert on the Constitution, let alone on the Framers' conception of executive power. As Yoo recounts, Trump could only guess at the number of articles in the document (it is seven, not the eleven or twelve he estimated). It is not unheard of for the president to mangle fundamental principles in the stray tweet or ad-lib. The euphemism customarily attached to him is that he is "transactional"; he does not look at politics, let alone the constitutional framework in which politics plays out, in ideological or theoretical terms.

Yoo is quite right that, contrary to his political opposition's dire predictions and studied outrage, Trump has turned out to be a staunch defender of the Constitution. His excrescences—some necessary disruptions of Washington's way of doing business, some the inevitable fallout of unsavory character traits—have "broken political norms." Yet, Yoo stresses, Trump "did not seek to break constitutional understandings." Instead, "[h]e has returned to the Framers' original vision of the presidency as an office of unity, vigor, and independence." In so doing, Trump "may have done the nation his greatest service" by "securing the benefits of an energetic executive for his successors."

Perhaps so. This, however, is an accident of the Framers' design. Trump's opponents have sought to undermine him in abusive and novel ways. He has taken refuge in the Constitution because its authors fashioned it as the antidote to such antics. Its system of divided powers and competing checks is based on the assumptions that governmental officials will exceed their authority at the expense of other officials, and that the aggrieved must be empowered to defend themselves. Trump's concrete experience bears out those prescient assumptions. He did not start out with a purpose to vindicate our founding law. He inexorably gravitated to it as he sought to vindicate *himself*.

The second thing to bear in mind flows from the first: *Defender in Chief* is at least as much about the *presidency* as it is about the *president*. To be sure, the canvas is sketched by President Trump's peculiar struggles. His November 2016 triumph was secured through a state-driven majority in the Electoral College despite his being thumped in the popular vote. There have been revolts from within and without—from the executive policy bureaucracy as well as the law enforcement and intelligence apparatus; from a special counsel insulated from Justice Department supervision; and from the judiciary. And Trump is just the fourth president in American history to face a serious congressional impeachment investigation, and only the third to be formally impeached.

Yoo recounts these episodes in faithful detail, but they mainly serve as his jumping-off points. Their importance lies not in how the Trump presidency has been shaped by its crises, but in how those crises have tested the executive authority established by the delegates to the 1787 convention in Philadelphia.

That is not to say *Defender in Chief* shies away from analysis of the Trump policy menu. Indeed, among the book's valuable insights is Yoo's explication of a coherent "Trump Doctrine" on foreign relations—a detectable shift away from America as the selfless (and increasingly debt-plagued) guarantor of global stability, and toward an America unapologetically pursuing her own interests, impatient with free-riding allies and remote conflicts. Still, the book's focus is the Constitution's framework rather than president's preferences. The author thus finds himself in deep disagreement with some Trump initiatives while nonetheless defending the chief executive's prerogative to press them.

The fact that one can oppose a policy while vindicating the executive's discretion to adopt that policy is a testament to the Framers' genius in designing a governing system for a free people. One needn't agree, for example, with Trump's skepticism about NATO, his "trade wars," or his immigration restrictionism to grasp the imperative of having policy made by a unitary, democratically accountable president, rather than by anonymous but willful bureaucrats. In preserving the prerogatives of the presidency, Trump has preserved the Constitution's balance of powers. In light of the Framers' understanding that the separation of powers is the primary bulwark against tyranny, Trump's defense of presidential power is a defense of liberty itself.

In Yoo's telling, the president's battle for the Constitution has played out on three stages. The first was his two-part fight to stave off impeachment: The drawn-out, Obama administration-authorized FBI probe that eventually became the investigation overseen by Special Counsel Robert Mueller, followed by the partisan Ukraine kerfuffle. Secondly, Trump has faced down opposition by entrenched national-security and foreign-service bureaucrats—collectively known as the "interagency"—who chafe at traditional executive leadership in foreign affairs and war. Third was the gladiatorial arena into which Congress devolved over judicial appointments, especially those of Neil Gorsuch and Brett Kavanaugh to the Supreme Court. These and lower court appointments, Yoo surmises, could restore the original understanding of the Constitution to its proper place as the foundation for deciding questions of governmental power and individual liberty.

Again, Yoo's frame of reference is executive power. The underlying facts of Trump's brouhahas are pertinent, but Yoo is doing constitutional law more than history. My own book, *Ball of Collusion* (which Professor Yoo graciously mentions), digs into the history and focuses on the dangers of an incumbent administration's exploitation of counterintelligence spying powers against its political opposition. Yoo, by contrast, homes in on the threat the Trump-Russia investigation posed to the separation of powers. Consequently, he focuses on Trump's vindication of the chief executive's right to fire such subordinates as FBI Director James Comey and Special Counsel Mueller—the president actually dismissed the former and claimed authority to dismiss the latter—even as he applauds Trump for allowing Mueller to complete his investigation.

The sordid details of the story can obscure the central importance of the president's right to fire subordinates. The Constitution's chief concern is liberty. One way it protects

liberty is by vesting in the president *all* executive power, and that protection will be undermined if we tolerate encroachments on that vesting. The flipside of this is that it is only *executive* power that is vested in the president; he does not make the laws he executes, but Congress does. Yoo fondly recalls the late, great Justice Antonin Scalia's observation that "every tinhorn dictator" has a beautiful bill of rights, but it's the separation of powers that protects liberty.

As students of Machiavelli, Locke, Montesquieu, and Blackstone, the Framers were convinced that the combination of legislative and executive authority in one set of hands was the very definition of tyranny. To permit Congress to strip away a president's control of the executive branch by limiting his capacity to fire subordinates—officers who do not exercise their own power but only power delegated to them by the president—would indulge what Alexander Hamilton saw as the gravest threat to the separation of powers: The "legislature's propensity to intrude upon the rights and to absorb the powers of the other departments." That would be particularly egregious as applied to matters touching on law enforcement. As Yoo explains, Article II of the Constitution vests the executive power in the president without qualification. At the time of the founding, the enforcement of law was unquestionably a core executive power. Were there any doubt, Article II goes on to enumerate the president's duty to "take Care that the Laws be faithfully executed."

Equally tending toward tyranny would be the exercise of law enforcement power absent political accountability. A century of progressive governance has ingrained in federal law enforcement an ethos of independence now metastasized into arrogance. Its self-image is that of a fourth branch of government: the rule of law personified, untouchable by grimy politics.

For administrative state enthusiasts, it is a quaint formality that the police power is assigned to the executive branch. In effect, they reject the premise that the Justice Department and its premier investigative component, the FBI, are answerable to the president, which is the only thing that makes them, like him, accountable to voters who bear the brunt of law enforcement policy. Moreover, those who would free DOJ and the FBI from the president's control ignore that a big chunk of what the bureau does—namely, counterintelligence—is not actually a law enforcement function to vindicate the rule of law, but rather a domestic security mission that supports the president's core constitutional duty to protect the nation. Instead, they see the Attorney General as the public's lawyer, not the president's, and the FBI as guided solely by "the law"—an abstraction with little meaning but what is supplied by partisan politics.

This bureaucratic ideal provides a mirage of stability at the expense of the liberty derived from the separation of powers. Yoo discusses progressive scholars who see Article II's vesting of executive power in the president as essentially titular. The chief executive is a single person whose title is president, but beyond that, the president is granted very few, narrow enumerated powers: to take care that the laws be executed, to issue pardons, and to be the commander-in-chief. The executive is essentially bereft of inherent authority, functioning as the junior partner in a power-sharing arrangement with Congress, which holds a reservoir of "necessary and proper" power to determine the means of exercising federal authority. Such a vision of executive power, along with the idea that *executive* power is distinct from *administrative* power, would render the Constitution, as Yoo puts it, "a loose system of checks and balances that gives Congress room to create new institutional designs to govern the administrative state and limit the growth of the presidency."

Yoo persuasively contends that the original meaning of executive power is best illustrated by then-Treasury Secretary and executive visionary Alexander Hamilton in his defense of President Washington's 1793 Neutrality Proclamation, which kept the United States out of Europe's burgeoning war. The Vesting Clause states a general grant of executive power in its historical abundance. The subsequently enumerated powers (including the Take Care Clause) "specify and regulate the principal articles implied in the definition of Executive Power; leaving the rest to flow from the general grant." Thus, "the Executive Power of the Nation is vested in the President; subject only to the exceptions and qualifications" expressed elsewhere in the Constitution. These exceptions are to be narrowly construed. Consequently, in the case of President Trump, the president may not appoint top executive officers without Senate consent because the Constitution says so; however, as the Supreme Court held in *Myers v. United States* (1926), the president may fire such officials at will, because the Constitution is silent on dismissal—the chief executive's authority is presumed, and there is no implied requirement of Senate approval.

The Constitution, in sum, commands an energetic, unitary executive, who participates in the separation of powers to uphold liberty, and who is responsible for the actions of subordinates—whom he must be able to dismiss at will. The last point is important because most executive branch officials are not elected, but appointed by the president; to maintain accountability to the people, the president must be able to dismiss these subordinates for any reason, and the voters must be the ones to determine the appropriateness of those reasons in the next presidential election. This is the framework that President Trump preserved by firing Director Comey, reining in an FBI that flouted limitations on its awesome law enforcement and counterintelligence powers and waded without sufficient predication into the republic's electoral politics. Similarly, Trump defended the framework by maintaining—despite congressional, administrative, and media caterwauling—his authority to dismiss the special counsel, although he wisely (or, more accurately, through the prudent intercession of White House staffers and informal advisers) refrained from exercising that prerogative. By not only allowing Mueller to complete his investigation but also cooperating with it—for example, by waiving executive privilege and making the White House Counsel available for extensive prosecutor interviews—the president avoided a suicidal political misstep. He ended up being convincingly cleared of conspiring with the Kremlin.

In considering Trump's conduct of foreign relations, Yoo persists in the leitmotif of robust presidential power: the Constitution's design of an executive with "advantages of unity, speed, and decision, specifically so that it could protect the national security and pursue our interests abroad."

Some changes wrought by President Trump have been

"earth-shattering." Under the Obama administration, American fortification of the liberal international order had evolved into American decline in favor of multilateral governance arrangements. In prioritizing American sovereignty, Trump is determined to reverse the decline and skeptical about global governance. In his view, international organizations and their aspirational but practically unenforceable agreements promote bureaucratic sprawl, but not security and liberty. Furthermore, the progressive piety that enlightened engagement with rogue regimes would evolve them into responsible actors has proved delusional. The rogues cheat, provoke, and pose increasing threats to a United States tied down by herculean efforts to uphold outdated or ill-conceived international commitments.

It is hyperbole to claim, as Trump critics do, that his response is isolationism. There has, however, been a retrenchment in furtherance of an "America First" national security strategy. The primary focus is on protection of the homeland, with an emphasis on border security and enforcement of the immigration laws. There is more focus on great power competition, and diminished interest in collective efforts to combat jihadism, transnational crime, and climate change. Rather than striving for global stability, Trump expects reciprocity—fair (rather than free) trade and allies who pony up for the privilege of the American security umbrella they enjoy. The president seeks to strengthen American military might, cyber and space capabilities, and prowess in the technological, energy, and manufacturing sectors. The more removed a foreign concern or conflict is from American interests, the more apt it is to be addressed only by quiet diplomacy, with no commitment to act. Rivals are alternatively courted and threatened; allies are goaded to do more for themselves.

Thus, the withdrawal from the Iran nuclear deal, the Trans-Pacific Partnership, and the Paris Accord on climate change. A trade war with China, and tariffs used to pressure even friends. Moscow stung by the U.S. abrogation of a Reagan-era treaty on nuclear arms and provision of lethal weapons to Ukraine; but Moscow simultaneously cajoled by entreaties for better relations—potentially including a new nuclear arms pact. Missile strikes, without congressional authorization, against the atrocious Assad regime in Syria, even as American forces are gradually withdrawn from the region. A dizzying switch from the threat of war with the "little rocket man" in North Korea to an unlikely Trump-Kim Jong-un bromance, the ultimate utility or foolishness of which remains to be seen. A strong backing of Israel, including moving the U.S. embassy to Jerusalem (which administrations of both parties have long promised, but which only Trump was willing to do against the "interagency" conventional wisdom); this has led, not to the catastrophe predicted by experts, but to dramatically improved relations between Israel and Sunni Islamic states—the better to contain Iran.

As Yoo demonstrates, Trump has been able to carry out his doctrine, and thus deliver on campaign promises, because the Framers conceived of the executive power as including foreign affairs supremacy. That is, the executive power is subject to the significant congressional checks spelled out in the Constitution, but only those checks. For example, the president cannot make treaties without Senate approval, but he does not need Senate input to abrogate them.

As with law enforcement, the Constitution's silence in the domain of foreign relations implies exclusive executive authority because that is a traditional executive function. This does not lead to an imperial presidency. Congress retains powers of the purse and over legislation, and thus the ability to kill presidential initiatives that need funding and statutory authorization. Lawmakers can conduct aggressive oversight. And, as we've recently seen, Congress may impeach the president over alleged misconduct in foreign relations. But these checks are essentially political, not legal. In fact, to the extent there have been legal controversies over Trump's border security policies and limitations on foreign ingress into the United States (the so-called travel ban and refugee restrictions), these have been muted because Congress—recognizing the imperative of decisive executive action in crisis conditions—has endowed the presidency with sweeping statutory authority.

Yoo makes three further related points about the relationship between Congress and the president in the realm of foreign affairs. First, Yoo rehearses his contention that the Constitution's vesting in Congress of the power to *declare* war is not the power to *initiate* war, which largely rests with the president. (This topic was central to Yoo's excellent 2006 book, *The Powers of War and Peace*). Second, Yoo develops a deft separation of powers theory based on whether the Framers placed an authority in Article I or Article II. For example, the treaty power, located in Article II, is essentially executive but with an ancillary legislative function (the Senate's "Advice and Consent" role); whereas the power to enact law, located in Article I, is essentially legislative but with an ancillary executive function (the president's veto power, which can be overridden by a congressional supermajority).

Third, Yoo gives careful consideration to the Trump impeachment. House Democrats accused the president of abusing his powers by enmeshing a reluctant foreign government in American electoral politics and, as a pressure point, delaying the transfer of congressionally appropriated defense assistance that Ukraine needs to defend its border from Russian aggression. One need not endorse the president's actions, nor adopt Trump's description of his performance as "perfect," to appreciate that his dealings with Ukraine fell short of impeachable offenses. The Framers made impeachment and removal extraordinarily difficult to carry out because they were to be reserved for egregious executive wrongs that provoke dire crises. Less than a year out from a presidential election, under circumstances where Trump did finally provide the defense aid to Ukraine, impeachment was overkill. The episode caused no harm to our security and, if the public were upset about it, it could vote Trump out of office.

It was vital, Yoo argues, for Trump to defend the presidency by fighting his impeachment. Doing so reaffirmed the unitary executive, as opposed to the vaunted policy community, as the organ of democratically accountable foreign policy in a free republic. In addition, by prevailing, Trump safeguarded the Constitution's design of the presidency against congressional partisans all too willing to convert impeachment into a tool of quotidian political combat.

The president's many judicial appointments may be his most enduring legacy and therefore, from Yoo's perspective, his most consequential defense of the Constitution. With the indefatigable assistance of Majority Leader Mitch McConnell

in the Republican-controlled Senate (exploiting the decision of Democrats, under former Majority Leader Harry Reid, to do away with the filibuster in most judicial confirmations), Trump has filled vacancies on the bench at a record-making pace.

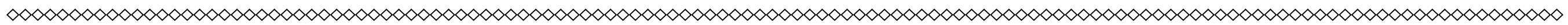
As Yoo points out, the enterprise has not been as transformative as it may appear at first blush. The majority of Trump's judges have filled slots previously held by appointees of other Republican presidents. Trump would have to be reelected to shift the ideological orientation of several important appellate tribunals. Still, Trump has made his mark by stressing, more than any of his predecessors, the imperative of a more conservative, originalist judiciary to preserve our constitutional order. He has been uniquely transparent about relying on the expertise of the Federalist Society and the Heritage Foundation in identifying worthy, young nominees who can reasonably be expected to serve for decades. Trump likely would not have been elected but for the untimely death of Justice Scalia, which placed in sharp relief for the electorate the very different visions of the judiciary held by the competing parties. Voters animated by democratic self-determination were alarmed at the types of judges Hillary Clinton would undoubtedly have appointed. That was Trump's opening.

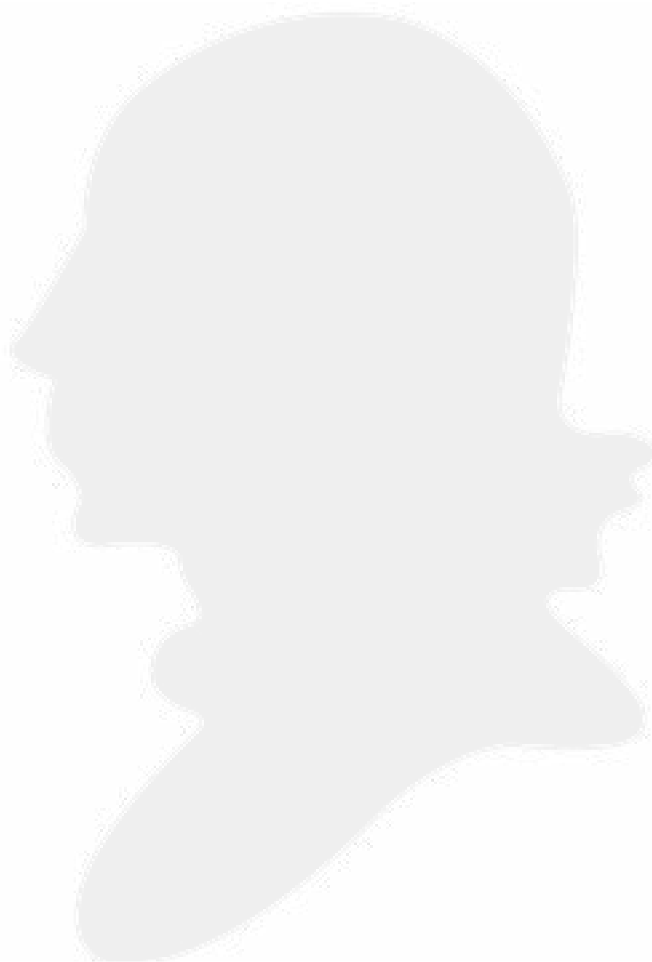
The president has not only appointed originalist judges, he has fought for them. Many presidents would have abandoned the pitched battle over then-Judge Kavanaugh's nomination to replace Justice Anthony Kennedy. Democrats turned the affair into an appalling brawl, taking character assassination to an unprecedented level—which, after the Robert Bork and Clarence Thomas nomination fights, is saying something. So deep-seated is the hostility to Kavanaugh that, though unable to derail his nomination, leading Democrats have vowed to explore impeaching him. Beyond that, with the objective of overcoming the Trump/McConnell confirmation conveyor belt, Democrats are openly resorting to their FDR playbook: threatening to expand the High Court and pack it with liberal Democrats when they are in power. This is such a radical strategy for politicizing court decisions that even Roosevelt, at the height of his powers following an overwhelming 1936 election victory that left him with supermajorities in both houses of Congress, had to back down after proposing it.

Trump's duels with his opponents over judges, then, have upheld the Constitution in crucial ways. By facing down impeachment threats and court-packing schemes, Trump has reinforced judicial independence, which, as Yoo points out, stabilizes democracy and secures minority rights. Further, the president has vindicated separation of powers principles by ensuring that the Senate could not exploit its advice and consent authority to, in effect, usurp the chief executive's power to appoint judges. Finally, by putting a premium on the installation of judges who will uphold the Constitution's protection of individual liberty against government overreach, Trump has defended the Framers' design and the core rights of Americans to life, liberty, and security.

Has all of this been in the president's self-interest? Without a doubt. Donald Trump did not come to power as a crusader for the Constitution. He is self-driven and without reverence for the norms of his office. Politically, he is motivated to disrupt Washington's established order, to revitalize American sovereignty, and to recalibrate America's interactions with the world in a way that elevates America's interests. He made no secret of this, and it is what his core supporters elected him to do.

As John Yoo demonstrates in this scintillating study, that is the way liberty is vindicated in our governing system. Without the Constitution, President Trump could not have pursued his agenda. Without defending the Constitution, the Trump presidency could not have survived.





Can Originalism Constrain the Imperial Presidency?

By Lee J. Strang

Federalism & Separation of Powers Practice Group

A Review of:

The Living Presidency: An Originalist Argument Against Its Ever-Expanding Powers, by Saikrishna Bangalore Prakash (Harvard University Press, 2020)
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Other Views:

- Gary L. Gregg II, *Is It Too Late to Recover the Founders' Presidency?*, Law & Liberty, (June 16, 2020), https://lawliberty.org/book-review/is-it-too-late-to-recover-the-founders-presidency/.
- Peter M. Shane, *The Originalist Myth of the Unitary Executive*, 19 U. Pa. J. Const'l L. 323, (2016), *available at* https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1614&context=jcl.
- Saikrishna B. Prakash & John C. Yoo, *The True Extent of Executive Power*, Federalist Soc'y Teleforum, (July 29, 2020), https://fedsoc.org/events/the-true-extent-of-executive-power.

The Living Presidency: An Originalist Argument Against Its Ever-Expanding Powers, by Professor Saikrishna Bangalore Prakash, is a readable, systematic, and well-reasoned description of today's living presidency, as well as a roadmap showing the way back to the constitutionally-authorized office. *The Living Presidency*'s thesis is that today's presidents routinely "alter the Constitution and laws" such that the office has "become the amending executive."[1] But, in the beginning, "the original presidency was not meant to be all-powerful [and] lacked the unilateral authority to amend the Constitution or to make, amend, or unmake statutory law."[2] Professor Prakash describes the causes of today's out-sized presidency, details support for his claims that the living presidency departs from the Constitution's original meaning, and then suggests means to tame the living presidency.

The Living Presidency is readable and accessible to lawyers and educated laymen. At one point, Professor Prakash refers to the "generations of schoolchildren who grew up watching Schoolhouse Rock's catchy song and video 'I'm Just a Bill.'"[3] He also colorfully describes Justice Hugo Black's statement that the president merely executes the law, calling it "as antiquated as a rotary dial telephone, at least if we use modern practice as the benchmark."[4] *The Living Presidency* is peppered with concrete examples supporting Professor Prakash's points. For example, while detailing the presidents' push to acquire the power to substantively amend federal statutes, he uses the example of President Barack Obama delaying implementation of the Affordable Care Act's employer mandate via "transition relief," which he justified by pointing to past presidents' delayed implementation of tax legislation.[5] One of Professor Prakash's most effective techniques is to propose thought experiments about alternative choices that could have been made by the Framers and Ratifiers. "[I]magine what Article II would look like," he asks, "if it had been written in a radically different era." Would Americans in 1975 have created such a powerful executive?[6]

Part of *The Living Presidency*'s accessibility also stems from its clear organization. In Chapter 2, Professor Prakash methodically explains why presidents have accumulated the power to make and amend laws. He identifies and discusses multiple motivations that have caused presidents to push the boundaries of their authority, including the love of power, a hunger for fame, and a desire to keep

1 Saikrishna Bangalore Prakash, The Living Presidency: An Originalist Argument Against its Ever-Expanding Powers 42 (2020).

2 *Id.*

3 *Id.* at 41.

4 *Id.* at 216.

5 *Id.* at 227-29.

6 *Id.* at 24.

their promises to voters.[7] *The Living Presidency* overall likewise has a clear, interlocking structure that introduces Professor Prakash's idea of the living presidency, then examines the causes of the living presidency in general, and then drills down into three of the most important ways the living presidency has grown.

I. *The Living Presidency*'s Provocative Argument

Chapter 1, provocatively titled *Kingly Beginnings*, pushes against the conventional wisdom that the Framers and Ratifiers created a modest, even weak, republican chief magistrate whose primary task was to enforce Congress' will. Instead, Professor Prakash argues that the "Constitution did create a monarch, albeit a limited, republican one."[8] In other words, the president was to be a monarch because of his king-like powers, but the office was also limited in ways called for by our republican form of government. He details the key aspects of the new office, including a method of selection independent of the legislature, a relatively long term of office with the possibility for additional terms, a single office holder, and a variety of powers to control executive officers and to check Congress.[9] Then, why is the conventional wisdom conventional? Because, according to Professor Prakash, "we have exalted form over substance. We have been deceived by the republican trappings of the Constitution," such as the president's title, "and have paid little heed to its actual features."[10] Still—and this is the key point of Chapter 1—despite the office's robust powers, Professor Prakash maintains that Article II did not authorize the president to alter the law, either the Constitution or congressional statute. Instead, constitutional change is authorized only via Article V, and statutory change is authorized only via Article I.[11]

Chapters 2 and 3 contain Professor Prakash's methodical and fulsome explanation for the evolution of the office to today's living presidency. Chapter 2 explains *why* presidents have sought and gained lawmaking power. Professor Prakash details the numerous factors—both internal and external to the office, and both benign and self-serving—that have caused presidents to seek more power, along with the resulting transformation of the presidency into a law- and Constitution-changing office. For example, presidents desire power (seemingly a negative), and presidents wish to keep campaign promises (seemingly a positive), and these (along with other) motivations push presidents to expand the bounds of their power.[12] Part of the persuasiveness of Professor Prakash's description derives from the fact that the identified causes of the growth of presidential power are not tied to a particular party, ideology, or personality; instead, the causes have accumulated over time, and the presidents responding to them do so out of typical human motivations.

Chapter 3 continues the argument begun in Chapter 2 by explaining *how* presidents have acquired lawmaking power. The living presidency arose from a number of mutually-supporting mechanisms. First, Article II's grant of all "executive Power" to the president was plausibly leveraged by presidents to argue that their capacious interpretations of their own power were faithful to the text. Second, the other branches of government were hindered structurally and by their own choosing from effectively combatting the energetic presidency. For instance, Congress' many structural limitations, such as bi-cameralism, hindered its capacity to quickly and effectively check the president. Third, modern political circumstances, including especially the president's claim to be the sole nationally-elected tribune of the American people, gave the president an advantage over Congress in democratic legitimacy.

Professor Prakash even-handedly lays blame for today's sorry state of affairs at the feet of Americans of all political stripes. Readers see this in the examples he employs and his explanations. For example, Professor Prakash details how Presidents Bill Clinton, George W. Bush, and Barack Obama all expanded the scope of the president's commander-in-chief power to suit their immediate policy interests.[13] Professor Prakash argues that the development of presidents into party leaders has caused Americans in the president's party to support their president's illegal exercises of power:[14]

> A Democratic president who negates a pro-life provision . . . on grounds that it is unconstitutional can expect almost unanimous support from pro-choice co-partisans . . . . And a Republican president who asserts that an existing federal policy insufficiently respects the freedom of religion will find a base champing at the bit to endorse this assertion.[15]

Similarly, Professor Prakash's proposals in the last chapter to cabin the living presidency would benefit Americans of all political stripes, at least in the long-term, though they have political valence in the short term. For example, Professor Prakash recommends augmenting congressional staff.[16] This would give Congress the manpower it needs to identify, evaluate, and marshal legal and other resources to tame the living presidency, and there is no obvious political reason why this proposal should not gain widespread bi-partisan support in the long run.

In Chapter 4, Professor Prakash criticizes both originalists and living constitutionalists for what he calls "fickle originalism" and "fickle living constitutionalism."[17] He focuses most of his critical attention on living constitutionalists which makes sense, as readers will learn, because of their blind spot regarding the living presidency. Professor Prakash argues that originalists have fallen prey to finding support for today's "imperial" presidency by misinterpreting Article II. He criticizes "fickle originalists" for "apply[ing] different rules" to the presidency, such as citing

7 *Id.* at 44-57.

8 *Id.* at 23.

9 *Id.* at 29-30.

10 *Id.* at 36.

11 *Id.* at 36-41.

12 *Id.* at 45-46, 48-53.

13 *Id.* at 175-77.

14 *Id.* at 80-82.

15 *Id.* at 81-82.

16 *Id.* at 253-55.

17 *Id.* at 94.

to modern practices to justify their interpretations.[18] He does not name names, however, which makes it difficult for readers to know which scholars and arguments he has in mind.

Living constitutionalists, on the other hand, put aside their typical embrace of changing constitutional meaning and uncharacteristically "would have us believe that the Founders got it right on this one point alone" by creating a limited executive.[19] Professor Prakash identifies more of the "fickle living constitutionalists" he is criticizing, and that makes it easier to understand his argument. For instance, he describes Professor Bruce Ackerman's theory of informal amendment and shows how one could reasonably apply it to the modern presidency to justify President George W. Bush's practices (which Ackerman himself criticized).[20] Even here, however, it would have been valuable to know how representative the couple of identified "fickle" living constitutionalists are of their compatriots.

In Chapters 5-8, *The Living Presidency* describes the key constitutional changes to the executive office itself and to Congress, which helped create the living presidency. Each chapter tells a familiar, sad tale. The original Constitution identified limited presidential power over a given subject and, over time, presidents pushed and pushed at the constitutional limits for reasons and using means described in Chapters 2 and 3. Because of this constant pressure pushing limits ever outward, today the living presidency has accumulated additional powers through multiple informal amendments to the Constitution. Professor Prakash dubs this the "practice-makes-perfect argument for the Constitution—that repeated practices can change the Constitution's meaning."[21] Chapter 5 introduces the three chapters that follow by summarizing the office's mutation from defending the Constitution to amending it. The office occupied by George Washington did not authorize the president to play any role in changing constitutional meaning, and it required the president to follow the Constitution and federal statutes. President Donald Trump's office, by contrast, has acquired the powers to change constitutional meaning and to modify or reject congressional statutes. Chapter 6 argues that presidents since Harry Truman have shifted the war-making powers from Congress to the presidency. Chapter 7 shows how presidents came to dominate American foreign affairs at the expense of Congress and the original Constitution. Chapter 8 details the living presidency's practice of evading, changing, and voiding federal statutes, along with its acquisition of lawmaking capacity.

Chapter 9, *The Living Presidency*'s last chapter, provides a map showing how Americans can return the office of the president to something like its original contours. Professor Prakash offers thirteen ways that Congress could limit executive power, including, for instance, requiring senior White House officials to receive Senate confirmation.[22] He also argues that federal courts should remove jurisdictional barriers to judicial review of executive actions (such as the political question doctrine) and reduce deference to executive decisions (such as that accorded under *Chevron*), which would empower the courts to better check the living presidency. And most importantly, he argues that courts should renounce the practice-makes-perfect or "historical gloss" theory of interpreting executive power.[23]

Provocatively, *The Living Presidency* identifies three more aggressive reforms that Professor Prakash believes are unconstitutional according to the original meaning, but that living constitutionalists would likely consider constitutional. Professor Prakash proposes, for instance, that Congress should convert existing *executive* administrative agencies (which are generally headed by a single person removable at the president's will) into *independent* administrative agencies (headed by multiple individuals removable by the president only for cause). This would increase the number of law-executing officials who are relatively independent of the president and who would therefore be less likely to engage in the living presidency's penchant for amending, ignoring, and creating law. This move would simultaneously reduce the living presidency's power and enhance Congress' power by creating institutions that more faithfully execute laws passed by Congress.[24] Professor Prakash briefly comments that these reforms would be most likely to pass prior to a presidential election when both political parties can hedge their risks through limiting the living presidency's power.[25]

II. What To Do With Nonoriginalist Presidential "Precedents"?

In Professor Prakash's telling, every American institution and most Americans have been part of the problem. "The transformations [of the presidency] are all around us, and every institution—Congress, the courts, the executive, and the public—has helped usher in those changes."[26] Of course, presidents, past and present, covet greater power for a variety of reasons, including fundamentally to secure their policy objectives. The federal judiciary, hedged in by both constitutionally mandated and self-imposed jurisdictional limits, has avoided disrupting the expansion of presidential powers. Congress is the branch that has ceded the most authority to the executive, because of its own institutional limitations, the role of parties, and its desire to shed responsibility for controversial subjects, among other reasons. Most worrisome, however, is the role played by the American people, who have come to expect presidents to make and keep campaign promises that can only be kept through unconstitutional

18 *Id.* at 98.

19 *Id.*

20 *Id.*

21 *Id.* at 226.

22 *Id.* at 250-68.

23 *Id.* at 272-74.

24 Professor Prakash also proposes an independent impeachment agency to which Congress would delegate its impeachment functions and which would be staffed by "experts" who would define and conduct impeachments and impeachment trials. Were this to happen, such an agency would be ironic because the living constitutionalism that gave rise to the living presidency and which helped Congress bust through its own limited and enumerated powers, would end up stripping Congress of its impeachment power and using that stolen power to tame the living presidency.

25 Prakash, *supra* note 1, at 271-72.

26 *Id.* at 216.

assertions of executive authority. If American voters want federal officials to achieve goals that require the officials to exceed their limited and enumerated powers, it is practically impossible to tame officials' use of those unconstitutional powers. This is the identical challenge that faces originalist scholars who argue that Congress exceeded its Commerce Clause authority when it enacted federal anti-discrimination laws[27]—there is no appetite among Americans to return Congress to its limited powers in this and other areas.

This raises the question of whether and to what extent presidential practices that violate the original meaning of Article II—the practices the form the basis of the "historical gloss" on Article II—possess any legal authority. The phenomenon described by Professor Prakash is one in which current governmental practices—the living presidency—diverge from what the Constitution's original meaning authorizes, and it is ubiquitous in today's American constitutional system. All three branches of the federal government have (especially since the New Deal) regularly acted inconsistently with the Constitution's original meaning. Congress regularly enacts legislation that is beyond its limited and enumerated powers, and the judiciary regularly issues rulings that are not warranted by the original meaning.[28] (Professor Prakash notes this at a number of points.[29]) Indeed, the phenomenon of nonoriginalist practices is so pervasive that critics of originalism have regularly employed this fact to criticize originalism,[30] and originalists have worked hard to respond to the criticism.[31]

One common response by originalists is to argue that at least some of the nonoriginalist practices have some legal authority. For instance, I have argued that the original meaning of "judicial Power" in Article III requires federal judges to follow some nonoriginalist precedent, and that this approach has many virtues including protecting the rule of law.[32] Most originalists appear to follow something like that approach.

The Living Presidency is called "an originalist argument" against the living presidency, but it does not discuss whether some of the living presidency's nonoriginalist practices retain legal authority similar to that of nonoriginalist judicial precedents. *If*, upon investigation, it turns out to be the case that some of the living presidency's nonoriginalist practices retain legal authority, then that undermines Professor Prakash's argument because some aspects of the living presidency would be legitimate under originalism itself. How much it is undermined depends on how many such practices are legally supported and the importance of those practices. Professor Prakash's argument is only valid to the extent nonoriginalist living presidency practices do not retain any legal authority.

What would an investigation of the legal authority of nonoriginalist executive practices look like?[33] A scholar would have to determine whether the original meaning of "executive Power" (or possibly some other aspect of the president's power as outlined in Article II) includes within it a requirement (or at least an authorization) that the current occupant of the White House follow his predecessors' unconstitutional "precedents." At first glance, there are reasons pointing to different conclusions. On the one hand, the reasons that pushed the American legal system (following the English legal system) to adopt stare decisis seem to apply to executive actions as well as judicial. For instance, the rule of law is enhanced by stability, which is promoted when the president exercises his powers within the same boundaries as his predecessors and does not transgress them. The rule of law also benefits when the president does not withdraw too much from the outer bounds set by past presidents who extended those boundaries. On the other hand, the history of English and American courts shows that stare decisis was originally understood to mean judges were following preexisting law; precedent was the product of the application of that law to concrete circumstances, not a development of new law that had to be followed. But that declaratory theory of judicial decision-making does not appear to have applied to the king, or later to American executives, and therefore it may not apply to the president.

The question is also complicated because, even if the original meaning of "executive Power" did not include a requirement or authorization for presidents to follow prior presidents' nonoriginalist practices, it could still be the case that presidents have the authority to do so if the practice falls into the "construction zone."[34] Summarized briefly, the construction zone exists when the Constitution's original meaning does not determine the outcome of a legal case. The original meaning may narrow the universe of outcomes, but it does not identify one, uniquely correct answer. One might argue that, in cases where the original meaning is underdetermined, the president

27 The Supreme Court upheld the 1964 Civil Rights Act using nonoriginalist reasoning in *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241 (1964), and *Katzenbach v. McClung,* 379 U.S. 294 (1964).

28 For instance, Congress purportedly relied on its Commerce Clause power to regulate farmer Filburn's production and consumption of wheat on his farm, and the Supreme Court ruled that that statute was constitutional. Wickard v. Filburn, 317 U.S. 111 (1942).

29 *See, e.g.*, Prakash, *supra* note 1, at 12, 282.

30 This nonoriginalist criticism comes in a number of forms. Most powerfully, some critics contend that the Constitution includes current practices (including nonoriginalist practices) so that originalists are mistaken about what the Constitution actually is. *See, e.g.*, Ronald Dworkin, Law's Empire 202, 225-27 (1986) (describing law as the best interpretation of legal practice). Second, nonoriginalist critics claim that overruling all or most nonoriginalist precedent would cause dramatic harm to rule of law values. *See, e.g.*, Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. Rev. 204, 231 (1980) (making the most prominent early version of this claim).

31 Originalists have responded to the problem of nonoriginalist precedent in two basic ways. Some have argued for the "get-rid-of-it-all" position, and some have argued that originalism should accept at least some nonoriginalist precedent. *See* Lee J. Strang, Originalism's Promise: A Natural Law Account of the American Constitution 33-34 (2019) (summarizing the existing positions).

32 *Id.* at 103-41.

33 To be clear, I have not investigated this question or surveyed the literature on it.

34 *See* Strang, *supra* note 31, at 31-33, 63-91 (explaining constitutional construction and articulating the Deference Conception of Construction).

may create binding practices that later presidents must follow.[35] If, for instance, the Constitution does not determinatively settle whether the president has the power to unilaterally remove principal executive officers,[36] then past presidents' practice of doing so would liquidate constitutional meaning in favor of a presidential power to do so.

III. What Does the Living Presidency Mean for Living Constitutionalism?

Professor Prakash's book shows how the living presidency is a theoretical and practical problem for living constitutionalism. Living constitutionalists, as Professor Prakash details, claim that their constitutional theory gives Americans the good parts of the Constitution—things like robust free speech protections and few limits on Congress' power to do good—and lets them avoid being stuck with the bad parts—such as limits on administrative agencies and limited protection for equality and free speech.[37] However, when it comes to the living presidency, living constitutionalists suddenly "stay[] rather mum. . . . For many living constitutionalists, quite a few of whom loathe the idea of expanding presidential powers, the living presidency is akin to the crazy uncle in the attic: the less said, the better."[38] Living constitutionalists avoid the living presidency because it undermines living constitutionalism's claim to be "a theory of beneficial constitutional change."[39] The living presidency also shows that their living constitutionalism is selective and not a principled theory of interpretation.

Professor Prakash also persuasively argues that the existing practices of the living presidency are unstable. "Nothing about existing practices signals an end to such shifts. We have not arrived at some stable equilibrium. Given the incentives and motives of presidents, and their aides, today's conceptions will not be the same as tomorrow's."[40] Moreover, because the personal and institutional incentives that caused the presidency to metastasize continue to operate, the dynamic is one of continued indeterminacy that pushes toward greater presidential power. These problems show that the living presidency is not normatively attractive because of the instability it creates along with an ever more powerful president.

35 *See* William Baude, *Constitutional Liquidation*, 71 Stan. L. Rev. 1 (2019) (describing constitutional "liquidation," whereby the Constitution's meaning, where indeterminate, is settled by deliberate practice that receives public sanction).

36 I tentatively argue in a forthcoming essay that the Constitution *did* determinatively give the president that power, and that Congress, in the Decision of 1789, identified that determinative meaning. Lee J. Strang, *An Evaluation of Evidence for Constitutional Construction From "The Decision of 1789" Debate in the First Congress*, 46 Ohio N.U. L. Rev. ___ (2020).

37 Prakash, *supra* note 1, at 99-103.

38 *Id.* at 104.

39 *Id.*

40 *Id.* at 212-13.

IV. Is Originalism the Best Way to Contain the Living Presidency?

In the debates between originalists and nonoriginalists, a standard nonoriginalist move, as Professor Prakash notes, is to point out how the living Constitution is more normatively attractive than the original one—that it gets better results even if it fudges on procedure. *The Living Presidency* challenges that claim in two important ways. First and directly, Professor Prakash details how the bloated powers of the living presidency exceed what most Americans, regardless of their jurisprudential views, believe is healthy. Most Americans, for instance, do not want the President to be able to unilaterally enter into a land war overseas. By any objective measure, the living presidency is too powerful.

Second, the living presidency's key mechanism of growth is past presidential practice, which is easy to manipulate to achieve immediate partisan goals. The partisans of the current occupant of the White House will marshal past presidential acts to support their president, while critics will marshal their own examples and distinguish the president's support. For instance, both Democrats and Republicans have switched between supporting and opposing congressional regulation of the armed forces based on the Commander in Chief Clause, depending on whether Clinton, Bush, or Obama was president.[41] This dynamic leads Professor Prakash to conclude that "muddled partisan disputes are about all we can expect under the living presidency approach."[42]

Originalism, by contrast and in principle, excludes resort to "modern politics or ethical considerations" in the dynamic of expanding presidential power, and therefore its "answers are clear."[43] Most of us will like some aspects of the original presidency and dislike other aspects. But most of us also wish to abandon the status quo: fights over indeterminate presidential practice aiming solely at current partisan advantage. The letter of party affiliation after a president's name ought not be relevant to whether he has the power to employ "enhanced interrogation techniques," or to "commit" but not "engage in" hostilities in Libya.[44] Originalism holds out the promise of reducing both the growth of the living presidency and the partisan acrimony that erupts over how to interpret past presidential practices.

Professor Prakash's argument that originalism possesses these two virtues is powerful and attractive, and I *think* it is accurate. However, there are at least two related reasons for caution. First, originalism has not been the governing method of interpretation since at least the New Deal, so it could be the case that originalism will not be able to bear the burden of governing—that originalism will not be able to separate politics from law, as it promises, when it is the predominant theory of interpretation.[45] Second, there are hints in some areas of originalist scholarship that originalism is susceptible to cracking under the strain of having to provide

41 *Id.* at 175-77.

42 *Id.* at 177.

43 *Id.*

44 *Id.* at 176-79.

45 At least in its focal case, when identifying and applying determinate original meaning.

sufficient—that is, accurate and determinate—answers to operate our constitutional system. For instance, what does one make of the variety of purportedly originalist interpretations of various provisions of the Constitution that conflict with one another? Professor Randy Barnett articulated one interpretation of the Commerce Clause, while Professor Jack Balkin contended for another, and both scholars presented originalist arguments to support their respective claims,[46] *and* both scholars' conclusions seemed to match their respective policy preferences. Originalists have reasonable responses to this phenomenon,[47] but this along with other hints should make originalists cautious.

V. How Does Contingency Affect Interpretation?

Professor Prakash repeatedly highlights the contingency of the contours of the executive office and how the office identified in Article II depends on the Framers' and Ratifiers' choices made in a particular context based on their reasonable—though not uniquely reasonable—assessment of the needs of and threats to the new constitutional order. "The Founders made a number of design choices for the new government, each backed by sound reasons."[48] To note just one: in developing the office of the president, the Framers were strongly influenced by the failure of post-Revolution state executives, which they thought resulted from their lack of independence and energy.[49] Different reasonable constitutional drafters in different contexts would reasonably have made different choices, as Professor Prakash's many thought experiments show.

By highlighting this constitutional contingency, *The Living Presidency* further emphasizes originalism's contributions to the rule of law. Precisely because of the dramatic contingency inherent in the Framers' and Ratifiers' prudential choices about how best to structure the executive office, reasonable Americans—then and now—may reasonably criticize their choices. For instance, it is reasonable to argue that Article II should have been more detailed, like Article I, to guard against the practice-makes-perfect theory of presidential power.[50] But if the president—or a judge, or any officer—can interpret the Constitution differently based on the interpreter's own prudential judgments (that differ from the judgments made by the Framers and Ratifiers), then the law's meaning will be subject to wide variation, and the Constitution's coordinating capacity will be correspondingly reduced.[51] Originalism, through its faithfulness to the Constitution's original meaning, secures the benefits of the rule of law by causing officers to treat the Framers' and Ratifiers' reasons, communicated via the original meaning, as exclusionary reasons.[52]

VI. Conclusion

The Living Presidency is a clear and persuasive account of how the modern presidency slipped its constitutional bonds so that today the president has the power to amend the Constitution and to amend, reject, and make federal law. Though he suggests a number of remedies for the living presidency, the story told by Professor Prakash is especially disturbing because the living presidency's many causes are so powerful and deeply entrenched that it makes hope for a return to the original presidency difficult to maintain.

46 Randy E. Barnett, Restoring the Lost Constitution: The Presumption of Liberty 278-97 (2004); Jack M. Balkin, *Commerce*, 109 Mich. L. Rev. 1 (2010).

47 My view on this phenomenon is that we should expect such pressures to pose challenges to originalism but that, over time, the scholarship will identify areas of agreement, areas of agreed-disagreement, and areas of pure disagreement on what the original meaning is. This challenge is unlike that facing living constitutionalism, where proponents of different partisan perspectives are incentivized to divine the president's powers from indeterminate presidential practices.

48 Prakash, *supra* note 1, at 62.

49 *Id.* at 24-27.

50 *Id.* at 65-68.

51 *See* Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 Geo. L.J. 97, 99-100 (2016) (summarizing the authors' similar argument).

52 These reasons, communicated through the original meaning, exclude other reasons from an officer's practical deliberations and thereby secure the original meaning's primacy and capacity to coordinate. *See* Strang, *supra* note 31, at 221-309 (making this argument).

Open Questions in *Lieu v. Federal Election Commission*: Due Process, Adverseness, & Article III Standing

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Other Views:

• Albert W. Alschuler, Laurence H. Tribe, et al., *Why Limits on Contributions to Super PACs Should Survive* Citizens United, 86 Fordham L. Rev. 2299 (2018), *available at* https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=5493&context=flr.

• Press Release, Free Speech for People, *Congressman Ted Lieu, Lead Plaintiff in Lieu v. FEC Discusses Lawsuit Seeking to End Super PAC Spending in U.S. Elections*, https://www.commondreams.org/newswire/2020/07/10/congressman-ted-lieu-lead-plaintiff-lieu-v-fec-discusses-lawsuit-seeking-end# (includes link to virtual briefing).

• Matea Gold, *Can super PACs be put back in the box?* Wash. Post (July 6, 2016), https://www.washingtonpost.com/politics/can-super-pacs-be-put-back-in-the-box/2016/07/06/9beb18ba-43b1-11e6-8856-f26de2537a9d_story.html.

In July 2016, a group of candidates for federal office, led by Representative Ted Lieu and Senator Jeff Merkley, filed an administrative complaint with the Federal Election Commission (FEC). Their target: ten advocacy groups, most of which had either criticized the candidates or praised their opponents in the past. Their demand: for the FEC to prosecute the groups for receiving excessive contributions. Their legal team: a "powerhouse."[1] Their goal: "to end super PAC spending in US elections."[2]

The complaint disappeared from the public consciousness almost immediately. In a way, it was designed to fail, at least in the short term. It asked the FEC to pursue the ten advocacy groups for violating a federal law that sets a $5,000 per-contributor cap on annual contributions to "political committees." (In ordinary English, the law says that if you want to pool your money with others to run ads about federal candidates, the most any one of you can chip in is $5,000.) According to Representative Lieu and his co-complainants, the ten advocacy groups had accepted contributions far exceeding the $5,000 cap.[3]

Factually, they were right. But as their complaint acknowledged, the courts and the FEC have said that the $5,000 cap cannot constitutionally be applied to groups that engage in independent advocacy alone (speech independent of candidates, that is). In 2010, the en banc D.C. Circuit held in a case called *SpeechNow.org v. FEC* that the $5,000 contribution cap violates the First Amendment as applied to "independent expenditure-only group[s]."[4] Months later, the FEC issued an advisory opinion to similar effect, confirming that independent advocacy groups "may solicit and accept unlimited contributions from individuals, political committees, corporations, and labor organizations."[5]

Those rulings made the FEC's dismissal of the *Lieu* complaint something of a foregone conclusion. Representative Lieu and his co-complainants freely acknowledged that the targets of their complaint were independent expenditure committees.[6] They also acknowledged that the FEC's 2010 advisory opinion lets independent expenditure committees accept unlimited contributions.[7] So unsurprisingly, the FEC dismissed the administrative complaint. The candidates then sued the FEC

1 Matea Gold, *Can super PACs be put back in the box?* Wash. Post (July 6, 2016), https://tinyurl.com/zbewje7.

2 Press Release, Campaign for Accountability, *CfA Joins All-Star Legal Team Representing Candidates and Members of Congress Seeking to Abolish Super PAC Spending* (July 7, 2016), https://tinyurl.com/y4lddfx6.

3 Administrative Complaint ¶¶ 44-83, Matter Under Review 7101 (July 7, 2016), *available at* https://tinyurl.com/yxnd7pbp.

4 SpeechNow.org v. FEC, 599 F.3d 686, 696 (D.C. Cir. 2010) (en banc).

5 FEC Adv. Op. 2010-11, 2010 WL 3184269, at *2 (July 22, 2010).

6 Admin. Compl., *supra* note 3, at ¶¶ 24-33.

7 *Id.* at ¶ 7.

in federal court, seeking to compel the agency to reopen the enforcement proceeding. Again unsurprisingly, the U.S. District Court for the District of Columbia considered itself bound by the D.C. Circuit's opinion in *SpeechNow*. It upheld the FEC's decision to dismiss the candidates' administrative complaint.[8] The candidates appealed. And the D.C. Circuit summarily affirmed, observing that "the challenged contributions to independent-expenditure-only political committees cannot constitutionally be prohibited under *SpeechNow.org v. FEC*."[9]

Little in that chain of events appears to have surprised the candidates. As they told the D.C. Circuit, "[t]hey challenged *SpeechNow*, not because they expected the FEC or the district court to overrule it, but simply to preserve their claims for appeal."[10] So when the D.C. Circuit denied their petition for en banc rehearing this past winter, the candidates petitioned the Supreme Court for a writ of certiorari. Their question presented is whether the federal government can constitutionally limit the amount of money Americans pool for political speech. The goal remains the same as in 2016: "giving the Supreme Court the opportunity to overrule the *SpeechNow* decision so we can rebuild our democracy."[11] The Supreme Court is scheduled to consider the petition on November 6.

On the merits, we find the candidates' arguments against *SpeechNow* unpersuasive. (Our firm represented SpeechNow in the *SpeechNow* case, so our views on the merits are probably to be expected.) But a lot has already been written about *SpeechNow* and "SuperPACs," so we're not going to focus on the merits arguments here. Instead, we're going to address three threshold issues that the parties in *Lieu* have largely ignored: (A) due process considerations, (B) lack of party adverseness, and (C) Article III standing. In our view, the *Lieu* case raises serious questions on each of these fronts (and similar ones are likely to arise in future cases that use the FEC complaint process to try to alter campaign-finance laws). Throughout the four year life of the case, however, these questions have received virtually no attention. Whatever the correct answers may be, they should have been ventilated thoroughly by the parties and the lower courts long before *Lieu* arrived at the Supreme Court.

I. Background

A. SpeechNow *and SuperPACs*

Since the 1970s, the Supreme Court has distinguished between "expenditures" and "contributions" made in the context of political campaigns. Simplifying slightly, making an expenditure is the act of spending your own money on a political advertisement. You like Candidate X, so you buy an ad in the newspaper saying, "Vote for Candidate X." Making a contribution, by contrast, is the act of giving money to someone else so that they can use it for political ends. You like Candidate Y, so you donate to Candidate Y's campaign. All of this activity is protected to one degree or another by the First Amendment. But the Supreme Court has said that contributions are somewhat less protected than expenditures. As a result, the Court has upheld some governmental limits on the amount of money you can contribute—to candidates and political parties, for example. But the Court has held that in no circumstances can the government limit the amount of money you can spend for political speech on your own.[12]

For years, this framework created a peculiar result. Each citizen could spend as much money as he or she wanted on independent political speech; those "expenditures" could not constitutionally be capped. At the same time, however, federal campaign-finance law barred citizens from pooling their money for that same speech. If you were to combine your resources with others, that would be a "contribution," your joint effort would be a "political committee," and anyone who chipped in more than $5,000 per year would be courting federal criminal charges. The result favored wealthy individuals (and more recently, corporations and labor unions[13]) over people of more modest means. Sheldon Adelson or Chevron or the SEIU could each spend $100 million of their own money on political ads. Those are "expenditures." But if two citizens were to pool more than $5,000 each for that same kind of advocacy, they'd face federal charges for making excessive "contributions" to one another.[14]

That regime ended just over a decade ago. In March 2010, the en banc D.C. Circuit ruled in *SpeechNow.org v. FEC* that the federal government cannot limit the amount of money Americans pool for independent political speech.[15] As applied to independent advocacy groups, the court held, the Federal Election Campaign Act's $5,000 cap on contributions violates the First Amendment.[16]

The Department of Justice chose not to seek Supreme Court review.[17] The FEC issued an advisory opinion announcing that it would no longer enforce the $5,000 contribution limit against independent advocacy groups like SpeechNow.[18] And those groups entered the popular lexicon as "SuperPACs."

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8 Lieu v. FEC, 370 F. Supp. 3d 175, 178 (D.D.C. 2019).

9 Lieu v. FEC, No. 19-5072, 2019 WL 5394632, at *1 (D.C. Cir. Oct. 3, 2019).

10 Appellant's Response in Opposition to FEC's Motion for Summary Affirmance and Affirmative Request to Hold FEC's Motion in Abeyance at 3-4, Lieu v. FEC, No. 19-5072 (D.C. Cir. filed May 30, 2019), *available at* https://tinyurl.com/y4goy5ly.

11 Press Release, Free Speech for People, *Supreme Court Will Have Chance to Review Case Seeking to End Super PAC Spending in U.S. Elections* (June 18, 2020), https://tinyurl.com/yxrsunws.

12 Buckley v. Valeo, 424 U.S. 1, 46-51 (1976) (per curiam). There are some nuances to that rule. For example, the government has some leeway to limit even independent expenditures by foreign nationals and government contractors. Bluman v. FEC, 800 F. Supp. 2d 281 (D.D.C. 2011), *aff'd*, 565 U.S. 1104 (2012); Wagner v. FEC, 793 F.3d 1 (D.C. Cir. 2015) (en banc), *cert. denied sub nom.* Miller v. FEC, 136 S. Ct. 895 (2016).

13 Citizens United v. FEC, 558 U.S. 310, 318 (2010).

14 52 U.S.C. § 30116(a)(1)(C).

15 599 F.3d at 696.

16 *Id.*

17 Letter from Attorney General Eric H. Holder, Jr., to Senate Majority Leader Harry Reid (June 16, 2010), *available at* https://tinyurl.com/y3rd9nja. The plaintiffs in *SpeechNow* sought certiorari, unsuccessfully, on the separate question whether independent expenditure committees could be subject to registration and reporting laws.

18 FEC Adv. Op. 2010-11, 2010 WL 3184269 (July 22, 2010).

In the years since, five other circuits have followed the D.C. Circuit's lead and invalidated limits on the amount of money people can pool for political speech.[19] "Few contested legal questions," the Second Circuit remarked in 2013, "are answered so consistently by so many courts and judges."[20]

B. The Lieu *Litigation*

Over the past decade, proponents of campaign-finance laws have sought to pare back SuperPACs using various strategies. In 2014, for example, law professor Lawrence Lessig created a SuperPAC dedicated to abolishing SuperPACs.[21] Elsewhere, campaign-finance proponents lobbied state and local lawmakers to limit contributions to independent advocacy groups—a tactic designed to tee up the issue for litigation. "One potential route to Supreme Court review," proponents observed in 2018, is "the enactment of legislation incompatible with the right declared by *SpeechNow*."[22] To that end, one coalition began "encourag[ing] legislatures to enact these limits, especially in places where federal courts of appeals have not yet ruled on their validity."[23]

The *Lieu* complaint marked another step in the campaign. Under the Federal Election Campaign Act, "[a]ny person" may file a complaint with the FEC, alleging that a candidate or speaker or group has violated campaign-finance law and asking the agency to prosecute.[24] In mid-2016, Representative Lieu and his co-complainants used that procedure and submitted a complaint.[25] They identified ten independent advocacy groups, most of which had at one time or another spent money opposing one or another of the complaining candidates.[26] They asserted that each of those ten groups had accepted per-person contributions of far more than the $5,000 allowed by federal law.[27] And citing those "knowing"[28] violations, they asked the FEC to "conduct an immediate investigation" and sue the offending groups for declaratory and injunctive relief.[29]

SpeechNow stood as an acknowledged obstacle. The $5,000 contribution cap the candidates invoked was the same one the D.C. Circuit had held could not be applied to independent advocacy groups. Since 2010, FEC Advisory Opinion 2010-11 has formally declared that independent advocacy groups can "solicit and accept unlimited contributions."[30] Congress has long provided that such advisory opinions "may be relied upon" by the public at large.[31] And the candidates nowhere disputed that the ten groups their complaint targeted had complied with the 2010 advisory opinion in all respects.[32] As they acknowledged on filing day, their complaint was less about the ten groups targeted and more about getting *SpeechNow*'s reasoning up to the Supreme Court.[33]

The FEC dismissed the complaint. The candidates, the agency noted, "concede that *SpeechNow* and [Advisory Opinion] 2010-11 permit the conduct described in the Complaint."[34] So the agency found no basis for opening an enforcement action.

The candidates challenged that dismissal in federal court. Federal campaign-finance law authorizes this kind of suit; a complainant "aggrieved" by the FEC's failure to proceed with their complaint can sue the FEC and seek a court order setting aside the agency's decision not to open an enforcement action.[35] And in the candidates' view, the FEC had acted "contrary to law" by dismissing their administrative complaint based on the D.C. Circuit's decision in *SpeechNow*. Because *SpeechNow* was wrongly decided, the candidates argued, it should be abrogated and cannot form a valid basis for dismissing their complaint.

The U.S. District Court for the District of Columbia rejected that argument. To accept the candidates' position, the court reasoned, "would be tantamount to a declaration that binding precedent of the D.C. Circuit was unlawful."[36] Case dismissed.

The candidates fared no better before the D.C. Circuit. The appeals court twice denied their requests for en banc review and summarily affirmed the district court's judgment with one sentence of analysis: "The Federal Election Commission's decision to dismiss the administrative complaint was not contrary to law as the challenged contributions to independent-expenditure-only political committees cannot constitutionally be prohibited under *SpeechNow.org v. FEC*."[37]

With four years of preliminaries out of the way, Representative Lieu and his co-plaintiffs repaired to the Supreme Court for the main event. This past June, the candidates petitioned for certiorari on the question whether "the federal statutory limit on contributions to political committees . . . comports with the First Amendment as applied to committees that make only

19 *See infra* note 111.

20 N.Y. Progress & Prot. PAC v. Walsh, 733 F.3d 483, 488 (2d Cir. 2013).

21 Derek Willis, *Mayday, a Super PAC to Fight Super PACs, Stumbles in Its First Outing*, N.Y. Times (Nov. 17, 2014), https://tinyurl.com/yxznkwml.

22 Albert W. Alschuler, Laurence H. Tribe, et al., *Why Limits on Contributions to Super PACs Should Survive* Citizens United, 86 Fordham L. Rev. 2299, 2346 (2018) (hereinafter Alschuler & Tribe).

23 *Id.*

24 52 U.S.C. § 30109(a)(1).

25 Admin. Compl., *supra* note 3, at ¶¶ 9-21.

26 *Id.* at ¶¶ 9-21, 24-33.

27 *Id.* at ¶¶ 44-83.

28 *Id.* at ¶¶ 1, 3, 85-95.

29 *Id.* at ¶ 96.

30 FEC Adv. Op. 2010-11, 2010 WL 3184269, at *2 (July 22, 2010).

31 52 U.S.C. § 30108(c)(1).

32 Admin. Compl., *supra* note 3, at ¶ 7.

33 Gold, *supra* note 1 ("A team of attorneys including Laurence Tribe, a professor of constitutional law at Harvard University, and Richard Painter, who was the chief ethics lawyer for former president George W. Bush, are taking aim at *SpeechNow.org* with a new complaint they hope will reach the Supreme Court before the 2020 elections.").

34 FEC, Factual and Legal Analysis at 13, Matter Under Review 7101 (June 1, 2017), *available at* https://tinyurl.com/y6qq84r7.

35 52 U.S.C. § 30109(a)(1), (a)(8)(A).

36 *Lieu*, 370 F. Supp. 3d at 186.

37 *Lieu*, 2019 WL 5394632, at *1.

independent expenditures."[38] In September, the FEC filed its brief in opposition,[39] and on October 21 the candidates submitted their reply.[40] With the case distributed for the Court's November 6 conference, a decision on whether to grant certiorari could issue as early as November 9.

II. Questions Unanswered

Much of the parties' cert-stage briefing in *Lieu* centers on the merits of the candidates' argument: whether *SpeechNow* was correctly decided and whether the federal government can limit the amount of money Americans pool for political speech. (Unusually, the FEC's cert-stage brief argues that the $5,000 contribution limit violates the First Amendment as applied to independent advocacy groups.) The parties also argue over whether the enforcement action the candidates asked the FEC to prosecute would technically amount to a "sanction" against the targeted groups. Largely ignored, though, are three issues that implicate the integrity of the adversarial process and traditional notions of fairness. First: whether the premise of the candidates' complaint—that the FEC should have prosecuted political groups for acts the agency had previously blessed—breaks with basic rule of law principles. Second: whether it is prudent to adjudicate the scope of First Amendment rights in a case where no affected speaker is a party. And third: whether the candidates have Article III standing.

A. Lieu *Raises Grave Due Process Concerns*

1. The Candidates Urge the FEC to Prosecute Acts Previously Declared Legal

Foremost are the due process concerns. Consider the circumstances. In July 2010, the FEC announced that independent expenditure committees could lawfully "solicit and accept unlimited contributions."[41] By statute, Congress has provided that FEC advisory opinions "may be relied upon" by "any person" similarly situated to the person who requested the opinion.[42] And by all accounts, every contribution listed in the *Lieu* plaintiffs' administrative complaint conformed to the FEC's 2010 opinion.[43]

Even so, the candidates filed their complaint, asking the FEC to "immediate[ly] investigat[e]" the contributions and to sue the recipients in federal court.[44] The agency rightly dismissed the matter, in part because it found that "Respondents are entitled to rely on [the 2010 advisory opinion] unless they acted contrary to Commission guidance."[45] Resorting to federal court, the candidates have now sought to vacate that dismissal; they seek a federal court order directing the FEC to renew enforcement proceedings based on acts taken in reliance on FEC guidance.

Granting the candidates that relief would raise constitutional concerns of the highest order. Americans have a right to expect "some minimum standard of decency, honor, and reliability in their dealings with their Government."[46] That is why "traditional notions of fairness" bar the government from blessing a course of conduct with one hand and punishing it with the other.[47] For the FEC to take the steps the candidates demand would thus "result in precisely the kind of 'unfair surprise' against which [the Supreme Court's] cases have long warned."[48] The Constitution forbids treating people that way, and the FEC was right to rebuff the candidates' request.

2. The Candidates' Efforts to Minimize the Due Process Concerns Lack Merit

In the lower courts and in their reply brief, the candidates minimized this concern on the ground that they asked the FEC to sue their critics for "only declaratory relief."[49] For three reasons, that contention lacks merit.

First, it appears to misstate the record; the candidates' complaint to the FEC requested not just declaratory relief, but "injunctive relief" too.[50] And whatever might be said of declaratory relief (more on that below), targeting advocacy groups for a federal injunction is a grave exercise of coercive power. In the lower courts, in fact, the candidates acknowledged as much. Before the district court, they contrasted "declaratory judgment[s]" with "the strong remedy of injunction."[51] They distanced declaratory relief from "other coercive relief"—like injunctions.[52] They also noted that "coercive measure[s]" (like injunctions) generally translate to "a 'sanction.'"[53]

Second, even if the candidates had in fact asked the FEC to pursue declaratory relief alone, it's no small matter for the government to single out political groups for declaratory judgment actions. Contrary to the candidates' view, a declaratory judgment absolutely visits "distinctive burden[s]" on those bound by it.[54] It

38 Petition for Writ of Certiorari at i, Lieu v. FEC, No. 19-1398 (U.S. docketed June 18, 2020), *available at* https://tinyurl.com/yyymogvh.

39 Brief in Opposition, Lieu v. FEC, No. 19-1398 (U.S. filed Sept. 21, 2020), *available at* https://tinyurl.com/y3avt58z.

40 Reply Brief, Lieu v. FEC, No. 19-1398 (U.S. filed Oct. 21, 2020), *available at* https://tinyurl.com/y27q7kll.

41 FEC Adv. Op. 2010-11, 2010 WL 3184269, at *2 (July 22, 2010); *see also id.* at *1 ("[T]he Commission concludes the Committee's planned course of action complies with the Act.").

42 52 U.S.C. § 30108(c)(1)(B).

43 *E.g.*, Admin. Compl., *supra* note 3, at ¶¶ 7-8.

44 *Id.* at ¶ 96.

45 Factual and Legal Analysis, *supra* note 34, at 11.

46 Heckler v. Cmty. Health Servs. of Crawford Cty., Inc., 467 U.S. 51, 61 (1984).

47 United States v. Penn. Indus. Chem. Corp., 411 U.S. 655, 674 (1973).

48 Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 156 (2012).

49 *See, e.g.*, Plaintiffs' Opposition to Motion to Dismiss Amended Complaint at 13, Lieu v. FEC, No. 16-cv-2201 (D.D.C. filed June 13, 2018), *available at* https://tinyurl.com/y6zp6k5o; Reply Brief, *supra* note 40, at 3 (stating that "a declaratory judgment" was "the only relief petitioners asked the FEC to issue").

50 Admin. Compl., *supra* note 3, at ¶¶ 7, 96.

51 Pls.' Opp. to Mot. to Dismiss Amended Compl., *supra* note 49, at 14.

52 *Id.*

53 Plaintiffs' Reply in Support of Motion for Leave to File Amended Complaint at 23, Lieu v. FEC, No. 16-cv-2201 (D.D.C. filed Aug. 16, 2017).

54 Pls.' Opp. to Mot. to Dismiss Amended Compl., *supra* note 49, at 13.

does far more than benignly "tell[] people what the law is."[55] It is binding on the defendants specifically—not, as the candidates told the district court, on the world at large.[56] It can be a predicate for injunctive relief.[57] Put simply, "a declaratory judgment is a real judgment, not just a bit of friendly advice."[58] From a rule of law perspective, then, the candidates' line between declaratory judgments and injunctive decrees is irrelevant. Representative Lieu and his co-plaintiffs filed their case with one goal: to compel the FEC to reinstate an enforcement proceeding targeting acts the agency previously declared lawful. Were that enforcement action to proceed, it would contravene basic principles of fairness—whether the remedy sought were monetary or injunctive or "only" declaratory.

Third, whatever remedies their administrative complaint may have requested, the candidates have no control over what sanctions the federal government may mete out for violations of federal law.[59] For this reason, too, the candidates' parsing of "coercive" versus "non-coercive" enforcement is largely beside the point.[60] Being targeted by a federal investigation is serious business. That is doubly true in the First Amendment context, where (to borrow the Supreme Court's words) "[t]he chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution" alone, "unaffected by the prospects of its success or failure."[61] For those on the receiving end, a federal investigation is burdensome, time-consuming, intimidating, and costly—whatever the outcome.[62]

The *Lieu* case illustrates the point. The candidates' administrative complaint alleged under oath that their political critics "knowingly" accepted illegal contributions and "knowingly" violated federal law.[63] It contended that the FEC was "not bound by the D.C. Circuit's ruling" in *SpeechNow*.[64] It urged the agency to "conduct an immediate investigation" and sue the candidates' critics for "declaratory and/or injunctive relief."[65] In response, FEC lawyers then issued notices to a dozen political groups, five companies, one trust, and nineteen citizens.[66] In each notice, the agency advised that the recipients "may have violated the Federal Election Campaign Act of 1971." In each notice, the agency instructed the recipients "to preserve all documents, records and materials relating to the subject matter of the complaint." In each notice, the agency cited its "statutory authority to refer knowing and willful violations of the Act to the Department of Justice for potential criminal prosecution."

Understandably, almost everyone who got that notice hired lawyers—almost all from expensive firms with specialized election law practices. Who can blame them? The Federal Election Campaign Act is "unique and complex."[67] The complainants include powerful federal officeholders, candidates, and a prominent academic. And who would consider ignoring a federal agency's threat of criminal prosecution? Even the candidates' counsel appear to have been struck by the costs imposed by merely opening an investigation of this sort; in a 2018 law review article, they marveled at the "thousands of dollars" the defense lawyers must have "charged their clients for filing responses describing law the plaintiffs had acknowledged in their complaint."[68] That comment seems to have been a dig at the perceived wastefulness of law firm practices. But from our vantage point, it exposes a more fundamental issue: The candidates simply gave no weight to the seriousness, unfairness, and due process implications of subjecting their critics to a federal enforcement action.

B. Lieu *Suffers from a Lack of Party Adverseness*

The *Lieu* petition also raises questions that go to the heart of the adversarial process. Representative Lieu and his co-plaintiffs are asking the Supreme Court to decide a "highly consequential"[69] question implicating the First Amendment rights of countless private speakers. But not one of those speakers is a party to the case. Consistent with the Federal Election Campaign Act, the candidates sued the FEC alone.[70] None of the advocacy groups the candidates asked the agency to prosecute are named as defendants. Nor are any of those groups' supporters. On one side of the caption are politicians who want a federal agency to target their critics. On the other side is the federal agency itself.

That line-up is concerning, particularly in a case involving core First Amendment rights. Our nation's "adversarial system of adjudication" depends on "the principle of party presentation."[71] In *Lieu*, though, one side of the question presented lacks any concrete representation. The candidates (the plaintiffs) want to reinstate the $5,000 contribution cap as it applies to independent advocacy groups. The FEC (the defendant) is the agency charged with enforcing that cap. Granted, the FEC's cert-stage briefing asserts that the $5,000 limit violates the First Amendment as applied to independent advocacy groups.[72] But there is no guarantee the agency would maintain that litigating position if

55 *Id.*

56 *Id.* at 11, 13.

57 *See* Samuel L. Bray, *The Myth of the Mild Declaratory Judgment*, 63 Duke L.J. 1091, 1111 (2014).

58 Badger Catholic, Inc. v. Walsh, 620 F.3d 775, 782 (7th Cir. 2010) (Easterbrook, C.J.).

59 *See, e.g.*, 52 U.S.C. § 30106(b)(1).

60 *See* Pls.' Opp. to Mot. to Dismiss Amended Compl., *supra* note 49, at 3.

61 Dombrowski v. Pfister, 380 U.S. 479, 487 (1965).

62 *See Citizens United*, 558 U.S. at 335 (remarking on "the heavy costs of defending against FEC enforcement").

63 Admin. Compl., *supra* note 3, at ¶¶ 1-3.

64 *Id.* at ¶ 8.

65 *Id.* at ¶ 96.

66 *See, e.g.*, Letter from Jeff S. Jordan to Marlene Ricketts, Matter Under Review 7101 (July 14, 2016), *available at* https://tinyurl.com/y2ycoleu.

67 *Citizens United*, 558 U.S. at 334 (citation omitted).

68 *See* Alschuler & Tribe, *supra* note 22, at 2350.

69 Petition, *supra* note 38, at 11.

70 52 U.S.C. § 30109(a)(8).

71 United States v. Sineneng-Smith, 140 S. Ct. 1575, 1579 (2020).

72 Brief in Opposition, *supra* note 39, at 16-22.

the Court were to set the case for argument.[73] After all, federal agencies and the Solicitor General's Office have an institutional interest in preserving federal laws against constitutional challenges "in all but the rarest of cases."[74]

One solution could be for the Court to appoint an amicus to defend the judgment below. The Court exercises that power on occasion. But usually it has done so when the interest left undefended is one common to society as a whole—an interest in seeing a statute upheld or a sentence affirmed, for instance.[75] Here, by contrast, the unrepresented interest is a distinctly personal one: the right to associate for political expression. It is held by each of us as individuals, not by society as a whole (and certainly not by the Department of Justice or the Federal Election Commission). And at no point in the *Lieu* case has that interest been securely represented.

That lack of adverseness is not a quirk but a structural flaw—one both foreseeable and foreseen. In 2018, in fact, the candidates' attorneys declared not only that it would be "incongruous" for the Solicitor General to argue that the $5,000 limit violates the First Amendment, but that "the administration's political interests also counsel support for the plaintiffs"—the government's ostensible opponents.[76] That lack of concrete party adverseness is nothing if not a red flag. We know of no instance in which the Supreme Court has decided a First Amendment question in circumstances like these.

C. Lieu *Implicates Several Open Questions About Article III Standing*

1. Article III Standing in Federal Election Campaign Act Lawsuits

Article III standing reflects the principle that plaintiffs can get into federal court only if they show that the ruling they seek would redress a cognizable harm. Standing can be tricky at the best of times, and that's especially true when it comes to the Federal Election Campaign Act. Recall that the Act authorizes "any person" to file a complaint with the FEC, asking the agency to prosecute an alleged violation.[77] If the FEC dismisses that complaint, the complainant can then sue the FEC in federal court. That's what Representative Lieu and his co-plaintiffs did: they filed an administrative complaint, the FEC dismissed it, and the candidates now seek a court order setting that dismissal aside. The Act authorizes this sort of lawsuit: Section 30109(a)(8) says that "[a]ny party aggrieved by an order of the Commission dismissing a complaint filed by such party" may sue the agency to set aside the dismissal.[78] But for Article III standing purposes, that statutory green light isn't enough. Section 30109(a)(8) itself "does not confer standing," the courts hold.[79] It merely "confers a right to sue upon parties who otherwise already have standing."[80]

If that sounds complicated, it is. But the takeaway is this. Anyone can file a complaint with the FEC, asking the agency to prosecute a campaign-finance violation. And Section 30109(a)(8) says that anyone whose complaint is dismissed can sue the agency to get the dismissal overturned. But because of the Article III standing doctrine, you can file one of those suits only if the relief you're requesting—a court order setting aside the FEC's dismissal of your complaint—is likely to redress a cognizable harm you've suffered.

So what kinds of harm count? Well, a bare desire for the FEC to "get the bad guys" isn't enough.[81] Rather, the harm the courts have most clearly recognized in the campaign-finance context is "informational injury."[82] According to the Supreme Court, the Federal Election Campaign Act grants people a right to information about campaign spending.[83] That right is harmed if a candidate or committee fails to disclose information the Act requires it to report. In turn, an FEC enforcement action against the violator might lead to the disclosure of the required information.[84] So if you ask the FEC to pursue a disclosure violation and the agency declines, you may have standing to sue the agency to set aside that decision because if you win, the result—the disclosure of information—may redress a "sufficiently concrete" harm.[85] That sort of "informational injury" is the only harm the Supreme Court has yet recognized in the context of Section 30109(a)(8).

2. Article III Standing in *Lieu*

How do those principles apply in *Lieu*? It's not clear. Representative Lieu and his co-plaintiffs certainly don't appear to be claiming an informational injury; they complain not that their critics failed to disclose contributions, but that their critics accepted certain contributions in the first place. So informational injury isn't the harm. Instead, it seems that the candidates claim an injury sounding in "competitor standing"—the notion that their critics' receipt of excess money harmed them by obliging them to campaign in an illegally structured competitive environment.[86] And to be sure, competitor standing is a real doctrine; the Supreme Court has applied it in the commercial context since at least the 1970s, typically to hold that a business can challenge agency action

73 *Cf.* Brent Kendall & Jess Bravin, *Trump's Justice Department Takes U-Turns on Obama-Era Positions*, Wall St. J. (Jan. 5, 2018), https://tinyurl.com/y3dkpvko; Adam Liptak, *Trump's Legal U-Turns May Test Supreme Court's Patience*, N.Y. Times (Aug. 28, 2017), https://tinyurl.com/y95xl85v.

74 Seth P. Waxman, *Defending Congress*, 79 N.C. L. Rev. 1073, 1078 (2001).

75 *See, e.g.*, Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2195 (2020); *see generally* Katherine Shaw, *Friends of the Court: Evaluating the Supreme Court's Amicus Invitations*, 101 Cornell L. Rev. 1533, 1594 (2016) (cataloguing amicus appointments).

76 Alschuler & Tribe, *supra* note 22, at 2354 n.331.

77 52 U.S.C. § 30109(a)(1).

78 *Id.* § 30109(a)(8)(A).

79 Nader v. FEC, 725 F.3d 226, 228 (D.C. Cir. 2013) (citation omitted).

80 *Id.*

81 Common Cause v. FEC, 108 F.3d 413, 418 (D.C. Cir. 1997) (per curiam).

82 FEC v. Akins, 524 U.S. 11, 24 (1998).

83 *Id.* at 21.

84 *Id.* at 25.

85 *Id.*

86 *See* Amended Complaint ¶¶ 28-38, Lieu v. FEC, No. 16-cv-2201 (D.D.C. filed Mar. 7, 2018), *available at* https://tinyurl.com/y3ozbyd2.

that unlawfully exposes the business to increased competition.[87] But if competitor standing is indeed the candidates' theory of harm in *Lieu*, it presents more questions than answers. To start, the Supreme Court has never applied the competitor standing doctrine to politics. In fact, a divided D.C. Circuit panel first did so only in 2005.[88] For our part, we don't have a firm view on whether it makes sense to import competitor standing principles from the commercial context to the political. But one thing is clear: that "thorny issue"[89] would need to be untangled before the Court were ever to reach the merits in *Lieu*.[90]

For now, though, let's assume that competitor standing applies in the political arena. Even accepting that premise, it remains unclear whether the candidates in *Lieu* have alleged an injury. "The nub of the 'competitive standing' doctrine," the D.C. Circuit has summarized, "is that when a challenged agency action authorizes allegedly illegal transactions that will almost surely cause [a company] to lose business, there is no need to wait for injury from specific transactions to claim standing."[91] Thus, litigants typically invoke the doctrine in the commercial context to challenge agency actions authorizing "an actual or imminent increase in competition."[92] That prospect of future harm, the doctrine holds, may qualify as "a cognizable Article III injury."[93]

It's unclear how *Lieu* fits in that framework. The candidates are not challenging an agency action that permits "an actual or imminent increase in competition."[94] They aren't, for example, challenging a regulation that authorizes allegedly illegal campaign activities in the future.[95] Rather, the harms they complained of to the FEC are years in the past. They asked the agency to prosecute ten specific political groups based on past incidents of allegedly unlawful behavior. The agency declined to do so. And with that agency action as the candidates' target,[96] their federal court complaint asserts no obvious link between injury, causation, and redressability. The complaint dutifully recited that each candidate "plans to run" or "expects to run" for federal office in the future.[97] It alleged that most of the ten groups had at one time or another spent money opposing one or another of the candidates.[98] It alleged that the candidates wanted the FEC to investigate and prosecute those groups.[99] Yet nowhere did it allege that any of those groups was likely to speak out against any of the candidates in future campaigns.[100]

Even under the broadest view of competitor standing, that gap raises serious questions. With no allegation that any of the targeted groups is likely to injure the candidates' competitive interests now or in the future, it's unclear what harm would be redressed by the FEC's prosecuting them. In the commercial context, in fact, the D.C. Circuit has made this point explicitly, observing that a "terminated" act of illegal competition "cannot itself form the basis for standing" under the competitor standing doctrine.[101] That principle is hard to square with the candidates' requested relief in *Lieu*. The candidates complained to the FEC about past—sometimes years-old—contributions. They seek a court order directing the FEC to prosecute the groups that received those contributions. Yet their federal court complaint contains no hint that any of those groups is likely to "compete" (i.e., run ads) against them ever again.[102]

In trying to thread that needle, the candidates' complaint retreats from the specific to the general; it alleges not that the targeted committees will harm the candidates again, but that unspecified "groups" might criticize the candidates in the future.[103] But if that is the candidates' claimed injury, the relief their complaint seeks would appear not to remedy it. Unlike a suit contesting a rule of general applicability, the candidates' complaint does not challenge an agency action that affects the "competitive environment's overall rules" going forward.[104] It asks only that the federal courts order the FEC to reinstate an enforcement proceeding against ten specific committees.[105] At most, that renewed proceeding would bind those ten committees alone—not "groups" at large.[106] And the complaint nowhere

87 *E.g.*, Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 152 (1970).

88 Shays v. FEC, 414 F.3d 76, 85-86 (D.C. Cir. 2005).

89 *See Common Cause*, 108 F.3d at 419 n.1.

90 Of course, there are other paths by which speakers and candidates can challenge governmental regulation of political activity. Some laws, for example, have burdened political speech by "grant[ing] funds to publicly financed candidates as a direct result of the speech of privately financed candidates and independent expenditure groups." Arizona Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 742 (2011). Laws of that sort can be challenged, not under a competitor standing theory, but as a direct burden on political speech. *Cf. id.*

91 El Paso Nat. Gas Co. v. FERC, 50 F.3d 23, 27 (D.C. Cir. 1995).

92 Sherley v. Sebelius, 610 F.3d 69, 73 (D.C. Cir. 2010).

93 MD Pharm., Inc. v. DEA, 133 F.3d 8, 11 (D.C. Cir. 1998) (citation omitted).

94 *Sherley*, 610 F.3d at 73; *see also Ass'n of Data Processing Serv. Orgs., Inc.*, 397 U.S. at 152-53; Assoc. Gas Distribs. v. FERC, 899 F.2d 1250, 1258-59 (D.C. Cir. 1990).

95 *Shays*, 414 F.3d at 86.

96 Amended Compl., *supra* note 86, at ¶¶ 22-23 (requested relief).

97 *Id.* at ¶¶ 29, 31, 33-34, 36, 38.

98 *Id.* at ¶¶ 28, 30, 33, 36, 37.

99 *Id.* at ¶ 80.

100 *See id.* at ¶¶ 28-38.

101 *Assoc. Gas Distribs.*, 899 F.2d at 1258-59; *see also* Mobile Relay Assocs. v. FCC, 457 F.3d 1, 13 (D.C. Cir. 2006) ("While we have recognized competitor standing in the licensing context, the party seeking to establish standing on that basis 'must demonstrate that it is "a *direct* and *current* competitor whose bottom line may be adversely affected by the challenged government action."'").

102 In fact, some of the groups appear to have gone inactive even before the candidates asked the FEC to get involved. *E.g.*, Bold Agenda PAC, FEC Financial Summary, https://tinyurl.com/y6c3r5mt; American Alliance, FEC Financial Summary, https://tinyurl.com/y66akcvj.

103 Amended Compl., *supra* note 86, at ¶¶ 29, 31, 33, 34, 36, 38.

104 *Shays*, 414 F.3d at 86.

105 *See* Amended Compl., *supra* note 86, at 22-23 (requested relief).

106 *See* Taylor v. Sturgell, 553 U.S. 880, 884 (2008). If the FEC were to add additional respondents to the enforcement proceeding (as it did in the

alleges that the FEC's pursuing those committees would redress any real-world harm to Representative Lieu and his co-plaintiffs.

Perhaps there's a good answer to all this. And to be clear, we're no friends of overly strict standing rules. People whose federally protected rights are on the line should absolutely have recourse to the federal courts. But in a case that seeks to constrain the First Amendment rights of Americans nationwide, it is unclear what cognizable harm the plaintiffs in *Lieu* seek to redress. That question—unbriefed and unaddressed in the lower courts—would need to be resolved in the first instance by the Supreme Court were certiorari to be granted.

III. Closing Thoughts

There may be plausible answers to the issues detailed above, but we have not been able to come up with them. Nor have the plaintiffs in *Lieu* offered any. Instead, the candidates' cert-stage briefing claims a writ of certiorari almost as of right, on the theory that *SpeechNow* invalidated a federal law and "[w]hen an inferior court has nullified an Act of Congress, its decision should not be the last word."[107] But when the Department of Justice declines to appeal an adverse ruling (as in *SpeechNow*), Congress itself contemplates that lower courts might have the last word.[108] Congress also continued to entrust the D.C. Circuit with deciding cases like *SpeechNow* in the first instance, even after removing a right of direct appeal to the Supreme Court in 1988.[109]

Also unpersuasive is the candidates' other main argument for certiorari: that *Lieu* is the Supreme Court's only chance to address their question presented.[110] In truth, laws similar to the federal contribution limit have offered ample opportunities for state actors to seek the Court's review. Since 2008, for example, six other federal courts of appeals have considered whether independent expenditure groups can be subject to contribution limits.[111] Unlike *Lieu*, each of those cases appears to have been litigated in a concretely adversarial posture throughout. And there is reason to believe that similar cases will continue to arise. For example, sixteen states have appeared as amici in support of the *Lieu* petition;[112] of those, seven are in circuits that have yet to decide whether contributions to independent expenditure groups can be capped. In 2017, St. Petersburg, Florida, enacted just such a cap.[113] Seattle has considered similar legislation.[114] So has Massachusetts.[115] By design, these nationwide legislative efforts seek to "bring the constitutionality of limiting super PAC contributions before the [Supreme] Court."[116] Legal challenges to any of those laws would implicate the same constitutional question Representative Lieu and his co-plaintiffs have raised, with none of the stumbling blocks outlined above.

As the candidates' petition suggests, what they are asking of the Supreme Court is "highly consequential"[117]: Under the candidates' preferred rule, the federal government could once again deploy the full force of its civil and criminal power to police how much money Americans can pool for political speech. If that issue is to be addressed by the nation's court of last resort, it deserves to be heard in a case that presents it cleanly.

early stage of reviewing the *Lieu* complaint), those specific respondents would presumably be parties to any declaratory judgment action as well and bound by the resulting judgment.

107 Petition, *supra* note 38, at 10.

108 28 U.S.C. § 530D(a)(1)(B)(ii).

109 *See* Wagner v. FEC, 717 F.3d 1007, 1010 (D.C. Cir. 2013) (per curiam).

110 *See* Petition, *supra* note 38, at 3.

111 Republican Party of N.M. v. King, 741 F.3d 1089, 1103 (10th Cir. 2013); N.Y. Progress & Prot. PAC v. Walsh, 733 F.3d 483, 487 (2d Cir. 2013); Texans for Free Enter. v. Tex. Ethics Comm'n, 732 F.3d 535, 537-38 (5th Cir. 2013); Wis. Right to Life State Political Action Comm. v. Barland, 664 F.3d 139, 154 (7th Cir. 2011); Long Beach Area Chamber of Commerce v. City of Long Beach, 603 F.3d 684, 696 (9th Cir.), *cert. denied*, 562 U.S. 896 (2010); N.C. Right to Life, Inc. v. Leake, 525 F.3d 274, 293 (4th Cir. 2008).

112 Brief of Washington et al. as Amici Curiae, Lieu v. FEC, No. 19-1398 (U.S. filed July 22, 2020), *available at* https://tinyurl.com/y2v9ytp7.

113 Andrew D. Garrahan, *St. Petersburg Passes Anti-Super PAC Ordinance, Hoping to Set Up Constitutional Showdown*, Nat'l L. Rev. (Oct. 6, 2017), https://tinyurl.com/y4sqfbz2.

114 Seattle City Council, *Clean Campaigns Act*, https://tinyurl.com/y2but47l.

115 S.394, 191st Gen. Court, Bill (Mass. 2019), https://tinyurl.com/y3ubuj5e.

116 Alschuler & Tribe, *supra* note 22, at 2346.

117 Petition, *supra* note 38, at 11.