Volume 18

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Letter from the Editor

Dear Friend,

The Federalist Society Review is the legal journal produced by the Federalist Society's Practice Groups. The Review was formerly known as Engage, and although the name has changed, it still features top-notch scholarship on important legal and public policy issues from some of the best legal minds in the country.

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 and full issues are available at **fedsoc.org** and through the Westlaw database.

We hope that readers enjoy the articles 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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Administrative Law & Regulation

The Risks of Regulating in the Dark

By Sofie E. Miller

Note from the Editor:

This article argues that regulations passed in the final weeks of an outgoing president's term are often inferior because they are issued hastily; it argues that the Department of Energy's regulations establishing efficiency standards for washing machines in January 2001 are a prime example of this phenomenon.

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 links to other perspectives on the issue, including ones opposed to the position taken in the article. We also invite responses from our readers. To join the debate, please email us at info@fedsoc.org.

• Margaret Taylor, C. Anna Spurlock, Hung-Chia Yang, *Confronting Regulatory Cost and Quality Expectations: An Exploration of Technical Change in Minimum Efficiency Performance Standards*, Resources for the Future Disscussion Paper (Nov. 6, 2015), http://www.rff.org/research/publications/confronting-regulatory-cost-and-quality-expectations-exploration-technical.

• Cheryl Bolen, *Obama Regulatory Chief Rejects Midnight Regulation*, Bloomberg BNA (Dec. 7, 2016), https://www.bna.com/obama-regulatory-chief-n73014448176/.

• Elizabeth Kolbert, *Midnight Hour*, The New Yorker (Nov. 24, 2008), http://www.newyorker.com/magazine/2008/11/24/midnight-hour.

About the Author:

Sofie E. Miller is the senior policy analyst at the George Washington University Regulatory Studies Center and Editor of the Center's Regulation Digest.

The promise—or threat—of midnight regulations looms now, in the final days of the Obama administration. "Midnight" regulations are those issued after the November presidential election but before Inauguration Day as the outgoing administration attempts to finalize its regulatory policy priorities with a surge of rulemaking activity. This significant uptick in regulation, so common at the end of presidential administrations, is likely to affect more than just the number of pages in the Federal Register. Scholars have theorized that midnight rules are problematic because they short-circuit important procedural safeguards that ensure high-quality regulatory outcomes, like rigorous analysis, internal and external review, and public input in the rulemaking process. Stepping beyond theory, recent examples—such as the Department of Energy's energy efficiency standards for clothes washers—illustrate that midnight rules impose real burdens. This article retrospectively examines DOE's midnight regulation and its effects on consumers.

I. Measuring Midnight

Midnight regulations can pose a number of problems for the development of sound regulatory policy. For example, the Office of Information and Regulatory Affairs (OIRA) reviews proposed and final rules before they are published, acting as a final check on subpar agency analysis before it becomes binding policy. Using empirical methods, Mercatus Center economist Patrick McLaughlin has found that the mean review time of all regulations decreases by two thirds of a day for each additional economically significant rule that OIRA must review during the midnight period.[1] But how important are those two-thirds of a day to the overall quality of a rule? Can that additional time for review and analysis make the crucial difference between good and bad rules?

To answer that question, some scholars have attempted to measure the relationship between a rule's quality and whether it is issued during the midnight period. Based on their study of this relationship, McLaughlin and his colleague Jerry Ellig find that rules reviewed by OIRA during "midnight" are among those with the lowest quality of analysis[2]—presumably because of the additional pressures on OIRA time and staff resources during the post-election rulemaking crunch. In examining a dataset of 109 major rules, researchers Stuart Shapiro and John Morrall conclude that midnight rules have much smaller net benefits than rules issued during other points of time throughout an administration.[3]

These empirical studies line up with real world examples which suggest that the shortcuts associated with midnight

1 Patrick A. McLaughlin, *The Consequences of Midnight Regulations and Other Surges in Regulatory Activity*, 147 Pub. Choice Issue 3 (2011).

2 Patrick McLaughlin & Jerry Ellig, *Does Haste Make Waste in Regulatory Analysis?*, Social Science Research Network (2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1646743.

3 Stuart Shapiro & John Morrall, *The Triumph of Regulatory Politics: Benefit Cost Analysis and Political Salience*, 6 Reg. & Governance Issue 2

rulemaking lead to worse regulatory outcomes. In fact, the recent emphasis on retrospective evaluation of existing rules, initiated by President Obama's Executive Order 13,563, provides a key opportunity to assess the actual effects of regulations that were finalized around midnight during previous administrations.[4]

II. Wishy-Washy Analysis

One prime candidate for such retrospective examination is the Department of Energy's midnight rule—passed at the tail end of President Clinton's second term, right before George W. Bush took office—establishing energy and water efficiency standards for residential clothes washers. The rule was published on January 12, 2001, just 99 days after it was proposed and 39 days after the DOE received the last public comment on its proposal.[5] The DOE projected that its rule would increase clothes washer energy efficiency by as much as 35%, increasing the price of new clothes washers by $249, but saving consumers money on their utility bills.[6] However, these rosy projections were based on faulty analysis that grossly overestimated how often consumers wash their clothes, and resulted in standards that left consumers paying more money for worse products (not to mention moldy clothes).

Efficient appliances are more expensive than less efficient versions, but they can save consumers more money over the long term the more frequently they are used. As a result, households with high frequency of use are more likely to benefit from investing in more efficient appliances than households with lower frequency of use. In proposing its energy efficiency standards for clothes washers, the DOE calculated large net benefits by estimating that an average household operates its clothes washer a whopping 392 times per year, or more than once per day on average.[7]

While this may be realistic for large families or households with small children, it doesn't represent most households' appliance usage.[8] Even based on the DOE's original assumptions, households with lower frequency of use—including couples or single residents—would be expected to bear net costs as a result of the DOE's mandate for efficient (and more expensive) appliances. The payoff from more efficient appliances depends on individual household characteristics,[9] and the DOE's flawed assumptions about clothes washer use resulted in standards with large net costs for the vast majority of U.S. households.[10]

In fact, according to calculations submitted to the DOE in comments on the proposed rule by the Mercatus Center based on the DOE's data, any household that uses its clothes washer fewer than 300 times per year (or 5.8 times per week) would see a net cost as a result of the DOE's standard. A Rasmussen Research survey of 1,997 consumers conducted in 2000 found that only 15% of respondents used their clothes washers as frequently as the DOE assumed, and nearly 70% of respondents did not use them frequently enough to recoup the upfront cost of the new efficient machines mandated by the standard.[11] This finding is supported by the federal government's 2009 Residential Energy Consumption Survey, which calculated that U.S. households run their clothes washers about 282 times per year on average.[12]

All this means that the DOE used a ridiculously inflated assumption about household clothes washer usage to justify new efficiency standards for residential clothes washers. As a result, 70% of U.S. consumers bore net costs rather than the enormous net benefits that the DOE anticipated. But these monetary costs were just the beginning of the negative effects of this midnight regulation for Americans.

III. Something Is Rotten in the State of Kenmore

The DOE's final rule for residential clothes washers increased their energy efficiency by 35% and reduced the water that they are allowed to use by 18.1 gallons per cycle.[13] The Department estimated in 2000 that these savings were sufficient to save 5.52 quadrillion British thermal units (BTUs) of energy through 2030 and 11 trillion gallons of water over 25 years. As a result of these substantial energy and water savings, the DOE estimated that its rule would result in $15.3 billion in net benefits to Americans—mostly in the form of lower utility bills—through 2030.[14] However, these estimates seemed to miss one crucial constraint: energy and water are exactly what clean clothes. What effect does it have on consumer welfare to cap the inputs that are required for clean laundry?

Significantly reducing how much power and water clothes washers can use has a very tangible effect on consumers: mold, mildew, bad odors, and ruined laundry. After the DOE's new standard was adopted, front-loading washers could no longer effectively clean themselves through the typical wash cycle and, as

(2012).

4 Exec. Order No. 13,610, 3 C.F.R. 258 (2013).

5 Energy Conservation Program for Consumer Products: Clothes Washer Energy Conservation Standards, 66 Fed. Reg. 3,313 (January 12, 2001).

6 65 Fed. Reg. 59,549.

7 65 Fed. Reg. 59,561.

8 According to calculations by the Mercatus Center based on the DOE's data, such infrequent use would not make an efficient clothes washer a cost-beneficial purchase for my household, or any household that uses its clothes washer fewer than 300 times per year. *See infra* note 11 for additional information.

9 Sofie E. Miller & Brian F. Mannix, *One Standard to Rule Them All: The Disparate Impact of Energy Efficiency Regulations*, in Nudge Theory in Action: Behavioral Design in Policy and Markets (Sherzod Abdukadirov ed., 2016).

10 By way of illustration: my mother, who has nine children, used to run the clothes washer as frequently as three times a day. Given this frequency-of-use, she may have been able to recoup the higher cost of an efficient clothes washer through reductions in her energy and water bills. On the other hand, my current household of two runs the clothes washer once per week on average; in our case, it's not likely that a more efficient—and more expensive—washer will be worth the investment.

11 Mercatus Ctr. At Geo. Mason Univ., Addendum to Public Interest Comment on the Department of Energy's Proposed Clothes Washer Efficiency Standards (2000), http://mercatus.org/sites/default/files/publication/Clothes_Washer_Standards.pdf.

12 Energy Info Admin., U.S. Dept. of Energy, *Residential Energy Consumption Survey* (2009).

13 66 Fed. Reg. 3,313.

14 65 Fed. Reg. 59,551.

a result, detergent suds and laundry residue would build up and molder in the washer door seals and drums. Consumers began noting strange smells emanating from their efficient Whirlpool, Kenmore, and Maytag washing machines, leading to the hassles of ruined laundry, ongoing maintenance, and service calls.

Consumers' product options in the marketplace were restricted by the DOE's midnight regulation, meaning it wasn't a simple task to replace a faulty efficient washer with a new, effective one. However, consumers had other options—they could, for example, buy new low-sudsing detergents manufactured specifically for high-efficiency washers. Or they could buy a cleaning product specifically designed to address moldy washing machines; Whirlpool began to sell a cleaning product of its own, Affresh, which was intended to remedy its efficient machines' design flaws by removing odor-causing residue. Other appliance manufacturers, including Amana, recommend that customers purchase Affresh to remove and prevent "odor-causing residue that can occur in all brands of HE [high efficiency] washers."[15]

According to the 6th Circuit Court of Appeals, Whirlpool expected to reap $195 million in revenue by marketing Affresh to consumers who had purchased faulty washers, all while continuing to sell 200,000 of those faulty washers per year.[16] Meanwhile, consumers continued to pay higher prices for worse washing machines while paying extra for high-efficiency detergent, mildew cleaning products, and service requests to fix what they had already paid for.

Consumer Reports and other resources provide consumers with a laundry list of home remedies:

- Leaving the washer door open allows a front-loading washer to dry out between cycles. This is especially relevant since front-loading washers, unlike top-loading washers, require a tight seal—but an effective seal isn't likely to allow the interior to dry out between washes. As simple as this solution sounds, leaving the washer door open poses a safety issue in homes with small children or pets, who may be tempted to climb inside. Court documents reported that a young child drowned in a Kenmore front-loading machine manufactured by Whirlpool (and the CPSC opened a safety investigation for front loading machines).
- Consumers are advised to conduct regular hot water flushes with bleach to eradicate mold and mildew. Even consumers whose washers are not yet showing signs of contamination are advised to run a hot water cycle with bleach at least once per month to prevent mold and mildew growth. Running frequent hot water cycles in an empty washing machine tends to use a fair amount of both energy and water. EPA granted Whirlpool an Energy Star certification for its front-loading washers, but without incorporating the additional water and energy use required for the hot water flushes needed for regular maintenance.
- Consumers also have the option to wipe down the washer interior and door gasket, along with cleaning the detergent dispenser to address interior mold. While at least this option comes without an explicit price tag, this additional upkeep requires significant time, effort, and elbow grease, clearly an unwanted extra maintenance burden for consumers who rightfully expect that their clothes washers will work on their own to clean clothes.
- If all else fails, consumers are advised to avail themselves of service calls. In fact, Whirlpool paid Sears a substantial indemnity—over $100 million—for service calls to address mold issues, indicating that this option was neither infrequently used nor costless to implement.

Consumers bore a significant burden as a result of their moldy washers, whether measured in time, effort, expense, safety, or inconvenience. These costs, which we can easily identify after the fact, were apparently not considered by regulators before they hastily finalized this midnight regulation. While Whirlpool only received complaints on 3% of its washers, the problems were apparently endemic, affecting approximately 5.5 million consumers who purchased any of the implicated 83 models manufactured or marketed by Whirlpool, Maytag, and Kenmore.[17]

IV. The Indirect Costs of Dirty Laundry

How can we retrospectively quantify the extent to which consumers suffered from the DOE's midnight rule? Ten years ago, this question passed from the theoretical realm and into the courts. Consumers, plagued by moldy clothes washers and laundry that was never quite clean anymore, took their cases to the courts, where the U.S. Courts of Appeals for the 6th and 7th Circuits eventually ruled that the cases should go forward as a class action lawsuit. In 2014, this determination reached the Supreme Court, which declined to overrule the circuit courts, and the class action lawsuit proceeded.[18]

On August 25, 2016, the U.S. District Court for the Northern District of Ohio filed a joint motion for final approval of a nationwide class-action settlement agreement between Whirlpool Corporation, Sears Holdings Corporation, and plaintiffs in the front-loading washing machine class action cases.[19] This wide-ranging settlement affects millions of consumers who bought faulty front-loading washers made from 2001 to 2010, including Whirlpool, Maytag, and Kenmore branded products.

15 *CLEANERS, Affresh*® Washer Cleaner, Amana, https://amana.com/accessories/laundry/cleaners/affresh__174_washer_cleaner_w10135699.pro.

16 Emily Bazelon, *The Case of the Moldy Washing Machines*, Slate (July 26, 2013), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/07/whirpool_s_moldy_washing_machines_america_s_most_important_class_action.html.

17 *Settlement Agreement Exhibit 2: List of Access and Horizon Washer Models Included in Proposed Settlement Class* (April 18, 2016), http://www.washersettlement.com/pdf/Eligible_Washer_Models.pdf.

18 Sears, Roebuck and Co. v. Butler, 727 F.3d 796 (7th Cir. 2013), cert. denied, 134 S.Ct. 1277 (U.S. Feb. 24, 2014) (No. 13-430); Whirlpool Corp. v. Glazer, 722 F.3d 838 (6th Cir. 2013), cert. denied, 134 S.Ct. 1277 (U.S. Feb. 24, 2014) (No. 13-431).

19 U.S. District Court for the Northern District of Ohio, *Joint Motion for Final Approval of Class Action Settlement, Case No. 08-wp-65000*, Washer Settlement (Aug. 25, 2016), http://www.washersettlement.com/pdf/Joint_Motion_for_Final_Approval_of_Class_Action_Settlement.pdf.

The DOE, whose standards forced many families to switch from top-loading to more expensive front-loading washing machines, is notably absent from the list of defendants. Although consumers in the class action suit didn't realize it, their moldy washer problem began with the Department of Energy.

The lawsuit stated that the washers did not clean themselves properly of laundry residue, which resulted in odors and mold. But what is the monetary value of this harm to consumers? By way of answering that question, the court's settlement qualifies affected owners for a cash payment of $50, a rebate of 20 percent off the purchase of a new clothes washer or dryer, or up to $500 in reimbursements for expenses incurred for repairs or replacing a washing machine due to mold or odors. If all affected consumers opted for even the smallest settlement offered, the cost would be $275 million. These indirect costs are in addition to the direct costs of the rule—for example, the extra $249 that the DOE estimates consumers had to spend on washing machines because of its efficiency rule, or the fact that the vast majority of households didn't use their machines often enough to break even on the more efficient machines. All of this suggests that retrospective analysis of the DOE's efficiency standards by Margaret Taylor and her coauthors, which finds that the DOE *overestimated* the costs of complying with the clothes washer standards, misses the mark.[20]

V. The High Price of Energy Efficiency

Bad regulations and faulty analysis carry a price. In this case, the price that consumers paid as a result of rushed midnight rulemaking wasn't just theoretical: families paid more for their clothes washers and, instead of the promised benefits, the appliances brought additional costs and other trouble. Households bore costs in the form of higher prices, continued inconvenience, expense, time, and bad odors from moldy washing machines. The recent court settlement illustrates that consumers bear burdens—including indirect burdens—as a result of regulation gone awry. This leaves Whirlpool and Maytag liable for the moldy machines, while the DOE can wash its hands of the unanticipated indirect costs of complying with its rushed efficiency standard for clothes washers.

The DOE's energy efficiency regulation wasn't a minor policy change; it applies to the millions of U.S. households that use clothes washers to do their laundry, restricting their options and imposing higher costs in the form of higher prices and ongoing maintenance and upkeep. Furthermore, over 70% of these households ended up paying a net cost because they didn't save enough money on their utility bills to offset the higher prices of efficient washers. Examination of the Spring 2016 Unified Agenda suggests that the DOE wasn't deterred by the effects of its clothes washer rule: the agency plans to take action on 12 proposed and 13 final energy efficiency standards through Spring 2017. We will be waiting with bated breath to find out whether the DOE's next midnight rules will hang consumers out to dry.

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20 Margaret Taylor, C. Anna Spurlock, Hung-Chia Yang, *Confronting Regulatory Cost and Quality Expectations: An Exploration of Technical Change in Minimum Efficiency Performance Standards*, Resources for the Future Disscussion Paper (Nov. 6, 2015), http://www.rff.org/research/publications/confronting-regulatory-cost-and-quality-expectations-exploration-technical.

Gloucester County School Board v. G.G.: Judicial Overdeference Is Still a Massive Problem

By Ilya Shapiro & David McDonald

Note from the Editor:

This article discusses *Auer* deference, a central issue in *Gloucester County School Board v. G.G.*, which the Supreme Court recently remanded to the Fourth Circuit in light of new actions by the Trump administration.

The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the authors. Whenever we publish an article that advocates for a particular position, as here, we offer links to other perspectives on the issue, including ones opposed to the position taken in the article. We also invite responses from our readers. To join the debate, please email us at info@fedsoc.org.

• Cynthia Barmore, Auer *in Action: Deference After* Talk America, 76 Ohio St. L.J. 813 (2015), *available at* http://moritzlaw.osu.edu/students/groups/oslj/files/2015/11/Vol.-76-813-845-Barmore-Article.pdf.

• Cass R. Sunstein & Adrian Vermeule, Auer*, Now and Forever*, Notice & Comment (Sept. 19, 2016), *available at* http://yalejreg.com/nc/auer-now-and-forever-by-cass-r-sunstein-adrian-vermeule/.

• Bill Funk, *Why SOPRA Is Not the Answer*, CPRBlog (Oct. 3, 2016), *available at* http://www.progressivereform.org/CPRBlog.cfm?keyword=SOPRA.

About the Authors:

Ilya Shapiro is a senior fellow in constitutional studies at the Cato Institute and editor-in-chief of the Cato Supreme Court Review. David McDonald is a legal associate at the Cato Institute. This article is adapted from Cato's amicus brief filed in support of the petitioners in Gloucester County School Board v. G.G., which was joined by Professors Jonathan H. Adler, James F. Blumstein, Richard A. Epstein, and Michael W. McConnell, and the Cause of Action Institute.

Introduction

In early March, the Supreme Court punted the transgender bathroom-access case *Gloucester County School Board v. G.G.*, probably the highest-profile case of the term, back down to the U.S. Court of Appeals for the Fourth Circuit.[1] The Trump administration had recently rescinded the Department of Education (DOE) guidance letters at the heart of the lawsuit,[2] so the Court wanted the parties and the lower court to reevaluate the case in light of the new development. But while the future of this particular litigation—and whether it will return to the high court—may now be uncertain, the core legal questions about how much deference courts should give administrative agency determinations remain as live as ever. Notably, Judge Neil Gorsuch, the presumptive next justice, has made a name for himself as a critic of judicial deference to executive agencies.[3] There is also legislation pending in the Senate—commonly known as the REINS Act—that would require congressional approval of any new major regulation.[4] If anything, the debate over judicial deference doctrines is only heating up, and the arguments made in *Gloucester County* will continue to be relevant for some time.

Here's how the issue was joined here: Title IX, part of the U.S. Education Amendments of 1972, was passed to ensure that schools and universities did not discriminate on the basis of sex. It states that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance."[5] The statute itself allows for certain exceptions to this prohibition, and its implementing regulations have always allowed schools to provide "separate toilet, locker room, and shower facilities on the basis of sex."[6] This regulation has been uncontroversial for most of its history, and the traditional reading of the exception—interpreting "sex" to refer to the biological difference (particularly regarding reproductive organs) between males and females—was never challenged before the present litigation.

Gavin Grimm (G.G.), at the time of the events relevant to this litigation, was a student at Gloucester High School in Virginia. Grimm was born biologically female but has identified as a boy from about the age of 12. He remains biologically female, though he is on hormone therapy. This case arose from Grimm's

1 Gloucester County Sch. Bd. v. G.G., No. 16-273, 2017 U.S. LEXIS 1626 (Mar. 6, 2017) (vacating the judgment and remanding to the Fourth Circuit "for further consideration in light of the guidance document issued by the Department of Education and Department of Justice on February 22, 2017").

2 U.S. Dep't. Educ. & U.S. Dep't. Just., "Dear Colleague" Letter Withdrawing Previous Title IX Guidance Regarding Transgender Bathrooms (Jan. 22, 2017), *available at* http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.docx.

3 *See* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149–58 (10th Cir. 2016) (Gorsuch, J., concurring).

4 Regulations From the Executive in Need of Scrutiny Act of 2017, H.R. 26, 115th Cong. (2017).

5 20 U.S.C. § 1681.

6 34 C.F.R. § 106.33.

opposition to the school board's policy of not allowing him to use the boys' restroom and locker room (although he was given access to private unisex bathrooms open to all students). Upon hearing of the controversy from a transgender-rights activist, a Department of Education Office of Civil Rights (OCR) employee named James A. Ferg-Cadima sent a letter to the activist stating that "Title IX . . . prohibits recipients of Federal financial assistance from discriminating on the basis of sex, including gender identity."

Grimm then sued the school board, alleging that its policy violated Title IX and the Fourteenth Amendment's Equal Protection Clause. The Department of Justice (DOJ) filed a "statement of interest," holding the Ferg-Cadima letter out as the controlling interpretation of Title IX and its implementing regulations. The district court refused to give controlling deference to the letter, and Grimm appealed to the Fourth Circuit. The Fourth Circuit reversed the district court's dismissal, affording the OCR's interpretation of the regulation *Auer* deference (the near-absolute deference courts give to agency interpretations of their own regulations). Indeed, the Fourth Circuit's deference to the Ferg-Cadima letter was outcome-determinative. Without such deference, the court acknowledged, the interpretation was "perhaps not the intuitive one."[7]

Following the Fourth Circuit's ruling, federal officials in the DOE and DOJ issued a "Dear Colleague" letter to every Title IX "recipient[] of Federal financial assistance" in the country, affirming and expanding on the contents of the Ferg-Cadima letter. The school board sought Supreme Court review, which was granted October 28, 2016.

On February 22, 2017, the new Trump administration's DOE rescinded both the Ferg-Cadima letter and the "Dear Colleague" letter. After considering briefing from the parties on how to proceed, the Supreme Court vacated the Fourth Circuit ruling and remanded the case back to that court for further consideration. The Fourth Circuit hadn't decided the Title IX statutory-interpretation question, so the Court is allowing it to do so in the first instance.

While advocates on both sides of this contentious cultural issue may have wished to draw the Court into their debates over the nature of sexuality, the more straightforward legal path—before the withdrawal of the OCR guidance—would simply have been to reverse the Fourth Circuit's deference to the Ferg-Cadima letter and leave the arguments over privacy and nondiscrimination to other forums. Judicial deference to informal agency statements of this sort—statements that have not been tested in notice-and-comment rulemaking—undermines the separation of powers, defeats the purposes of notice-and-comment as set forth in the Administrative Procedure Act, thwarts the protections of judicial review of agency rulemaking, and encourages regulatory brinkmanship without full consideration of congressional will or practical consequences. Notice-and-comment rulemaking has a purpose. *Auer* deference to informal agency opinions is antithetical to that purpose.

We take no position here on Title IX's definition of "discrimination on the basis of sex," the meaning of the statute's exception for "separate living facilities for the different sexes," or the meaning of OCR regulations extending that exception to bathrooms, locker rooms, showers, or sports teams.[8] Congressional and administrative hearings—and public discourse more generally—are the best ways for our society to ruminate on such novel questions. A letter written by a low-level bureaucrat is not. Acting Deputy Assistant Secretary of Policy Ferg-Cadima may be the wisest man since Solomon—or not—but our system of legislation and regulation is not dependent on the Solomonic wisdom of acting deputy assistant secretaries.

The deference issues in this case are important because *process matters*. Those who hold the reins of political power will not always be benevolent, self-restrained public servants, and the procedural safeguards that seem frustrating and counterproductive in one instance may very well be necessary bulwarks against arbitrariness or oppression in another. As anyone who has lived in a hurricane-prone area can attest, the right time to board up your windows is before the storm hits, not after they've already been shattered.

The Court should thus, in the next appropriate case, limit the scope of its rule from *Auer v. Robbins*.[9] Under the *Auer* doctrine, courts afford agency interpretations of their own regulations controlling deference. This deference, we submit, must not be afforded to informal, non-binding agency pronouncements that have not been subjected to either of the paths for giving agency action the force of law: adjudication or rulemaking.

I. *Auer* Deference Is Unjustifiably Broader Than *Chevron* Deference

Once largely considered uncontroversial, *Auer* deference has come under increasing scrutiny. Various judges—including Supreme Court justices—have recently voiced concerns with the doctrine's effects on due process and the separation of powers, with some going as far as calling for *Auer* to be overruled.[10] There is also serious debate among the circuit courts on several questions concerning *Auer*'s scope, particularly on the question of whether *Auer* deference should apply to informal agency pronouncements.[11]

In *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, the Court held that courts must give "effect to an agency's

7 G.G. v. Gloucester Cnty. Sch. Bd., 822 F.3d 709, 722 (4th Cir. 2016).

8 Prof. Blumstein has separately argued that the enforcement guidance is inconsistent with the sex-segregation regime that characterizes Title IX. *See* James F. Blumstein, *New Wine in Old Bottles: Title IX and Transgender Identity Issues*, Vanderbilt Pub. L. Research Paper No. 16-51, http://bit.ly/2jbBEkL.

9 519 U.S. 452 (1997).

10 *See, e.g.,* Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199, 1208 (2015) (Sotomayor, J.); *id.* at 1211 (Scalia, J. concurring in the judgment); *id.* at 1213 (Thomas, J., concurring in the judgment); Decker v. N.W. Env. Def. Ctr., 133 S. Ct. 1326, 1338–39 (2013) (Roberts, C.J., concurring); *id.* at 1339–42 (Scalia, J., dissenting); Talk America, Inc. v. Mich. Bell Telephone Co., 131 S. Ct. 2254, 2265 (2011) (Scalia, J., concurring); *see also* Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting).

11 *Compare* United States v. Lachman, 387 F.3d 42, 54 (1st Cir. 2004) (holding that *Auer* deference is inappropriate for interpretations contained in informal pronouncements); Keys v. Barnhart, 347 F.3d 990, 993–95 (7th Cir. 2003) (same); Arriaga v. Fla. Pac. Farms, L.L.C., 305 F.3d 1228, 1238 (11th Cir. 2002) (same); *with* Cordiano v. Metacon Gun Club, Inc., 575 F.3d 199, 207–08 (2d Cir. 2009) (holding that *Auer*

regulation containing a reasonable interpretation of an ambiguous statute."[12] In a series of cases almost 20 years old, the Court then limited *Chevron* deference to ensure that agencies would not circumvent notice-and-comment rulemaking when they interpreted Congress's statutes. *Christensen v. Harris County* held that "[i]nterpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference."[13] A year later, in *Mead*, the Court reaffirmed that only interpretations carrying the force of law warrant *Chevron* deference.[14]

Since agency discretion to interpret broad statutory directives is derived only from Congress's delegation of such authority, there must be an indication that Congress intended the mechanism by which a ruling acquired the force of law.[15] That congressional intent requirement is generally (but not necessarily) satisfied by notice-and-comment rulemaking.[16] Agency statutory interpretations not promulgated through notice-and-comment, formal adjudication, or some other method that legally binds the agency to its decision are entitled to limited deference only as far as their reasoning is persuasive, under *Skidmore v. Swift & Co.*[17]

The Court has not had occasion to extend these *Chevron* principles to *Auer*. Under *Auer*, an agency pronouncement interpreting one of its own regulations, regardless of whether it has the force of law—or whether anyone outside the agency is even aware of the interpretation before enforcement—is treated as entitled to controlling deference. This incongruence between the two deference doctrines creates unnecessary confusion and uncertainty, and muddies the core justifications for providing deference.

Precisely the same reasons that lead the Court to insist that *Chevron* deference attaches only to agency action with the effect of law apply to *Auer* deference. Indeed, the failure to harmonize these two types of deference has created an absurd situation in which an informal letter from a low-level bureaucrat redefining a word in a regulation may be afforded more deference than the regulation itself, which actually went through public notice-and-comment rulemaking. This bizarre circumstance provides agencies—already loath to undertake the expensive and time-consuming notice-and-comment process—an additional incentive not to engage the public when making policy decisions. And that goes double for cases like *Gloucester County*, where the agency was attempting to promulgate a controversial policy that is likely to provoke legal challenges. Why go through all that trouble if it's just going to put you in a less advantageous litigating position anyway?

This case illustrates a further aspect of the *Chevron-Auer* divergence. If deference regarding *statutory* interpretation requires certain safeguards and procedures but deference regarding *regulatory* interpretation does not, agencies have the incentive to manipulate the legal form—statute or regulation—they purport to interpret. *Gloucester County* is a classic example. Title IX itself contains the operative language of the question at issue: whether an institution's statutory right to maintain "separate living facilities for the different sexes" refers to biological sex.[18] Yet because the immediate factual context involves bathrooms rather than living facilities, the parties have looked further to OCR regulation 34 C.F.R. § 106.33, which provides that institutions may also provide separate "toilet, locker room, and shower facilities on the basis of sex." Is the operative language of the separate-facilities exception statutory or regulatory? The answer could be either or both. The Fourth Circuit treated it as regulatory and thus applied *Auer* deference. Had the court treated it as statutory, *Chevron* would have applied—along with the limitations on its application—and the case would have come out the opposite way. Because in many cases statutes and regulations cover (much of) the same ground, the choice between *Auer* and *Chevron* will often be arbitrary. All the more reason to bring the prerequisites for applying the two kinds of deference into harmony.

II. Current *Auer* Doctrine Undermines Due Process, the Rule of Law, and Separation of Powers

A. Auer *Undermines Due Process and the Rule of Law*

It is a fundamental maxim of American law that, in order to be legitimate, the law must be reasonably knowable to an ordinary person. A properly formulated law must provide fair warning of the conduct proscribed and be publicly promulgated. These are not merely guidelines for good public administration; they are bedrock characteristics of law *qua* law.[19] *Auer* deference, at least as formulated in the current doctrine, violates this maxim by making it possible for administrative agencies to make changes to their regulations that have significant impacts on regulated persons without ever even publishing the changes to the public, let alone allowing the public to participate through notice-and-comment rulemaking. It allows "[a]ny government lawyer with a laptop [to] create a new federal crime by adding a footnote to a friend-of-the-court brief."[20]

When surveyed, two in five agency officials whose job duties include rule-drafting confirmed that "*Auer* deference plays a role in drafting" their regulations.[21] Allowing agencies to reinterpret their ambiguous rules at will, with no need for formal processes,

deference is warranted even in informal contexts); Bassiri v. Xerox Corp., 463 F.3d 927, 930 (9th Cir. 2006) (same); Smith v. Nicholson, 451 F.3d 1344, 1349–50 (Fed. Cir. 2006) (same).

12 467 U.S. 837, 842–44 (1984).

13 529 U.S. 576, 587 (2000).

14 United States v. Mead Corp., 533 U.S. 218 (2001).

15 *Id.* at 221.

16 *Id.* at 227–31.

17 323 U.S. 134 (1944).

18 20 U.S.C. §1681(a).

19 *See* Lon L. Fuller, The Morality of Law 33–38 (1964) (arguing that lack of public promulgation and reasonable intelligibility are two of the "eight ways to fail to make law").

20 Carter v. Welles-Bowen Realty, Inc., 736 F.3d 722, 733 (6th Cir. 2013) (Sutton, J., concurring).

21 Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 Stan. L. Rev. 999, 1066 (2015).

incentivizes them to write vague regulations to ensure the widest range of plausible potential meanings. In the words of Justice Scalia, "giving [informal agency interpretations] deference allows the agency to control the extent of its notice-and-comment-free domain. To expand this domain, the agency need only write substantive rules more broadly and vaguely, leaving plenty of gaps to be filled in later, using interpretive rules unchecked by notice and comment."[22]

Auer's fair-notice-related defects are not endemic to the rest of the Court's administrative deference jurisprudence, and limiting *Auer* need not also doom *Chevron*. The difference is that, unlike *Auer*, *Chevron* is limited by *Mead* and, as discussed above, *Mead*'s reasoning should extend to limit agency interpretations of their own regulations, bringing the two doctrines into closer alignment. Maintaining a distinction between published rules and nonbinding interpretations found in letters or circulars—heretofore unrecognized in regulatory interpretation jurisprudence—would ensure that only interpretations that have been given public scrutiny receive controlling deference. Agencies would be free to issue informal interpretations to quickly and efficiently provide guidance to employees and regulated parties, but those interpretations would lack the force of law and would not be given deference by the courts. Major policy changes, however, would require notice-and-comment rulemaking. This system ensures that someone, whether the courts through careful review or the public through the notice-and-comment process, is able to keep watch over what the agency is doing. *Mead* forced agency interpretations of statutes into the light, while agency interpretations of their own regulations remain in the shadows.

B. Auer *Undermines Separation of Powers*

Auer deference for informal interpretive letters "contravenes one of the great rules of separation of powers: He who writes a law must not adjudge its violation."[23] Affording controlling deference to agencies' interpretations of their own regulations gives executive agencies the power both to write the regulations they are charged with enforcing and later to declare just what the ambiguous words of those regulations mean—a task traditionally left to courts. Even Congress is not permitted this power. If Congress wants to change the meaning of one of its statutes, it has to pass a new law, and then courts engage in their own independent review of what the statute actually means. Regardless of the persuasiveness of evidence regarding legislative intent, courts never simply accept Congress's interpretation sight unseen.

Auer thus produces the absurd result that, when Congress delegates rulemaking authority to an agency, it effectively delegates greater authority than Congress itself possesses. Equally absurd is the fact that—at least since *Christensen* and *Mead* forced agency interpretations of statutes into the light—an agency receives greater deference when it changes policy by reinterpreting a footnote in an amicus brief or via an informal guidance letter than when it engages in formal reinterpretation of a statute.[24] The collection, in effect, of legislative and judicial authority into the hands of relatively unaccountable administrative agencies that *Auer* deference allows undermines the separation of powers at the center of the country's constitutional structure.

C. This Case Shows Auer *at Its Worst*

Gloucester County presented an egregious, yet typical, example of the absurd results *Auer* deference can lead to when a federal agency decides to act aggressively. The Ferg-Cadima letter asserting OCR's new interpretation of the bathroom exception to Title IX in 34 C.F.R. § 106.33 represented an abrupt change in longstanding agency and public understanding of the regulation—one that stood in direct conflict with Congress's repeatedly expressed policy choices. The interpretation contained in the letter did not go through notice-and-comment rulemaking. Indeed, it was not published to the general public at all. It was an informal letter written by a relatively low-level employee and was not even considered binding on the agency itself. Applying *Auer*, the Fourth Circuit gave this unpublished, non-binding letter from a minor bureaucrat the full force of a federal statute.

Nor did the "Dear Colleague" letter that followed the Ferg-Cadima letter go through any sort of rulemaking process when it was written in response to the current litigation. The lack of public comment is abundantly clear in that it shows no regard for any of the various legitimate concerns individuals have raised about transgender restroom and locker room access. The letter shows an OCR that has let its own policy preferences take it above and beyond its delegated authority, concerning itself with neither the express will of Congress nor the good faith opinions of regulated parties, let alone the procedures required by constitutional structure and the Administrative Procedure Act. The APA's notice-and-comment procedures exist specifically to counter aggressive agency behavior of this sort. But the Supreme Court's *Auer* jurisprudence, as currently applied, allows (if not encourages) agencies to do an end-run around the statutory requirements simply by promulgating vague rules and cloaking sweeping policy pronouncements as merely informal interpretations.

III. *Auer* Deference Should, at the Very Least, Be Limited to Interpretations that Have Gone Through Notice-and-Comment

An adjustment to the *Auer* doctrine to reconcile it with modern *Chevron* jurisprudence would mitigate most of *Auer*'s largest defects. As noted above in Part I, *Chevron* held that courts must give "effect to an agency's regulation containing a reasonable interpretation of an ambiguous statute."[25] Then *Christensen* explained that "[i]nterpretations such as those in opinion letters—like interpretations contained in policy

22 *Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment).

23 Decker v. Nw. Envtl. Def. Center., 133 S. Ct. 1326, 1342 (Scalia, J., concurring).

24 Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 Admin. L.J. Am. U. 1, 5 (1996) (noting how *Seminole Rock* [and *Auer*]'s "plainly erroneous" standard "has produced the bizarre anomaly that a nonlegislative or ad hoc document interpreting a regulation garners greater judicial deference (and thus potentially greater legal force) than does a legislative rule, such as the one involved in *Chevron*, in which an agency interprets a statute").

25 467 U.S. at 842–44.

statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference."[26] Then *Mead* reaffirmed *Christensen*'s central holding that informal interpretative statements lacking the force of law should be afforded only the lesser *Skidmore* deference.[27]

In *Auer*, the Court held that an agency's interpretation of its own regulation is controlling unless "plainly erroneous or inconsistent with the regulation."[28] The Court should follow *Christensen* and *Mead*'s limitation on *Chevron* by placing a similar restriction on *Auer*, especially when an agency's interpretative actions are nonbinding on the agency itself. If agencies want their interpretations to have the force of law—and to have courts defer to them—they should have to go through the trouble of notice-and-comment rulemaking. If they instead want flexibility and efficiency, they shouldn't enjoy judicial deference. There's a tradeoff—such that agencies remain accountable to either the public or the courts—but if decisions like that made by the Fourth Circuit in *Gloucester County* carry the day, agencies will get the best of both worlds while regulated people and institutions will get neither an opportunity to participate in rulemaking nor a proper day in court with real judicial review.

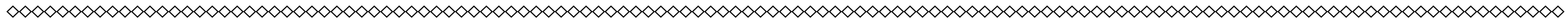
IV. Conclusion

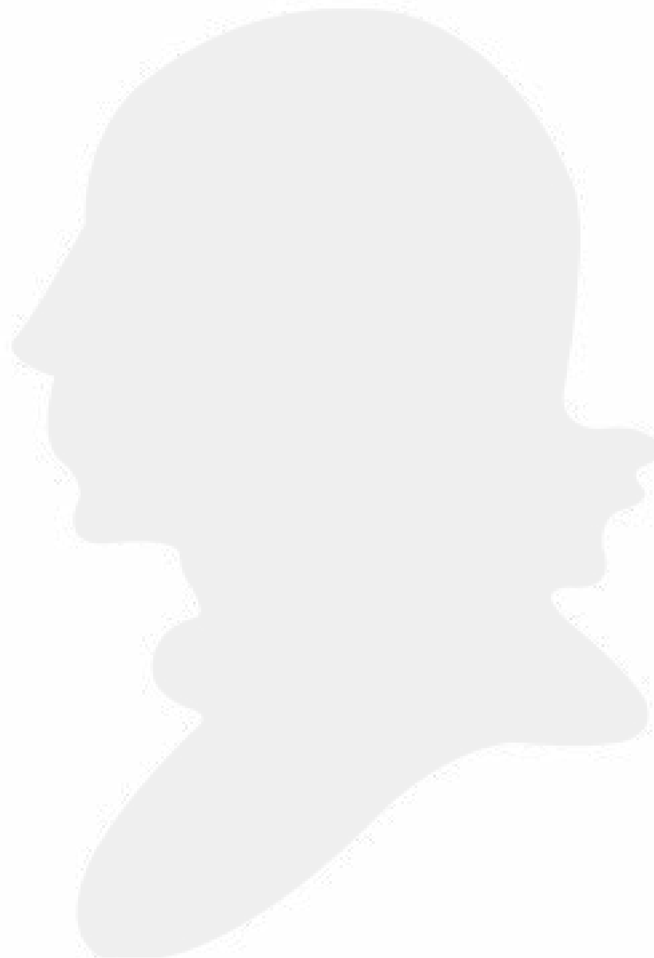
Despite the fact that the specific circumstances surrounding *Gloucester County v. G.G.* may prevent the Supreme Court from ever reaching the merits in the case, this issue of administrative deference remains extremely relevant. Sooner rather than later, the Court will have to reckon with the *Auer* doctrine it created. It should consider our concerns about *Auer*'s undermining of due process and separation of powers when that time comes.

26 529 U.S. at 587.

27 533 U.S. at 229–34.

28 519 U.S. at 461 (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)).





Civil Rights

Bottleneckers: The Origins of Occupational Licensing and What Can Be Done About Its Excesses

By Dick M. Carpenter II

Note from the Editor:

This article critically discusses economic regulation in general and occupational licensing in particular. It goes on to discuss Professor Randy Barnett's theory that the Constitution should be interpreted to protect economic liberty, then proposes one way legislatures can protect economic liberty without sacrificing the public good.

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• Mark Pulliam, *Libertarian Judicial Activism Isn't What the Courts Need*, American Greatness (Jan. 3, 2017), http://amgreatness.com/2017/01/03/libertarian-judicial-activism-isnt-courts-need/.

• Ian Millhiser, *The Plan To Build The Yuugest, Classiest, Most Luxurious Constitution You've Ever Seen*, Think Progress (Apr. 28, 2016), https://thinkprogress.org/the-plan-to-build-the-yuugest-classiest-most-luxurious-constitution-youve-ever-seen-f92107c90cee.

• Eliot Friedson, Professionalism: The Third Logic (2001), https://www.amazon.com/Professionalism-Third-Logic-Practice-Knowledge/dp/0226262030.

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At this moment, a campaign is being waged in America's state capitals. Its purpose? To protect the public from the menace of unregulated music therapists. A music therapist "directs and participates in instrumental and vocal music activities designed to meet patients' physical or psychological needs."[1] Whatever one thinks of this work, it is difficult to imagine what threat it could possibly pose.

Indeed, the push to license music therapists is coming not from harmed or concerned consumers, but from industry insiders. The American Music Therapy Association (AMTA) has been lobbying state legislators coast to coast, demanding licensure.[2] As a result, nine states now regulate music therapists, some with requirements that eclipse those required for many medical professions. Georgia, for example, requires aspiring music therapists to earn a bachelor's degree or higher from an AMTA-approved music therapy program, complete 1,200 hours of clinical training, pass the $325 examination for board certification, pay various fees to the state, attain 18 years of age, and pass a criminal background check.[3]

These requirements restrict the flow of workers into the occupation and result in higher prices for consumers. Indeed, consumers in states that license music therapists could pay as much as 15 percent more for music therapy,[4] without any evidence that the bottleneck on new practitioners will make it better or safer.

Similar stories abound in the annals of licensing, a fact that will come as no surprise to those familiar with public choice theory. However, the action by which industries seek government protection from competition is less well understood by the general public. Public choice theory, for all its merits, has not produced an accessible and suitable shorthand. There is rent-seeking, of course, but the term is obscure and its meaning difficult to intuit, making it a less than ideal tool for explaining the concept.

In this article, I discuss a new term for entities like the AMTA that lobby for anticompetitive licenses and other regulations, and for the government officials that create those licenses: bottleneckers. A bottleneck is a person or thing that "retards or halts free movement and progress."[5] Drawn from the physical properties of the neck of a bottle, the metaphor is vivid and has proven useful for describing obstructions in contexts as disparate as road traffic and project management. It is also equally

1 *Music Therapist*, Dictionary of Occupational Titles, http://www.occupationalinfo.org/07/076127014.html.

2 *State Recognition*, Certification Bd. for Music Therapists, http://www.cbmt.org/advocacy/state-recognition.

3 *Examination*, Certification Bd. for Music Therapists, http://www.cbmt.org/examination.

4 Morris M. Kleiner & Alan B. Krueger, *The Prevalence and Effects of Occupational Licensing*, 48 Brit. J. Indus. Rel. 676 (2010).

5 *Bottleneck*, Merriam-Webster, http://www.merriam-webster.com/dictionary/bottleneck.

well suited for describing those who seek to impede the free flow of workers into occupations and the process by which they do it. This handy and economic coinage makes it possible, in one word, to describe those who seek to co-opt government for their own ends. But limiting the monopolistic activities of bottleneckers requires an understanding of how they work. Indeed, one of the great prevailing myths about occupational licensing schemes is that they are created because of some presumed need, that legislators hear from harmed consumers or concerned citizens or perhaps take notice of some threat to public health and safety that a license could supposedly mitigate. The true genesis of licensing laws, however, is nothing like that idealized narrative, and this article will explore some of the history of such laws.

I. How Bottleneckers Are Involved in Creating Licenses

Workers have long understood the advantages to be gained by restricting the flow of entrants into their occupations. Already in 1776, Adam Smith had observed that trades conspired to reduce the availability of skilled craftspeople in order to raise wages.[6] At the time, workers accomplished this by forming exclusive organizations—guilds—that granted them monopoly rights to their trade under the auspices of the civil authorities.[7]

Modern-day licensing schemes typically arise in similar fashion. People already at work in an occupation organize into professional associations and lobby legislators for licensure, the effect of which is shutting out competitors who have not completed the designated requirements. To support their requests, industry bottleneckers often raise the specter of hyperbolic threats to public health and safety from unregulated practice and little to no empirical evidence. To make it easy for legislators to give them what they want, bottleneckers often provide sample licensing legislation they wrote themselves. Since occupational licensing is primarily handed out at the state level, this process repeated in one state capitol after another, usually as part of a deliberate campaign. The AMTA's current push for music therapy licensing is a textbook and real-time example.

Another quintessential example of a license's birth comes from the death industry. Funeral directors began forming city and state trade associations in the late 19th century.[8] In 1882, these coalesced into the National Funeral Directors Association (NFDA).[9] One of the funeral directors' goals in organizing was, in the NFDA's words, to "protect themselves from excessive and therefore harmful competition from within their own ranks."[10] Throughout the late 19th and early 20th centuries, the NFDA successfully lobbied legislators to pass laws licensing funeral directors and embalmers in all 50 states and the District of Columbia. By requiring a minimum amount of schooling (often one year), an apprenticeship, and a licensing examination, these laws restricted competition among providers of funeral goods and services. These bottlenecks emboldened funeral directors to significantly inflate casket prices—by as much as 600 percent[11]—and engage in questionable business practices like "bundling," that is, requiring purchase of a casket as a precondition to providing services that they alone could legally offer. In 1984, the Federal Trade Commission reined in bundling, among other practices.[12] No longer able to require grieving families to buy caskets before selling them other exclusive services, funeral directors returned to their state legislatures to demand new bottlenecks to protect their surplus profits. A dozen states went on to adopt laws allowing only licensed funeral directors to sell caskets and other funeral merchandise.

After Prohibition's repeal, the liquor industry helped design the regulations that would govern it, providing yet another example of how licensing schemes come to be.[13] As a result, most states require that much of the alcohol produced for consumers pass through a wholesale distributor before becoming available for retail purchase[14]—supposedly to prevent overconsumption of alcohol. While there is little evidence that this "three-tier system"—which inspired the term bottlenecker—produces any such public benefit, there is plenty of evidence that it produces surplus profits for the liquor industry. Estimates put the distributor markup on alcohol as high as 30 percent,[15] and analysts cited by the FTC have concluded that the liquor industry has "the most expensive distribution system of any packaged-goods industry by far, with margins more than twice those in the food business."[16] Bottlenecking, clearly, is big business. Bottleneckers will therefore go to great lengths to maintain and even grow their advantage.

II. How Bottleneckers Protect and Expand their Privileges

Bottleneckers fight hard to protect their licensing schemes when they come under threat: coordinating letter-writing

6 Adam Smith, The Wealth of Nations (Modern Library 1937) (1776).

7 Heather Swanson, *The Illusion of Economic Structure: Craft Guilds in Late Medieval English Towns*, Past and Present, Nov. 1988, at 29.

8 Robert W. Habenstein & William M. Lamers, The History of American Funeral Directing (7th ed. 2010).

9 *Id.*; Steven W. Kopp & Elyria Kemp, *The Death Care Industry: A Review of Regulatory and Consumer Issues*, 41 J. Consumer Aff. 150 (2007).

10 Rebecca A. von Cohen, *The FTC Assault on the Cost of Dying*, 27 Bus. & Soc'y Rev. 49-50 (1978).

11 Craigmiles v. Giles, 110 F. Supp. 2d. 658, 664 (E.D. Tenn. 2000).

12 Elizabeth Howell Boldt, *Nail in the Coffin: Can Elderly Americans Afford to Die?,* 21 Elder L.J. 149 (2013); Kopp & Kemp, *supra* note 9; Jean Rosenblatt, *Funeral Business under Fire*, *in* Editorial Research Reports 1982, at 813-28 (1982), http://library.cqpress.com/cqresearcher/document.php?id=cqresrre1982110500; Ruth Darmstadter, *Blocking the Death Blow to Funeral Regulation*, 42 Bus. & Soc'y Rev. 32 (1983); Fred S. McChesney, *Consumer Ignorance and Consumer Protection Law: Empirical Evidence from the FTC's Funeral Rule*, 7 J.L. & Pol'y 1 (1990).

13 John E. O'Neill, *Federal Activity in Alcoholic Beverage Control*, 7 L. & Contemp. Probs. (1940); Pamela E. Pennock & K. Austin Kerr, *In the Shadow of Prohibition: Domestic American Alcohol Policy since 1933*, 46 Bus. Hist. 383 (2005).

14 *See, e.g.*, Wash. State Liquor Control Bd., Beer and Wine Three-Tier System Review Task Force Report (2006), http://leg.wa.gov/JointCommittees/Archive/SCBW/Documents/6-10-2008_LCB.pdf.

15 Garrett Peck, The Prohibition Hangover: Alcohol in America from Demon Rum to Cult Cabernet (2009).

16 Fed. Trade Comm'n, Possible Anticompetitive Barriers to E-Commerce: Wine 22 (2003); *see also* Alix M. Freedman & John R. Emschwiller, *Vintage System: Big Liquor Wholesaler Finds Change Stalking Its Very Private World*, Wall Street J. (Oct. 4, 1999), https://www.wsj.com/articles/SB938992474677779565.

campaigns, crowding legislative hearing rooms, paying personal visits to legislators, holding industry days at state capitols, giving special awards to legislators, making campaign contributions, and delivering testimony to legislative committees full of alarming anecdotes and unsubstantiated facts.

For example, in 2000, when an Oklahoma legislator proposed a bill to allow casket sales without a funeral director's license, industry bottleneckers warned legislators that the bill would mean dead bodies would have to be propped in a corner while awaiting a casket purchased over the internet, completely ignoring the reality of next-day delivery.[17] The bill subsequently failed. As of this writing, Oklahoma's casket bottleneck remains intact, having withstood a half dozen legislative challenges and a constitutional lawsuit.[18] In another example, when the Florida legislature in 2011 considered repealing its licensing law for interior designers,[19] a battle raged for weeks in the state capitol, with licensed designers—represented in force by their professional association—predicting epic cataclysms should the license be eliminated.[20] "What you're basically doing is contributing to 88,000 deaths every year," one licensed designer warned.[21] When the legislative session's final gavel fell, the license remained standing.

But bottleneckers are not purely reactive. They often spent a good deal of time and money currying favor with legislators even before a challenge arises. The National Beer Wholesalers Association (NBWA), for example, boasts about a presence in every community and state legislature, and distributors visit every member of the U.S. Congress annually, with the stated intent of shoring up the three-tier system.[22] And through its political action committee (PAC) the NBWA has consistently been one of the largest contributors to state and federal political candidates. From 1990 to 2014, its PAC contributed more than $32 million to candidates and spent more than $11 million in lobbying, including expenses associated with more than 20 lobbyists just at the federal level.[23] Such activities are key to understanding why legislators are so often willing to acquiesce to bottleneckers' demands: In obliging them, legislators gain an identifiable, energized, and moneyed base of support.[24]

The dividends for such spending can be significant. In 2013, Texas alcohol bottleneckers successfully pushed for a law to further enhance their profits. The law forced alcohol producers to give away the territorial distribution rights for their products for free.[25] It also allowed distributors to sell these valuable rights, acquired at no cost, to other distributors at a profit. This bottlenecking victory came on the heels of $7 million in contributions to state legislators between 2009 and 2012.[26]

Bottleneckers also protect and expand their licensing schemes by becoming members of and ultimately dominating the licensing boards that govern their own occupations. The process—called regulatory capture—allows bottleneckers to police their own occupations and to sweep competing occupations into their domain.[27] The latter phenomenon is known as license creep,[28] and this vehicle has been used by bottleneckers to, among other things, regulate eyebrow threaders[29] (who use a single piece of cotton thread to remove unwanted facial and body hair) and African-style hair braiders (who style hair without heat, chemicals, or sharp objects) as cosmetologists and regulate teeth-whitening entrepreneurs as dentists.[30] Through regulatory capture,

17 Ray Carter, *Casket Seller Sues Okla. in Federal Court over Licensing Act*, J. Rec., Mar. 15, 2001; Ray Carter, *Casket Sales Bill Dies in Oklahoma House Committee*, J. Rec., Feb. 20, 2003.

18 Carter, *Casket Seller Sues*, *supra* note 17; Carter, *Casket Sales Bill Dies*, *supra* note 17; Ray Carter, *Casket Sales Proposal Attracts New Allies*, J. Rec., Feb. 19, 2002; Will Kooi, *Oklahoma State Rep. Paul Wesselhoft: Tribes Should Be Allowed to Sell Caskets*, J. Rec., July 29, 2010.

19 Zac Anderson, *Legislative Session Renews Debate on Jobs*, Herald-Trib. (Jan. 14, 2012), http://politics.heraldtribune.com/2012/01/14/legislative-session-renews-debate-on-jobs/; Arian Campo-Flores, *In Florida, Interior Decorators Have Designs on Deregulation*, Wall Street J. (Apr. 15, 2011), https://www.wsj.com/articles/SB10001424052748703551304576260742209315376; Tami Luhby, *States Look to Repeal 'Job-Killing' Regulations*, CNN Money (Mar. 4, 2011), http://money.cnn.com/2011/03/04/news/economy/state_regulation_repeal_governor/; Janet Zink, *Fewer Professions on List for Deregulation Proposal*, St. Petersburg Times, May 3, 2011.

20 Katie Sanders, *Business Group Says Florida Is One of Three States That Regulates Commercial Interior Designers*, St. Petersburg Times, Mar. 18, 2011; Zink, *supra* note 19.

21 Campo-Flores, *supra* note 19 (quoting Michelle Earley, a licensed interior designer).

22 *See* Nat'l Beer Wholesalers Ass'n, 2015-2016 Report, at 4, 9, 18 (2016), https://www.nbwa.org/sites/default/files/NBWA-Annual-Report-2015-2016_1.pdf.

23 *National Beer Wholesalers Assn*, OpenSecrets.org, https://www.opensecrets.org/orgs/summary.php?id=D000000101&cycle=A.

24 Fred S. McChesney, *Rent Extraction and Interest-Group Organization in a Coasean Model of Regulation*, 20 J. Legal Stud. 73 (1991).

25 Tex. Alco. Bev. Code §102.75(a)(7) ("[N]o manufacturer shall . . . accept payment in exchange for an agreement setting forth territorial rights.").

26 *Big Beer Drowns Small Competitors*, Lobby Watch (Mar. 7, 2013), https://web.archive.org/web/20130323012326/http://info.tpj.org/Lobby_Watch/pdf/AlcoholContribs.pdf.

27 Eliot Freidson, Professional Powers: A Study of the Institutionalization of Formal Knowledge (1986); Jason Potts, *Open Occupations—Why Work Should Be Free*, 29 Econ. Aff. 71 (2009); Robert A. Rothman, *Occupational Roles: Power and Negotiation in the Division of Labor*, 20 Soc. Q. 495 (1979); Saundra K. Schneider, *Influences on State Professional Licensure Policy*, 47 Pub. Admin. Rev. 479 (1987); Howard G. Schutz, *Effects of Increased Citizen Membership on Occupational Licensing Boards in California*, 11 Pol'y Stud. J. 504 (1983).

28 Dick M. Carpenter II, Lisa Knepper, Angela Erickson & John K. Ross, License to Work: A National Study of Burdens from Occupational Licensing (2012), http://ij.org/wp-content/uploads/2015/04/licensetowork1.pdf; Angela C. Erickson, White Out: How Dental Industry Insiders Thwart Competition From Teeth-Whitening Entrepreneurs (2013), http://ij.org/wp-content/uploads/2015/03/white-out1.pdf.

29 Aaron S. Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. Pa. L. Rev. 1093 (2014).

30 White Out, *supra* note 28.

bottleneckers become government officials. But sometimes the reverse happens and government officials become bottleneckers.

III. How Government Officials Become Bottleneckers

Government officials typically play a supporting, albeit essential, role in bottlenecking. But government officials bottleneck for their own reasons, which are not primarily about protecting private profits. This is not to say that such schemes bestow no benefits on industry insiders, only that such benefits are not the schemes' primary purpose.

For example, tour guide licenses, which exist in a handful of U.S. cities, do benefit licensed guides by restricting their competition, but this is not primarily why cities promulgate them. Instead of creating licensing schemes to protect a specific group of constituents, cities create them purportedly to protect their reputations among tourists and thus their economies. Since repealed, Savannah, Georgia's tour guide license traced back to the city's desire to ensure "quality" tours.[31] New Orleans' license, still in force, was also created for this purpose.[32] And the prevailing justification for Philadelphia's license, which is not currently enforced but remains on the books, was protecting the city's tourism interests.[33] Quality, however, is a more tenuous justification for regulation than health and safety and one that research has cast doubt on. For instance, a recent study of the District of Columbia's now-defunct tour guide license found that it had no effect on tour quality.[34]

Vending licenses represent a similar case. Once recognized as a respectable way by which the poor could earn a living,[35] vending fell into disrepute in the latter half of the 20th century when cities began taking steps to curtail it.[36] Even now, with street food enjoying renewed cultural prominence, many cities disapprove of vending, considering it "tacky" or conjuring myriad poorly substantiated health and safety rationales to justify regulations. Other rationales offered for vending bottlenecks go to cities' conceptions of vending businesses as somehow illegitimate. Believing—incorrectly—that vendors do not pay taxes and are thus parasitic on brick-and-mortar businesses, cities seek to protect the latter businesses from "unfair" competition. Brick-and-mortar businesses help the process along by appearing at city council meetings, demanding laws to ban vending, or at least keep vendors sufficiently far away from storefronts. Repression of vending ignores empirical evidence suggesting that street food is safe[37] and that, far from "stealing" business from them, food trucks may actually complement restaurants.[38] It also ignores the plethora of taxes that vending businesses pay—including property taxes through any of their business rents—to say nothing of vendors' many other economic contributions and the opportunities vending presents for upward mobility and entrepreneurship. Note that food safety laws are not included as an example of bottlenecking in this context. As discussed in greater detail below, regulation of food vendors—just like their restaurant competitors—in the form of inspections to ensure food safety may be a reasonable government function and, when applied uniformly and judiciously, does not act in the same anti-competitive manner as proximity laws and other such restrictions.

When it comes to defending their licensing schemes, government bottleneckers are just as fierce as industry bottleneckers. It took a First Amendment lawsuit for Savannah and Philadelphia to repeal and suspend their respective tour guide licenses, while New Orleans' license withstood a similar legal challenge. On the vending front, after a court struck down Atlanta's vending ordinance for creating an unconstitutional monopoly in 2012, the mayor responded by refusing to issue or renew vendors' licenses, claiming that the ruling had left the city without a vending ordinance. It took a looming contempt hearing against the mayor to persuade the city council to adopt a new vending ordinance.[39]

IV. Breaking Open Bottlenecks

Breaking open bottlenecks is frequently difficult, but it is possible, as the defeat of Atlanta's vending license proves. Some bottlenecks have been broken open in state capitols or city councils. For example, in 2005, African-style hair braider Melony Armstrong defeated Mississippi cosmetology bottleneckers at their own game when they introduced a bill to make state cosmetology regulations explicitly encompass braiding. Melony responded with a bill of her own that exempted braiders from cosmetology regulations. Due to Melony's determined lobbying and grassroots organizing, her bill passed.[40]

Recent reform efforts suggest elected officials are increasingly aware of problems of excessive occupational licensing and are seeking ways to remedy them. Indeed, once almost the exclusive

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31 Eric Curl, *City: Washington Court Ruling Won't Impact Savannah Tours*, SavannahNow (Jul. 15, 2014), http://savannahnow.com/news/2014-07-15/city-washington-court-ruling-wont-impact-savannah-tours.

32 Christopher Tidmore, *First Amendment Lawsuit Filed by Local Tour Guides*, La. Weekly (Dec. 19, 2011), http://www.louisianaweekly.com/first-amendment-lawsuit-filed-by-local-tour-guides/.

33 Kathy Matheson, *Philly to Tour Guides: Yo! Get It Right*, Fox News (May 27, 2007), http://www.foxnews.com/printer_friendly_wires/2007May27/0,4675,TestingTourGuides,00.html.

34 Angela C. Erickson, Putting Licensing to the Test: How Licenses for Tour Guides Fail Consumers—and Guides (2016), http://ij.org/wp-content/uploads/2016/10/Putting-Licensing-to-the-Test-3.pdf.

35 David Ward, *Population Growth, Migration, and Urbanization, 1860–1920*, in North America: The Historical Geography of a Changing Continent 285 (Thomas F. McIlwraith & Edward K. Muller eds., 2d ed. 2001).

36 Christine Gallant, *A Defense of City's Street Vendors*, Atlanta J.-Const., Aug. 11, 2011; Alfonso Morales, *Peddling Policy: Street Vending in Historical and Contemporary Context*, 20 Int'l J. Soc. & Soc. Pol'y (2000).

37 Angela C. Erickson, *Food Safety Risk of Food Trucks Compared to Restaurants*, 35 Food Protection Trends 348 (2015).

38 *Food Trucks Primarily Replace a Quick Service Restaurant Visit, Says NPD*, NPD Grp. (Aug. 19, 2013), https://www.npd.com/wps/portal/npd/us/news/press-releases/food-trucks-primarily-replace-a-quick-service-restaurant-visit-says-npd/.

39 Dion Rabouin, *City Council Vending Ordinance Delays Contempt Ruling Against Mayor Kasim Reed*, Atlanta Daily World (Nov. 5, 2013), https://atlantadailyworld.com/2013/11/05/11th-hour-ordinance-delays-contempt-ruling-against-mayor-kasim-reed/.

40 Dick Carpenter, *The Power of One Entrepreneur: A Case Study of the Effects of Entrepreneurship*, 4 S.J. Entrepreneurship 19 (2011).

province of the political right, licensure reform now also has proponents on the left. In 2015, the Obama administration released an 80-page report that cast a critical eye on the costs associated with licensing and the vast inconsistencies in licensing schemes across states and also made recommendations for state policymakers on how to reform licensing.[41]

Nonetheless, new bottlenecking continues apace in the creation of new licenses and the perpetuation of existing ones. Consequently, reform efforts are underway in courts of law and in the court of public opinion. In response to lawsuits brought by the Institute for Justice, for example, courts have struck down licensing requirements for casket sellers in Tennessee[42] and Louisiana,[43] threading in Texas,[44] braiding in California,[45] Texas,[46] and Utah,[47] and even Texas' scheme making it illegal for alcohol producers to receive compensation for distribution rights.[48]

Lawsuits have also spurred elected officials to change their laws, even before a ruling has been handed down. For example, in 2015, Savannah repealed its tour guide license in the face of the license's expected defeat in court. Of the move, a council member said, "I . . . realize that when you come up against the U.S. Constitution, you lose."[49]

But even in the courts, bottleneckers frequently prevail. For every bottleneck the courts have eliminated, they have preserved countless others. Indeed, the judiciary has a long history of deferring to the supposed will of the people in the form of legislatures. And this is not out of ignorance about the activities of bottleneckers or the willingness of elected officials to create licenses at their request. As the 10th U.S. Circuit Court Appeals famously observed as it upheld a bottleneck in *Powers v. Harris*, "while baseball may be the national pastime of the citizenry, dishing out special economic benefits to certain in-state industries remains the favored pastime of state and local governments."[50] Owing to significant precedent such as that in *Powers*, constitutional challenges to economic regulation were once thought to be all but unwinnable. From that perspective, any legal victories on behalf of economic liberty are noteworthy; they are a sign that the courts are still sometimes willing to scrutinize licensing systems to determine whether they achieve the necessary balance between protecting the public and respecting economic liberty—and to strike down any that appear unbalanced.

Georgetown University law professor Randy Barnett has argued that the U.S. Constitution requires a "presumption of liberty" that would lead to this kind of balancing in constitutional challenges to economic regulations. In his analysis of the original meaning of the Commerce Clause, the Necessary and Proper Clause, the Ninth Amendment, and the Fourteenth Amendment's Privileges or Immunities Clause, Barnett argues that these provisions have been ignored, distorted, or excised entirely by judges, resulting in what he calls the "lost Constitution." Consequently, two opposing constructions have arisen concerning the Constitution:

> Are all restrictions on the liberties of the people to be presumed constitutional unless an individual can convince a hierarchy of judges that the liberty is somehow "fundamental"? Or should we presume that any restriction on the rightful exercise of liberty is unconstitutional unless and until the government convinces a hierarchy of judges that such restrictions are both necessary and proper? The first of these is called "the presumption of constitutionality" . . . . The second of these constructions may be called the Presumption of Liberty.[51]

The construction that prevails at a given time has significant implications for how the courts and legislators interpret the powers the Constitution delegates to government officials. With regard to occupational regulations, the presumption of liberty supposes that when government officials consider whether to create or perpetuate a license, their starting point should be recognition of the freedom of practice. Under that construction, courts and legislators alike should presume that individuals have the right to practice their chosen occupation, free from government interference, unless and until those seeking licensure show with systematic evidence that it is needed to protect the public.[52]

Even then, full occupational licensure is unlikely to be necessary. In a recent article for *Regulation* magazine, my co-author and I discuss numerous regulatory options short of

41 Dep't of the Treas. Office of Econ. Policy, Council of Econ. Advisers & Dep't of Labor, Occupational Licensing: A Framework for Policymakers (2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf.

42 Craigmiles v. Giles, 312 F.3d 220, 224–25 (6th Cir. 2002).

43 St. Joseph Abbey v. Castille, 712 F.3d 215 (5th Cir. 2013).

44 Nick Sibilla, *Texas Supreme Court Strikes Down Useless Eyebrow Threading License*, Inst. for Justice (June 26, 2015), http://ij.org/press-release/texas-supreme-court-strikes-down-useless-eyebrow-threading-license/.

45 John Kramer, *Victory for Economic Liberty: California Decision Untangles Regulatory Nightmare for African Hairstyling*, Inst. for Justice (Aug. 19, 1999), http://ij.org/press-release/california-hair-braiding-latest-release/.

46 J. Justin Wilson, *Texas Hair Braiders Win Right to Open Braiding Schools*, Inst. for Justice (Jan. 7, 2015), http://ij.org/press-release/texas-hairbraiding-instruction-release-1-7-2015/.

47 J. Justin Wilson, *Federal Judge Strikes Down Utah's Hairbraiding Licensing Scheme*, Inst. for Justice (Aug. 9, 2012), http://ij.org/press-release/utah-hairbraiding-release-8-9-2012/.

48 Shira Rawlinson, *Victory for Texas Craft Brewers*, Inst. for Justice (Aug. 25, 2016), http://ij.org/press-release/victory-texas-craft-breweries/.

49 Russ Bynum, *Savannah Prepares Retreat in Speech Fight with Tour Guides*, Associated Press (Oct. 14, 2015), http://bigstory.ap.org/article/285b921fbbfa42748670f6eb1940a134/savannah-prepares-retreat-speech-fight-tour-guides.

50 379 F.3d 1208, 1226 (10th Cir. 2004).

51 Randy E. Barnett, Restoring the Lost Constitution: The Presumption of Liberty 5 (2013).

52 Of course, most licensing laws are adopted by states, and Professor Barnett is discussing the federal Constitution, but his argument about the presumption of liberty applies to state licensing laws under one of the very amendments at the center of his treatise—the 14th Amendment, which, among other things, applies federal constitutional rights to the states. For a brief overview of how the Supreme Court has used the 14th Amendment to apply the Bill of Rights to the states, see *Incorporation Doctrine*, Wex Legal Dictionary, https://www.law.cornell.edu/wex/incorporation_doctrine. Professor Barnett argues that, were the Privileges or Immunities Clause of the 14th Amendment to be understood according to its original meaning, rights protected by the federal

licensing that can provide many of the presumed benefits of licensing without restricting entry into occupations or triggering the demonstrable costs of licensing.[53] This menu can be thought of as a hierarchy, with the least intrusive forms of regulation at the top and the most restrictive—licensing—at the bottom. The top five options can be thought of as voluntary and include the following:

- *Market competition/no government regulation.* It is a foundational principle of free-market economics that markets generally work better than regulations, not only to allocate resources efficiently, but also to protect consumers.[54] In today's communications environment, consumers have at their fingertips copious amounts of information, the most basic of which is providers' reputations, that provides them with insight into the quality of providers' services, often making regulations superfluous. Thanks to social media, advice blogs, and websites such as Angie's List and Yelp, consumers can easily find recommendations on effective service providers and tips on which to avoid. Because of consumers' ready access to such information, market forces can often weed out incompetents and fraudsters more quickly and effectively than regulatory schemes.
- *Alternative dispute resolution and private litigation.* Alternative dispute resolution, which includes mediation and arbitration, has seen growing acceptance among consumers, business professionals, and the legal community in recent years.[55] Many courts require would be litigants to try this avenue before proceeding with formal litigation. In addition, the maximum financial threshold for many small-claims courts has risen appreciably for consumers. These options provide a low-cost alternative to formal private litigation for both consumers and occupational practitioners. However, if mediation and arbitration prove ill-suited, private rights of action that allow for litigation after injuries, even in small-claims courts, give consumers a means to seek compensation and compel providers to adopt standards of quality to avoid litigation and loss of reputation. The cost to consumers of obtaining the remedy could be reduced by allowing them to collect court and attorneys' fees if they prevail.
- *Quality service self-disclosure.* Virtually all occupational practitioners have websites, so linking to third-party evaluation sites provides consumers with an important competitive signal that practitioners are open to disclosure regarding the quality of their service. This is a market-based incentive that helps consumers differentiate highly competent, price-competitive occupational practitioners from mediocre ones. Even firms without websites can use this option by providing prospective customers with lists of references and past customers who can provide information about the firm.
- *Third-party professional certification and maintenance.* The National Commission for Certifying Agencies was created by the Institute for Credentialing Excellence in 1987. It has accredited approximately 300 professional and occupational programs from more than 120 organizations over the past three decades. These occupational certification programs cover nurses, automotive occupations, respiratory therapists, counselors, emergency technicians, and crane operators, to name just a few. Such occupational certifications, to be maintained, often require continuing education units. Most importantly, many organizations make such certifications a requirement for employment.
- *Voluntary bonding.* Voluntary bonding—a guarantee of protection against losses from theft or damage by a service provider—is common among general contractors, temporary personnel agencies, janitorial companies, and companies having government contracts. Some occupations carry with them more risks to consumers than others, and bonding essentially outsources management of risks to bonding companies.

The remaining elements of the hierarchy are forms of government intervention, listed from those forms of regulation with the lightest touch to those with the heaviest:

- *Inspections.* Inspections are commonly used in some contexts but could be applied more broadly as a means of consumer protection without full licensure. For example, municipalities across America adopt inspection regimes to ensure the cleanliness of restaurants. In such cases, inspections are deemed sufficient consumer protection over a more restrictive option of licensing food preparers, wait staff, and dishwashers. Inspections could also be applied to other professionals, such as barbers and cosmetologists, where the state has a legitimate interest in cleanliness of instruments and facilities. Similarly, periodic random inspection could replace the licensing of practitioners of various trades, such as electricians, carpenters, and other building contractors, where the application of skills is repeated and detectable to the experienced eye of an inspector.
- *Mandatory bonding or insurance.* For some occupations, states may find that voluntary bonding is not enough and instead require mandatory bonding or insurance. In particular, states may prefer this option when the risks associated with the services of certain firms extend beyond just the immediate consumer. For example, the state interest in regulating a tree trimmer is in ensuring that the service provider can pay for repairs in the event of damage to the home or other property of a party—a neighbor, for instance—not involved in the contract between the firm and the consumer. Tree trimming itself is a relatively safe

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Constitution would affect the scrutiny of economic rights, including those affected by state licensing laws.

53 Thomas A. Hemphill & Dick M. Carpenter, *Occupations: A Hierarchy of Regulatory Options,* Regulation, Fall 2016, at 20.

54 Milton Friedman & Rose Friedman, Free to Choose (1980).

55 The Architect's Handbook of Professional Practice 402 (Joseph A. Demkin ed., 14th ed. 2008) ("Within the last ten years, mediation has emerged as another alternative dispute resolution method that has received widespread acceptance."); John T. Dunlop & Arnold M. Zack, Mediation and Arbitration of Employment Disputes (1997).

profession that presents few other threats, making extensive state-mandated training, experience, testing, or other licensing requirements unnecessary. This means the state interest in protecting consumers and others from potential harm associated with tree trimming and other similar occupational practices can be met through bonding and insurance requirements, while allowing for basically free exercise of occupational practice.

- *Registration.* Registration requires providers to notify the government of their name, their address, and a description of their services. Because registration often includes a requirement that providers indicate where and how they take the service of process that initiates litigation, registration often complements private civil actions. The simple requirement of registration with the state may also be sufficient in and of itself to deter potential fly-by-night providers who may enter a state after a natural disaster or similar circumstances.
- *State certification.* State certification differs from voluntary, third-party certification in that the certifying body is the state rather than a private association, and in that it restricts the use of a title rather than the practice of an occupation. Under state certification, anyone can work in an occupation, but only those who meet the state's qualifications can use a designated title, such as certified interior designer, certified financial planner, or certified mechanic. Certification sends a signal to potential customers and employers that practitioners meet the requirements of the certifying boards. Certification is less restrictive than occupational licensing and presents few costs in terms of increased unemployment and consumer prices. Certification also overcomes a frequently cited basis for regulation—the problem of asymmetrical information, which is when service providers have more or better information than their customers.[56] The concern is that asymmetrical information creates an imbalance of power that service providers can use to their advantage (potentially to take advantage of customers). A related concern is specialized knowledge,[57] which is when a field is so complex that consumers cannot know enough to differentiate between good and poor service. Both concerns are used to justify full licensure, but certification can fulfill the same function of licensure—namely, signal sending[58]—without the costs. Certification provides consumers with information that levels the playing field without setting up barriers to entry that limit opportunity and lead to higher prices.
- *Occupational license.* Finally, licensing is the most restrictive form of occupational regulation. The underlying law is often referred to as a "practice act" because it limits the practice of an occupation to only those who meet the qualifications established by the state and remain in good standing. Because less restrictive types of regulation can often protect consumers just as effectively as licensing, but without licensing's costs in terms of lost employment and higher consumer prices, legislators should view licensing proposals with great skepticism. To the extent that they consider licensure, they should demand that proponents of creating or perpetuating a license establish the need for it with empirical evidence, not just anecdotes and speculation.

Indeed, my *Regulation* co-author and I argue that active consideration of the market-based mechanisms at the top of the hierarchy should always precede consideration of government regulation.[59] Ideally, policymakers would use the hierarchy to produce regulations that are calculated to meet demonstrated needs. They should do this by first identifying the problem, then identifying and quantifying the risks, then seeking solutions that get as close to the problem as possible; they should focus on the outcome (particularly on prioritizing public safety), use regulation only when necessary, keep things simple, and check for unintended consequences.

This hierarchy of options is now captured in model legislation promoted by the American Legislative Exchange Council. Versions of this legislation (although not the exact text) have been enacted into law by two states (Mississippi and Utah), five states are considering similar bills, and the U.S. Congress will soon consider a bill with this menu of regulatory options.

If this or similar legislation is adopted by other states and implemented as intended, this menu of options could help to block the well-worn pathway to licensure that bottleneckers have enjoyed during the past several decades. Indeed, given the growth of licensing—the percentage of the U.S. workforce needing a license has grown five-fold since the 1950s[60]—the need to uphold economic liberty is more essential and urgent today than ever before.

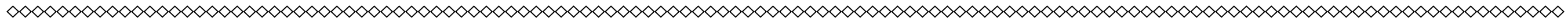
56 George A. Akerlof, *The Market for Lemons: Qualitative Uncertainty and the Market Mechanism*, 84 Q.J. Econ. 488 (1970).

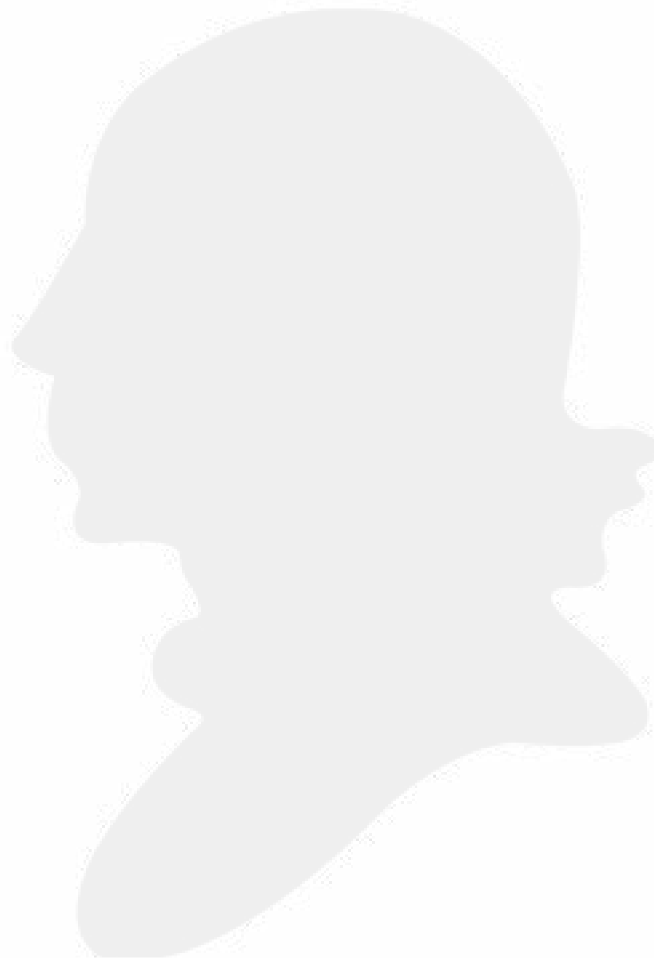
57 Eliot Freidson, Professionalism: The Third Logic (2001); David Brain, *Practical Knowledge and Occupational Control: The Professionalization of Architecture in the United States*, 6 Soc. Forum 239 (1991).

58 Michael Spence, *Job Market Signaling*, 87 Q.J. Econ. 355 (1973).

59 Hemphill & Carpenter, *supra* note 53 at 23.

60 Kleiner & Krueger, *supra* note 4.





Federal Special Education Law and State School Choice Programs

By Nat Malkus & Tim Keller

Note from the Editor:

In this article, Nat Malkus and Tim Keller outline the federal laws that protect students with disabilities, give an overview of school choice programs, and explain how participating in school choice programs affects the rights of students with disabilities. They summarize arguments against students with disabilities participating in school choice programs and offer counterarguments and nuances, ultimately arguing that well-designed school choice programs are beneficial to students with disabilities.

The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the authors. Whenever we publish an article that advocates for a particular position, as here, we offer links to other perspectives on the issue, including ones opposed to the position taken in the article. We also invite responses from our readers. To join the debate, please email us at info@fedsoc.org.

• Cory Turner, *Indiana's School Choice Program Often Underserves Special Needs Students*, NPR- All Things Considered (May 15, 2017), http://www.npr.org/2017/05/15/528502918/indianas-school-choice-program-often-underserves-special-needs-students.

• Dana Goldstein, *Special Ed School Vouchers May Come With Hidden Costs*, New York Times (Apr. 11, 2017), https://www.nytimes.com/2017/04/11/us/school-vouchers-disability.html?mcubz=1.

• Eve Hill, *"School Choice" May Leave Students with Disabilities No Choice*, Take Care (Apr. 17, 2017), https://takecareblog.com/blog/school-choice-may-leave-students-with-disabilities-no-choice.

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In January 2017, Betsy DeVos was narrowly confirmed as the 11th U.S. Secretary of Education, following one of the most contentious hearings of any cabinet appointee. DeVos' long history of advocating for school choice, and particularly for private school choice programs, made her a strong candidate in the eyes of President Trump, but a clear target for opponents of such programs.

In DeVos' confirmation hearing, one line of questioning that received substantial media attention concerned whether students with disabilities who participate in private school choice programs retain their legal rights under the Individuals with Disabilities Education Act (IDEA). IDEA guarantees students with disabilities a free and appropriate public education and allows recourse through administrative procedures and in the courts when such an education is not furnished.

Senator Maggie Hassan, speaking about students with disabilities participating in school choice programs, asked DeVos, "Do you think that families should have a recourse in the courts?"[1] Senator Tim Kaine pursued a similar line of questioning, asking DeVos, "Should all schools be required to meet the requirements of the [Individuals with Disabilities] Education Act?"[2] DeVos' reply, "I think they already are," was brushed aside. In the hearing's aftermath, DeVos was widely criticized for her supposed failure to commit to protecting students with disabilities, and the false premise that private school choice programs undermine the civil rights of students with disabilities remained largely unchallenged. The same lines of inquiry, which some find politically advantageous but which fundamentally misunderstand private school requirements under IDEA, have been promulgated in subsequent Senate hearings and public correspondence questioning DeVos.[3]

It is important to clarify the legal rights of students with disabilities participating in private choice programs, less for the public perception of DeVos than for the perception of these expanding programs. Private school choice programs have grown rapidly in recent years. More than half of current programs have been established since 2010,[4] and based on recent state

1 *Education Secretary Confirmation Hearing* (C-SPAN video broadcast Jan. 17, 2017), https://www.c-span.org/video/?421224-1/education-secretary-nominee-betsy-devos-testifies-confirmation-hearing&start=12183 (Sen. Hassan questioning begins at 02:40:31).

2 *Id.* (Sen. Kaine questioning begins at 02:51:42).

3 DeVos was questioned by the Subcommittee on Labor, Health and Human Services, Education, and Related Agencies on Tuesday, June 6, 2017, and was sent a follow-up letter from the Subcommittee on June 21, 2017, which asked DeVos to clarify her position on the application of federal laws regarding students with disabilities. *See* Review of the FY2018 Budget Request for the U.S. Department of Education, U.S. Senate Committee on Appropriations (June 6, 2017), https://www.appropriations.senate.gov/hearings/review-of-the-fy2018-budget-request-for-the-us-department-of-education; Letter from Margaret Wood Hassan, Sen., U.S. Senate, & Patty Murray, Sen., U.S. Senate, to Betsy DeVos, Sec'y of Educ., Dep't of Educ. (June 21, 2017), http://www.hassan.senate.gov/imo/media/doc/170621.DeVos_Followup_re_IDEA_and_Vouchers.pdf.

4 EdChoice, The ABCs of School Choice 8 (2017).

legislative activity, that growth does not appear to be slowing.[5] In addition, many of these programs are designed specifically for students with disabilities: of the 36 programs established since 2010, 13 are designed primarily or exclusively to serve students with disabilities.[6] With their rapid expansion, it is important to establish how these programs can responsibly provide for the needs and rights of the students they serve.

Public and private schools do differ in the protections they offer to students with disabilities, but it is wrong to assume those differences uniformly empower students in public schools and disenfranchise those in private schools. In this article, we explain how federal laws, including IDEA, apply differently in private and public school contexts, providing functionally distinct accountability structures and affording families different mechanisms for recourse. We further argue that, rather than restricting the rights of students with disabilities, private school choice programs actually complement these students' rights by expanding their pool of educational options.

This article consists of five sections. The first summarizes the federal laws protecting students with disabilities and explains how they apply differently in public and private schools. The second section introduces state private school choice programs, with a focus on those tailored to students with disabilities. The third section describes the legal arrangements built into these programs to protect students with disabilities, contrasts the accountability mechanisms in public and private school programs, and discusses how programs differ across states. The fourth section outlines arguments commonly leveled against private school choice programs, including that participating students with disabilities lose legal protections and that such programs harm public schools, and offers responses to those arguments. The final section summarizes our argument supporting these programs.

I. Federal Protections for Students with Disabilities

IDEA is the primary federal law providing protections for students with disabilities in public schools. It requires that each student with disabilities receive an individualized education program (IEP), a legally enforceable document that delineates the "special education and related services" the district will provide to the student.[7] An IEP is developed collaboratively by an IEP team, which includes the student's parents, teachers, and other school officials.

Although IDEA is the main focus of this article, two other federal laws provide educational protections for students with disabilities. The Americans with Disabilities Act protects individuals with disabilities from discrimination in a broad array of settings, including private schools, and provides for minor accommodations.[8] Section 504 of the Rehabilitation Act of 1973 provides a basis for accommodations in public schools for pre-K–12 students who have disabilities, including some students who do not qualify for an IEP under IDEA.[9] Under this law, students may qualify for a "504 plan," developed by school staff, students, and parents, that sets out the accommodations the school must provide.[10]

A. Development of Federal Protections for Students with Disabilities

Prior to 1970, a number of state laws excluded children with disabilities from attending public schools, and the U.S. Department of Education reported that only 20 percent of children with disabilities attended public schools.[11] The first major federal effort to improve the education of students with disabilities was a grant program under the Elementary and Secondary Education Act in 1965.[12] In 1970, the Education of the Handicapped Act replaced that program with federal grants to states to fund projects and programs for students with disabilities,[13] but it provided little guidance for how the funds should be spent, and it produced minimal improvements.[14]

It was not until 1975, when Congress passed the Education for All Handicapped Children Act (EAHCA), that students with disabilities in states that accepted federal funding were guaranteed a "free and appropriate public education" (FAPE).[15] In addition to ensuring the right to FAPE, EAHCA's three other purposes were to protect "the rights of handicapped children and their parents . . ., to assist States and localities to provide for the education of all

5 *School Choice in America*, EdChoice (Apr. 13, 2017), http://www.edchoice.org/school-choice/school-choice-in-america.

6 EdChoice*, supra* note 4, at 17, 19, 23, 27, 41, 47, 49, 51, 61, 65, 77, 117, 139 (We do not include Arizona's ESA program in this count; although it was originally enacted to serve only students with disabilities, it has since been expanded to near-universal eligibility).

7 20 U.S.C. § 1414(d)(1)(A)(IV), (B).

8 Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. § 12101 (2012)).

9 Section 504 of the Rehabilitation Act of 1973, Pub. L. No. 93-112 (codified as amended at 29 U.S.C. § 701 (2012)). All students eligible under the IDEA are also protected by Section 504, but not all students considered "otherwise qualified handicapped individuals" under Section 504 are eligible for the IDEA.

10 Similar to a parent's rights under IDEA, parents have recourse through various procedural safeguards, or the courts, if Section 504 accommodations are not provided. U.S. Dep't of Educ., Office for Civil Rights, Parent and Educator Resource Guide to Section 504 in Public Elementary and Secondary Schools 35-37 (Dec. 2016), https://www2.ed.gov/about/offices/list/ocr/docs/504-resource-guide-201612.pdf.

11 U. S. Dep't of Educ., Thirty-Five Years of Progress in Educating Children with Disabilities Through IDEA 3 (2010).

12 Elementary and Secondary Education Act of 1965, Pub. L. No. 89–10, 79 Stat. 27 (1965).

13 Education for All Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 773 (1975).

14 U.S. Dep't of Educ., *supra* note 11, at 5-6.

15 Education for All Handicapped Children Act, Pub. L. No. 94-142, was passed shortly after two prominent decisions, *Pennsylvania Ass'n for Retarded Citizens v. Com. of Pa.*, 334 F. Supp. 1257 (E.D. Pa. 1971), and *Mills v. Bd. of Educ. of D.C.*, 348 F. Supp. 866 (D.D.C. 1972), found the provision of education for students with disabilities in public schools was inadequate and required the state to provide an individualized public education that provided some educational benefit. *See id.*

handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children."[16]

EAHCA was reauthorized by Congress in 1990 as the Individuals with Disabilities Education Act (IDEA)[17] and again in 2004 as the Individuals with Disabilities Education Improvement Act (IDEIA).[18] IDEA established the due process rights around FAPE that remain in place today for students with disabilities.

B. Defining Special Education Services Under IDEA

Under IDEA, the process for developing a program to provide FAPE for individual students is well defined, but the educational content and services required to ensure the adequacy of FAPE are not. Since the needs of students with disabilities vary widely, the special education and related services a district will provide as part of FAPE are outlined in each student's unique IEP.[19]

IDEA envisions a collaborative process for developing a student's IEP. An IEP team, which includes the student's general and special education teachers, therapists, a school administrator, and parents, defines the specific services the district will offer the student. An IEP describes the student's current strengths and academic, developmental, and functional needs; establishes annual goals for the student; and specifies the services that the district will provide to help the student meet those goals. As part of the IEP team, parents participate in the development of their student's IEP; however, school officials have the final authority on what is and is not included in the IEP. The IEP is supposed to be developed based on the needs of the individual student and is not to be driven by the district's costs in meeting those needs. This is the "free" in FAPE. IDEA requires school districts to provide FAPE in the "least restrictive environment" to minimize the exclusion of students with disabilities from schools' general education programs.[20] In other words, under IDEA, students are to be placed in general education classrooms to the maximum extent possible.

The local education agency (typically the school district) bears the responsibility to provide a student with the services agreed to in their IEP. If a student's local public school cannot provide those services, the district may place the student at another public school or in a private school, at the district's expense, that has the necessary personnel and expertise.[21] Students placed in a private school by a public school district in order to fulfill its obligation to provide FAPE are considered "public placements" and retain all the rights to due process and recourse in the courts against their districts that are afforded to students in public schools under IDEA.[22]

C. Sources of Conflict Between Parents and Public Schools Under IDEA

It is the "appropriate" in FAPE that causes problems for families seeking services. IEPs are typically developed collaboratively and often result in amicable agreements, but some disagreements are inevitable given the potentially conflicting goals of parents and public schools. Parents naturally want to maximize the provisions and benefits of their child's IEP. Since they are guaranteed FAPE, regardless of what it costs the district, parents' considerations are based on their views of what is necessary for their child. On the other hand, districts' desire to constrain costs incentivizes them to meet the legal requirements for IEPs without cutting too deeply into the services they must provide other students. Though resource requirements are not supposed to circumscribe an IEP's content, substantial case law on the "appropriateness" standard for FAPE suggests that, at a minimum, many parents believe they do.

The legal standard that governs whether a student's IEP satisfies his or her substantive right to FAPE was established for mainstreamed[23] children in *Board of Education v. Rowley* in 1982.[24] In *Rowley*, the Supreme Court had affirmed that IDEA confers a substantive right to FAPE, but declined to adopt a specific standard for lower courts to apply when determining whether a student with disabilities had been denied FAPE. The Court held that "if the child is being educated in the regular classrooms of the public education system, [an IEP] should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade."[25] The *Rowley* standard was ambiguous enough to allow for substantive disagreements about what services are appropriate for a given mainstreamed student's specific needs. Appropriate benefits for non-mainstreamed students with disabilities were even less clear.

What standard to apply to determine "when handicapped children are receiving sufficient educational benefits" under IDEA was at the core of the U.S. Supreme Court's recent decision

16 U.S. Dep't of Educ., *supra* note 11, at 5.

17 Individuals with Disabilities Education Act, Pub. L. No. 101-476, 104 Stat. 1103 (1990) (codified as amended at 20 U.S.C. § 1400 (2012)); *see also id.* at 6.

18 Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (codified as amended at 20 U.S.C. § 1400 (2012)).

19 20 U.S.C. § 1414(d)(1)(A)(i)(IV).

20 *Id.* § 1412(a)(5). The requirement for providing FAPE in the "least restrictive environment" is intended to limit segregation of students with disabilities and ensure they are integrated into the general education system as much as is appropriate.

21 IDEA governs children placed in, or referred to, private schools by public agencies and states that, in general, "Children with disabilities in private schools and facilities are provided special education and related services, in accordance with an individualized education program, at no cost to their parents, if such children are placed in, or referred to, such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this subchapter or any other applicable law requiring the provision of special education and related services to all children with disabilities within such State." *Id.* § 1412(a)(10)(B)(i).

22 *Id.*

23 Mainstreamed refers to students with disabilities who are educated in a regular, or mainstream classroom, in contrast to students with disabilities educated in separate, or self-contained, classrooms.

24 Board of Educ. v. Rowley, 458 U.S. 176 (1982).

25 *Id.* at 203-04.

in *Endrew F. v. Douglas County School District.*[26] Endrew, who has autism, had an IEP in Douglas County Public Schools that his parents considered insufficient. After years of Endrew's poor progress under the district's IEP, his parents took the only immediate action they could: they placed him in a private school, where he thrived, and sued the district for failing to provide FAPE, asking for reimbursement of the private school tuition.

The 10th Circuit had ruled for the district by applying the "some educational benefit" standard, which required an IEP to provide educational benefits that were "merely more the de minimis," or more than no benefit at all. While several circuit courts have similarly applied the "some educational benefit" standard, other courts had applied a "meaningful educational benefit" standard, which sets a higher bar but still leaves a great deal of ambiguity. Endrew's parents argued for a yet higher standard which would require that students with disabilities receive educational opportunities that are "substantially equal to the opportunities afforded [to] children without disabilities."[27]

In *Endrew F.*, the U.S. Supreme Court ruled for the family, but rejected both the some educational benefit standard applied by the lower court and the equal opportunity standard argued for by Endrew's family. Instead, the Supreme Court said the standard should be whether the student's IEP is "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."[28] While the ruling resolved the lower court split by rejecting the trivial "some educational benefit" standard, it declined to provide concrete guidance as to how to apply the standard based on the "unique circumstances of the child for whom it was created."[29]

Unfortunately, this sort of ambiguous standard leaves room for significant discretion and interpretation, and thus will generate continued disputes. Although school districts are now slightly more constrained by the heightened standard required under *Endrew F.*, many parents will still be at a substantial disadvantage when negotiating their students' IEPs with district officials. Parents are always outnumbered in IEP proceedings, are unfamiliar with the process, face the "natural advantage"[30] of district officials' expertise, and are motivated to avoid conflict with the school officials who will educate their children.[31] These disadvantages in process are coupled with disadvantages in final decision making: if an agreement cannot be reached, the district has the authority to make the final decision on the provisions in an IEP, leaving parents with no option but to accept the IEP as it stands or challenge it in a convoluted, exhausting, and potentially very expensive due process hearing and appeals process. To be successful on appeal, parents often need to pay for educational consultants and lawyers to challenge the school district's conclusions.

D. Recourse Under IDEA

If parents disagree with the school district's placement decision or the contents of their student's IEP, they have two options within the procedural framework of IDEA. They can appeal the decision through IDEA's due process procedures[32] or remove their child from the public school system and sue the school district for reimbursement of private school tuition.[33] There is a third option outside of IDEA, which is to unilaterally place their child in a private setting and pay the expenses out of their own pocket. This third alternative is discussed below in section I.E.

IDEA permits parents to file a complaint and receive an impartial hearing before a hearing or review officer of the state or local education agency; either side may appeal the final administrative decision to a state or federal district court.[34] Parents may file complaints about the school district's determination of ineligibility for an IEP, the contents of an IEP, and the failure of the school district's assigned program or placement to meet the IEP's provisions.[35] Pending the resolution of these administrative proceedings, IDEA requires that the student remain in his or her current educational placement.[36]

Parents' second option, sometimes referred to as "place and chase,"[37] carries substantial risk because it requires parents to bear the upfront costs of a private school education with no certainty of reimbursement. The burden of proof lies with parents to prove that the education offered in the public school was inadequate. This is especially difficult because, under legal precedents including *Endrew F.*, courts are to give substantial deference to the expertise of school officials.[38] Parents who place and chase enter the private market because they view that option as superior to the education offered by the school district, though only parents with adequate financial resources can realistically consider this option. Additionally, absent a judgment in their favor, individual protections under IDEA do not apply to students while their parents pursue place and chase.

Both of these options are risky, because they can be long and expensive, and the outcomes are uncertain. If parents appeal the district's decision through the administrative process, their student stays in a free but arguably inappropriate education setting, and they face lost time and risk foregoing private educational alternatives that could meet their student's needs. Alternatively, they may place their child in a private program they believe to be sufficient, but they do so at their own expense unless and

26 Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988 (2017).

27 *Id.* at 1001.

28 *Id.*

29 *Id.*

30 Schaeffer v. Weast, 546 U.S. 49, 60 (2005).

31 *See generally* Debra Chopp, *School Districts and Families Under the IDEA: Collaborative in Theory, Adversarial in Fact*, 32 J. Nat'l Ass'n Admin. L. Judiciary 423 (2012) (discussing parents' disadvantages in the IEP process).

32 20 U.S.C. § 1415.

33 *Id.* § 1412(a)(10)(C)(ii).

34 *Id.* § 1415(i)(2)(A).

35 *Id.* § 1415(b)(6)(A).

36 *Id.* § 1415(k)(4)(A).

37 Martin A. Kotler, *Distrust and Disclosure in Special Education Law*, 119 Penn St. L. Rev. 485, 496 (2014).

38 *Endrew F.*, 137 S. Ct. at 1001-02.

until a judge rules in their favor and requires the school district to reimburse their costs.

E. Parental Recourse Outside the Protections of IDEA

IDEA's guarantees are only valuable if they can be enforced. When parents believe their student's right to FAPE has been withheld, or that the promised accommodations have not been delivered, their only immediate recourse is to turn to private education providers (regardless of whether they pursue a place and chase strategy). Such parental placement—as opposed to public placement by the school district—in private school does not remove IDEA protections from the student, it just removes the student from the public school system where those protections apply. This is different because the student retains the right to return to public school if the private school proves unsatisfactory, so the student still has access to the rights guaranteed by IDEA, but simply elects not to exercise them by entering the private school market.

Moreover, under both *Rowley* and *Endrew F.*, IDEA only guarantees a minimally "appropriate" free education. While FAPE may well represent an acceptable education under federal law, parents really want the best available education for their children. Such an education may require services far above and beyond the minimally appropriate services required of public schools by IDEA's FAPE standard.

Public and private schools have markedly different roles in offering educational services to students with disabilities, and students' rights vary with those roles. Public school districts are required to serve all district students; private schools are not. The ability of private schools to refuse to enroll students with particular disabilities often offends people at first glance. However, differences in purpose, capacity, scale, and mission between school districts and private schools reveal why imposing similar requirements is inappropriate. First, unlike public school systems, private schools do not have access to public revenue sources and the public tax base. They provide their services on a contractual basis direct to paying customers (parents). Second, given their small scales, private schools do not have all of the options public districts have to find an appropriate placement. Thus, when private providers are not well suited to educate a student with a given disability, they are free to decline enrollment, whereas public schools that are not up to the task must place the student elsewhere at their own expense. Finally, if private schools had to accept all students, then there could be no private schools that narrowly focus on students with particular disabilities, such as schools for the deaf or schools for students with autism; a universal-acceptance policy that effectively outlawed specialized education services like these would do more harm than good.

IDEA implicitly accepts the distinct roles of public and private schools in that it requires publicly funded services to be made available to serve students in both sectors, but it has different requirements for each. IDEA requires that public school districts provide services to students placed in private schools using IDEA funds.[39] School districts, or Local Education Agencies (LEAs), are required to conduct a thorough "child find" process to identify all students with disabilities that attend private schools located within the district's boundaries. Districts are required to spend a proportionate amount of federal IDEA funds, as determined by a statutory formula, to provide equitable services to this group of children, and to consult with parents and private school representatives as they design and provide public services for students with disabilities in private schools. These requirements show that Congress considered students with disabilities attending private schools to be protected under IDEA, but did not see fit to subject those schools to the requirements placed on public schools to ensure the provision of educational services.

The private market gives parents options for securing educational services that are different from what is available in public schools fully subject to IDEA. In the private market, parents bear the direct responsibility of securing an appropriate education independently from the determinations of public officials. Parents and private schools are voluntary participants in negotiating the specific terms of the education of the privately enrolled student (e.g., a student with a limited range of disabilities might only need general education and a few targeted programs on the side, while a student with acute needs might need a comprehensive focused program); parents' primary legal protection when they independently place their student in private school is the contract they make with the private school. Of course, they also retain recourse in the market; those who find the private school services inadequate always have the choice to send their student, and their tuition money, to a different private school, or to reenroll their child in a public school and accept the services that are provided pursuant to IDEA.

Increasing parent choice is the raison d'être for the private educational choice programs discussed below, but it must be acknowledged and communicated to parents that these programs rely on accountability mechanisms that are different from those contained in IDEA, and that those differences allow private schools to provide parents with additional and distinguishable educational choices, while shifting the burden of ensuring that they meet basic standards onto parents.

F. Educational Choice Programs Offer Parents an Alternative to IDEA's Procedural Protections

Where available, educational choice programs offer another path for families that are dissatisfied with the IDEA-guaranteed IEP by giving them financial assistance to access non-public educational alternatives. Importantly, they do this without subjecting parents to the costly and time-consuming litigation or drawn-out due process procedures they would face under IDEA alone. When viewed through this lens, educational choice programs supplement and expand existing rights under IDEA by enabling parents to seek educational alternatives without forcing them to navigate the complexities of the IDEA remedial process.

The reality is that IDEA's guarantee that public schools must provide FAPE to students with disabilities is not a guarantee that public schools will provide students with the *best available*

39 *See generally* 34 C.F.R. § 300.141 (2016) (describing LEA requirements under IDEA for students with disabilities privately placed in private schools); U.S. Dep't of Educ., The Individuals with Disabilities Education Act: Provisions Related to Children with Disabilities Enrolled by their Parents in Private Schools 3 (2008), https://www2.ed.gov/admins/lead/speced/privateschools/idea.pdf.

education. Public schools need only provide an *appropriate* education. Thus, if a public school district determines it can provide a student with an appropriate education, even when the student's parents believe the best available education would be in a private school, IDEA permits the district to decline to place that student in a private school and instead provide inferior special education services itself.

Indeed, the benefits private schools can provide are illustrated by the willingness of some parents to undertake the financially risky place and chase approach to securing special education services. But private educational choice programs avoid the risk-reward calculation inherent in the place and chase approach and make additional private options immediately available to parents of students with disabilities. Parents who choose a private placement do so deliberately, making the calculation that sacrificing IDEA's FAPE and IEP requirements, as well as its procedural safeguards, is worth it for their student's particular situation. A variety of state educational choice programs give families of students with disabilities—including those who would not be able to afford it without state assistance—the option to make those choices.

II. Introduction to Private School Choice Programs

In the 2016-2017 school year, fifty-six private school choice programs operated in 25 states and the District of Columbia.[40] Twenty programs were limited to students with disabilities, and several more gave additional consideration to such students.[41]

All private school choice programs share two features. First, they allow families to choose to send their children to private schools in lieu of available public schools by providing funding to offset some or all of those students' tuition or other educational expenditures.[42] Second, they are state programs and, with few exceptions,[43] are available statewide to qualifying students.

Beyond these features, private school choice programs differ in their eligibility requirements, funding mechanisms, and associated regulations. Most often, choice programs are classified into one of four categories—voucher programs, education savings accounts, tax-credit scholarships, and individual tax credits and deductions—all of which can benefit students with special needs. Each of these categories is summarized below.

A. Publicly Funded Scholarships, or Vouchers

Publicly funded tuition scholarships or grants, often referred to as vouchers, are the most common type of private school choice program. Typically, these programs give families some or all of the state's per-pupil education funding for district schools in the form of a check or warrant that parents can use toward tuition at participating private schools. In 2016-17, 23 voucher programs operated in thirteen states, serving approximately 178,000 students in total.[44] Almost all existing programs are targeted to specific student populations, with 12 limited to students with disabilities and nine others limited to low-income families.[45] Private schools accepting vouchers must often meet state-specific participation requirements, which can relate to health and safety, financial disclosures and audits, curriculum, test administration, staffing, tuition limits, and student performance. State requirements determine which schools are eligible to receive vouchers, but no voucher programs give the state direct power over private schools' operations.

B. Education Savings Accounts

Education savings accounts (ESAs) allow parents to withdraw their student from public schools and receive funds, either directly from the state or through a tax credit mechanism,[46]

40 Two choice programs, the Douglas County Choice Scholarship Program and Nevada's Education Savings Account program, existed, but were not in operation in 2017. The Douglas County program, which is a county rather than a state program, was enjoined by the Colorado Supreme Court in *Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist.*, 351 P.3d 461 (Colo. 2015). However, the U.S. Supreme Court vacated that decision on June 27, 2017 and remanded the case back to the Colorado Supreme Court to reconsider the case in light of its June 26, 2017 decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, No. 15-577, 2017 WL 2722410, holding that the state of Missouri violated the Free Exercise Clause of the First Amendment when it excluded a church-run preschool from an otherwise religiously neutral and generally available grant program. Nevada's program was ruled constitutional by the state supreme court in 2016, but the funding mechanism was blocked by the court, suspending the program until the state appropriates new funding for the program. *See* Schwartz v. Lopez, 382 P.3d 886 (Nev. 2016).

41 *See generally* EdChoice, https://www.edchoice.org (updated list of school choice programs in the U.S.).

42 Counts of private choice programs often include two similar programs in Vermont and Maine, which provide vouchers to students in towns that have no public schools. We do not include these in our count because these programs are designed to provide education to students where no public education is furnished, in contrast to other choice programs which provide students with private options in addition to public schools.

43 The Douglas County Choice Scholarship Program, which was not operational in 2016-17 and is not included in our count, is the only existing choice program that was enacted at the county level. Two Wisconsin programs are restricted to Milwaukee and Racine school districts, but these are supplemented by a third statewide program, and all three programs are established in state law. The Cleveland Scholarship Program is also a state-authorized program that was originally a pilot program restricted to students in the Cleveland Metropolitan School District. Ohio has other similar voucher programs targeted at low-income students, students in low-performing schools, and students with disabilities.

44 EdChoice, *supra* note 4, at 8. Several states have multiple voucher programs, including LA (2), MS (2), OH (5) and WI (4).

45 Of the two voucher programs that have neither of these limitations, the Cleveland Scholarship program gives priority to low-income families and the Ohio Educational Choice Scholarship Program is limited to students in low-performing schools.

46 *See* Jason Bedrick, Jonathan Butcher & Clint Bolick, Cato Institute, Taking Credit for Education: How to Fund Education Savings Accounts Through Tax Credits (2016).

to cover a wide range of educational expenses, including but not limited to online programs, tutoring, programs at community colleges and other postsecondary institutions, and tuition and fees for private schools. ESAs allow parents to customize their child's education by drawing from multiple providers. ESAs are currently operational in four states, and all four initially limited eligibility to students with special needs, though Arizona recently expanded its ESA to near-universal eligibility.[47] Nevada's ESA, which is not operational pending a new funding source from the state, also has universal eligibility for public school students.[48] ESAs include strict financial accountability requirements because they are predicated on giving parents full decision-making authority over how the funds are spent. Although the first ESA program only became operational in 2011, about 11,000 students already used ESAs in 2016-17.[49]

C. Tax-Credit-Funded Scholarships

Tax-credit-funded scholarship programs allow individuals or businesses to receive tax credits when they donate to nonprofits that provide private school scholarships. Scholarships are limited to the cost of tuition at a participating school, a percentage of the state's per-pupil spending, or a specific dollar amount. Twenty-one tax-credit-funded scholarship programs operated in 17 states in 2016-17, serving about 257,000 students.[50] Only two of these programs were limited to students with disabilities. States do not obtain any additional authority over participating schools as a result of these programs, though some programs require participating students to take certain assessments.

D. Individual Tax Credits and Deductions

Individual tax credits and deductions provide some state income tax relief for parents' approved educational expenses, which can include private school tuition. Four states provided tax deductions and five states provided tax credits in 2016, and only one state's program was limited to students with disabilities.[51] Although the amount of tax relief these programs provide is far less than the amount of funding provided by the first three types of programs, about 880,000 students benefitted from these programs in 2016-17.[52]

III. Legal Arrangements Governing Private Educational Choice Programs for Students with Disabilities

This section explores how federal law categorizes students with disabilities who leave their public schools to attend a private school using funds from a state's educational choice program. This section also addresses how particular states' programs regulate participation and what legal protections exist for participating students.

A. Students with Disabilities Who Participate in Educational Choice Programs Are Considered Parentally Placed Students Under IDEA

One constant across all educational choice programs is that participation by a student with a disability has the same legal effect as a parental placement under IDEA.[53] Given that IDEA accustoms parents of students with disabilities to the substantive and procedural rights discussed in section I, it is very important that parents understand that participating in a private school choice program has significant implications under IDEA.

While parents whose children participate in an educational choice program are subsidized with either state or privately-donated dollars, because those parents unilaterally decide to remove their child from the public school system and either enroll them in a private school or provide them with some other form of non-public education, their child is not entitled under federal law to FAPE, an IEP, or any of IDEA's due process protections that are available to students enrolled in a public school or to publicly placed students. Thus, parental placements into private schools do not come with the panoply of substantive and procedural rights that attach to public placements under IDEA. Table 1 provides a side-by-side comparison of the rights of publicly placed students and those of privately placed students.

47 By the 2020–21 academic year, all students who previously attended a public school for at least 100 days in the prior year will be eligible to receive an ESA, along with students who are entering kindergarten. *See* S.B. 1431, 53rd Leg., 1st Reg. Sess. (Ariz. 2017).

48 Nev.Rev.Stat. §§ 353B.850-880; 388D.100-140; 392.070(3).

49 EdChoice, *supra* note 4, at 8.

50 *Id.*

51 *Id.* at 124-42.

52 In 2014, the largest educational choice tax-credit program was in Illinois, where 285,000 credits were given averaging $280. The largest educational choice tax-deduction program was in Minnesota, where 210,000 deductions were taken, averaging $1,150. *Id.* at 128, 136.

53 *See* U.S. Gov't Accountability Off., GAO-16-712, School Choice: Private School Choice Programs Are Growing and Can Complicate Providing Certain Federally Funded Services to Eligible Students 7 (August 2016) ("'Parentally placed' children with disabilities would include those students with disabilities enrolled by their parents in private schools through private school choice programs.").

Table 1: Comparison of Rights of Publicly Placed Students Under Federal IDEA with the Rights of Parentally Placed Students Participating in an Educational Choice Program

Rights of Publicly Placed Students under IDEA	**Rights of Parentally Placed Students Participating in a School Choice Program**
Public school districts are required to evaluate students with suspected disabilities, including students who attend private schools.	Public school districts are required to evaluate students with suspected disabilities, including students who attend private schools.
Public school officials have the final say about a student's educational placement.	Parents have the final say about their student's educational placement.
Student is entitled to FAPE. Special education and related services are provided at no cost to parents.	Student is not entitled to FAPE. Parents may be charged for the cost of tuition and/or special education and related services not covered by the amount of the voucher, tax-credit scholarship, or ESA.
Student is entitled to an IEP. Student is entitled to special education and related services consistent with the IEP. If the IEP is not fully implemented, parents can avail themselves of IDEA's remedial processes and seek compensatory services.	Student is not entitled to an IEP at all unless the educational choice program requires the student to have an IEP as a condition of eligibility. There are no government-mandated remedial processes that parents can avail themselves of to seek relief if the student's IEP is not fully implemented.
Remedial processes include mediation, complaints, and due process hearings when parents dispute the identification, evaluation, or educational placement of a student with a disability, or the provision of FAPE or the implementation of the student's IEP.	Parents retain access to remedial processes (mediation, complaints, and due process hearings) regarding the school district's identification and evaluation of students, but parents do not have access to remedial processes regarding the provision of special education and related services or the implementation of the student's IEP.
Public school districts must review the student's IEP annually.	There is no right to any review of the student's IEP (if one was created in the first instance).
Student is entitled to transportation to the educational facility (public or non-public) selected by the public school district.	Student is not entitled to transportation to the non-public educational facility selected by the parent.

Accordingly, while parents cannot be charged for a public placement in a private school because IDEA requires the district to cover the cost, parents using a private school choice program could be required to pay at least part of the cost of their child's education if the private school they choose costs more than the amount of financial assistance provided by the school choice program. Parents of special needs students using a choice program have no more recourse against the private school than any other parents who unilaterally place their students in the school. In other words, under a public placement, the private school is accountable to the public school district, not the parent. But under a private placement, the private school is directly accountable to the parent, with the district playing no role at all. The ultimate recourse for parents who privately place their child in a private school and are dissatisfied with the result is to remove their child and send her to a different school, public or private.

In short, using an educational choice program to opt out of the public school system means that the student is no longer entitled to FAPE or any of the other procedural and substantive rights under IDEA, just as if the parents used their own money to send their child to a private school. However, that does not mean that children who are eligible to participate in a state's school choice program enter a completely unregulated system. States protect the rights of students with disabilities who participate in educational choice programs with eligibility requirements for participants, regulations imposed on participating schools, notice provisions, and instructions to school districts regarding disability evaluations.

B. Determining Eligibility for State Educational Choice Programs

As a general matter, students with disabilities are eligible to participate in any private school choice program in the country, if they otherwise meet the program's eligibility criteria. For example, Pennsylvania's Opportunity Scholarship Tax Credit Program defines student eligibility broadly (including non-disabled students), but offers students with disabilities additional scholarship funds.[54] However, not every program makes every student with a disability eligible. For instance, any student with a disability who is currently enrolled in Florida's public schools is eligible to participate in the John M. McKay Scholarship Program for Students with Disabilities,[55] but only Ohio students with autism may participate in Ohio's Autism Scholarship Program.[56] Furthermore, most choice programs that limit scholarships to students with special needs require that an otherwise qualifying student first be enrolled in a public school for some minimum period of time before becoming eligible to apply for a scholarship,[57] although there are often exceptions for

54 24 Pa. Cons. Stat. § 20-2009-B. In Pennsylvania, scholarship amounts are determined by the private entities that administer the program, but scholarships are capped at $8,500 for non-disabled students and $15,000—or the amount of tuition and fees, whichever is less—for students with disabilities.

55 Fla. Stat. § 1002.39.

56 Ohio Rev. Code Ann. § 3310.41(A)(7)(a).

57 *E.g.*, Arkansas' Succeed Scholarship Program for Students with Disabilities, Ark. Code Ann. § 6-41-802(a)(1)(A); North Carolina's Special

some students, such as those entering kindergarten and children whose parents are active duty military.[58] One state even requires that students seek and be denied access to public schools outside of the student's home district before becoming eligible for a private school scholarship.[59]

Several programs require that students have an active, or recently active, IEP at the time they apply.[60] Other states simply require that the student be identified by their public school district as being eligible for special education and related services.[61] It should be noted that a school district's evaluation and determination of eligibility is distinct from a medical diagnosis. Indeed, a district may determine that a child with a medical diagnosis of autism, for example, is either not eligible for special education and related services or that the student is only entitled to limited services because the student does not fit the district's determination of what constitutes a student on the autism spectrum. On the other hand, a district may determine that a student with no particular medical diagnosis is eligible for special education and related services because the district determines the student has a learning disability.

In light of IDEA's goal of providing all students with disabilities access to an appropriate education, it is worth asking whether any requirement beyond eligibility for special education and related services should be necessary for students with disabilities to access school choice programs. Why require the additional step of creating an IEP if parents believe that anything the public school offers will be inadequate? Requiring that students have an IEP in place in order to be eligible to participate, rather than allowing parents to decide whether to create one, can lead to an inefficient use of resources. Given that developing an IEP requires a significant investment of time and resources by public school districts and parents, policies that permit students to participate any time after a district determines that a student qualifies for special education and related services would be more efficient.

In a handful of states, one justification for requiring an IEP is that participating private schools must agree to implement the student's existing IEP.[62] However, even those states do not require participating private schools to follow that IEP to the letter.[63] The only case in which requiring an IEP seems to make sense is when the IEP determines the dollar value of a student's scholarship. For example, Florida's ESA program allows parents of students with a disability who qualify for the program without an IEP to request an IEP in order to determine the services the child would receive in the public schools, which affects the value of the student's scholarship.[64]

C. Requirements Imposed on Private Schools

Educational choice programs often regulate the private schools that accept participating students. Some programs only allow private schools that have been in operation for a certain period of time to enroll students.[65] Such regulations stymie entrepreneurship in ways that do not necessarily affect school quality, and they create unnecessary barriers to opening new schools that serve students with disabilities. Tennessee's ESA program encourages participating parents to choose private schools that educate students with disabilities alongside

Education Scholarship Grants for Children with Disabilities, N.C. Gen. Stat. § 115C-112.5(2)(f); Tennessee's Individualized Education Account Program, Tenn. Code Ann. § 49-10-1402(3)(C)(i).

58 *E.g.*, Georgia's Special Needs Scholarship Program, Ga. Code Ann. § 20-2-2114(a)(3)(A); North Carolina's Special Education Scholarship Grants for Children with Disabilities, N.C. Gen. Stat. § 115C-112.5(2)(f)(4), (5).

59 Wisconsin's Special Needs Scholarship Program, Wis. Stat. § 115.7915(2)(a)(1).

60 *E.g.*, Arkansas' Succeed Scholarship Program for Students with Disabilities, Ark. Code Ann. § 6-41-802(a)(2)(B); Georgia's Special Needs Scholarship Program, Ga. Code Ann. § 20-2-2114(a)(3)(B); Oklahoma's Lindsey Nicole Henry Scholarships for Students with Disabilities, 70 Okla. Stat. § 13-101.2(A); Tennessee's Individualized Education Account Program, Tenn. Code Ann. § 49-10-1402(3)(B); Utah's Carson Smith Special Needs Scholarship Program, Utah Code Ann. § 53A-1a-704(2)(d)(ii); Virginia's Improvement Scholarships Tax Credit Program, Va. Code Ann. § 58.1-439.25.

61 *E.g.*, Arizona's Lexie's Law for Disabled and Displaced Students Tax Credit Scholarship Program, Ariz. Rev. Stat. Ann. § 43-1505(E); South Carolina's Educational Credit for Exceptional Needs Children, SC Budget Proviso 109.15(A)(2)(a).

62 Ohio's Autism Scholarship Program, Ohio Rev. Code Ann. § 3310.41(B) ("Each scholarship shall be used only to pay tuition for the child on whose behalf the scholarship is awarded to attend a special education program that implements the child's individualized education program . . ."); Ohio's Jon Peterson Special Needs Scholarship Program, Ohio Rev. Code Ann. § 3310.52(A) ("The scholarship shall be used only to pay all or part of the fees for the child to attend the special education program operated by the alternative public provider or registered private provider to implement the child's individualized education program . . ."); Wisconsin's Special Needs Scholarship Program, Wis. Stat. §.115.7915(6)(h)(1) ("Each private school participating in the program . . . shall . . . [i]mplement the child's most recent individualized education program or services plan, as modified by agreement between the private school and the child's parent, and related services agreed to by the private school and the child's parent that are not included in the child's individualized education program or services plan.").

63 Ohio Dep't of Educ., For Students with Disabilities and their Parents: A Comparison of Rights Under IDEA and Chapter 3323 to the Jon Peterson Special Needs Scholarship Program (Nov. 2011) ("The scholarship shall be used only for the cost to attend a special education program that implements the child's IEP. However, there is no requirement that the scholarship provider provide all of the services set forth on the IEP."); Wis. Dep't of Pub. Instruction, Special Needs Scholarship Program: Frequently Asked Questions for Parents–2017-18 School Year (2016-2017 ed.) (Q: "Is the private school required to implement the student's IEP or services plan? [A:] SNSP schools are required to implement the IEP or services plan of SNSP students as modified by agreement between the private school and the student's parent/guardian.").

64 Gardiner Scholarship Program, Fla. Stat. § 1002.385(7)(a)(1).

65 Louisiana's School Choice Program for Certain Students with Exceptionalities requires private schools to not only have existed for two years, but to have "provided educational services to students with exceptionalities" for at least two years prior to enrolling students. La. Stat. Ann. § 17:4031(D)(1)(c). This not only erects barriers to opening new schools, but also discourages existing schools from serving students with disabilities.

non-disabled students and requires private schools to notify the Department of Education of "whether the [private] school provides inclusive educational settings."[66] Two programs go so far as to permit the state boards of education to regulate the private schools' curriculum and textbooks and set the hiring criteria for administrators and instructors.[67] Given such onerous restrictions, it is not terribly surprising that one of these two programs has only three participating schools and serves a mere 159 students, while the other has no participating schools or students.[68]

D. Mandatory and Optional Re-evaluations

Finally, some programs require participating students to be re-evaluated by their districts at regular intervals.[69] To the extent that the scholarship amount varies based on the type and severity of a child's disability, re-evaluations can be valuable to parents if the result is an increased scholarship amount to compensate for a previously undiagnosed disability. Of course, parents could also receive a smaller scholarship amount if the re-evaluation results in a less severe diagnosis. However, if an evaluation resulting in a smaller funding amount is the correct evaluation, meaning the participating student truly needs fewer financial resources to succeed in school, then the result is improved efficiency in the allocation of public funds, benefitting taxpayers or other students with disabilities.

IV. Survey of Arguments Against Choice Programs

Critics of allowing students with disabilities access to private school choice programs commonly offer four rationales. These arguments focus on participating students' foregone rights, uninformed decision-making, the limited funding available in many programs, and the harm to public schools. While all four deserve consideration, the first argument is based on flawed assumptions, and the remaining three should be considered primarily as concerns that should, and do, inform the design of these programs, rather than as reasons to oppose them.

A. Foregone Rights Under IDEA

The first and most common argument against private school choice for students with disabilities focuses on the legal protections and educational provisions these students enjoy in public schools and must, it is argued, give up to participate in choice programs. IDEA entitles students with disabilities in public schools to specific protections, including an IEP and due process rights. Since choice programs allow parents to place students in private schools that are not subject to those protections, critics argue that these programs effectively take away these students' rights.[70]

Similar arguments focus on broader accountability requirements under federal or state laws that apply to public but not private schools. For instance, the Every Student Succeeds Act requires public schools, but not private schools, to assess students annually and report the results by student subgroup, including students with disabilities. States also have certification requirements for public school special educators that typically do not apply to their private school counterparts.[71] Critics of choice programs argue that, since these programs allow students to attend schools that lack accountability through testing and teacher certification requirements, they effectively remove accountability for special education students.

The logic behind these criticisms contains two central flaws, both grounded in overconfidence in the legal and accountability protections in public schools. The first flaw is that the arguments assume that the private market offers no protections for students with disabilities. In fact, parents' ability to make choices in the private market provides a distinct, but nonetheless effective, set of protections and recourse for families of students with disabilities who choose to enter that market. Private schools must provide students with an appropriate education, not out of fear of litigation, but in order to retain students. Likewise, private schools must ensure their students make educational progress and their teachers are competent in order to remain solvent, not to satisfy bureaucratic requirements. So protections do exist in the private market, but they depend on different mechanisms than those in public schools, requiring active decision-making by parents presented with an array of private and public options. A central question in this calculus is whether parents should be trusted to make the right decisions for their children. That may be debated, but if so, the private market mechanisms that rely on them can be equally or more effective than public protections that rely on administrators instead.

The second flaw in critics' logic is the assumption that IDEA protections for public schools are sufficient to protect students' interests. One can appreciate the fact that those protections serve

66 Tenn. Code Ann. § 49-10-1403(d).

67 Mississippi's Dyslexia Therapy Scholarship for Students with Dyslexia Program, Miss. Code Ann. § 37-173-21; Nate Rogers Scholarship for Students with Disabilities Program, Miss. Code Ann. § 37-175-21; *see also* La. Stat. Ann. § 17:4031(D)(1)(c) (requiring private schools to employ teachers that hold the appropriate certification in special education or training that accords with a participating student's IEP).

68 *School Choice in America*, *supra* note 5, at 47, 49.

69 *See* Miss. Code Ann. § 37-181-5(8); Wis. Stat. § 115.7915(2)(h) ("The child's parent or guardian consents to make the child available for a reevaluation, by the individualized education program team appointed for the child by the resident school district, within 60 days following a request for a reevaluation under this paragraph.").

70 National Education Association, Voucher Schemes: A Bad IDEA for Students with Disabilities (2008), http://www.nea.org/assets/docs/PB14_SpecEdVouchers08.pdf; Council for Exceptional Children, A False Choice: Why Voucher Programs are Wrong for Students with Disabilities (2014), https://www.cec.sped.org/~/media/Files/Policy/Vouchers/voucher%20toolkit%202014%20FINAL.pdf; Meg Benner & Rebecca Ullrich, Center for American Progress, Betsy DeVos' Threat to Children with Disabilities (February 2, 2017), https://www.americanprogress.org/issues/education/reports/2017/02/02/298010/betsy-devos-threat-to-children-with-disabilities/.

71 National Education Association, *supra* note 71; Selene Almanzan & Denise Stile Marshall, Council of Parent Attorneys and Advocates, Inc., School Vouchers and Students with Disabilities: Examining Impact in the Name of Choice (June 2016), https://c.ymcdn.com/sites/copaa.site-ym.com/resource/resmgr/2016_Conference/COPAA_Voucher_paper_final_R6.pdf; Tim Walker, *School Vouchers' Empty Promise to Special Ed. Students*, neaToday (May 23, 2012), http://neatoday.org/2012/05/23/school-vouchers-empty-promise-to-special-ed-students-2/.

a large number of public school students well and still see that they are not universally sufficient. When students are not well served in public schools, parents are denied FAPE because they must choose between a *free* education in a public school and an education that is *appropriate* that may only be available in a costly private school. Families with the financial means to place and chase risk foregoing the free part of FAPE, while those without financial means must tolerate inadequate provisions during due process and appeal proceedings. While IDEA's protections and state requirements may effectively ensure FAPE for the majority of students with disabilities, the minority of students the system fails can only access alternatives through state-sponsored choice programs unless they can independently afford tuition. In addition, a family that receives FAPE that meets the standard for what is appropriate may have to forego private options that are better than FAPE if they do not have a choice program to help them afford those options.

B. Informed Decision-Making

Critics also point out that, no matter how defensible student protections in private choice programs are, they will not deliver value to parents if parents' decisions are not well informed. Recent articles on choice programs reported that some parents participating in Florida's McKay Scholarship Program did not understand the legal consequences of accepting a private school scholarship when they signed on.[72] As a result, some parents did not understand why they did not have the same recourse against their child's private school that they had had in the public school system. While such parents have the option to return to public schools and the recourse they offer, the consequences of poor information are lost time for students, extra effort for families, and foregone participation by another family that could have benefitted from the program.

It is impossible to know how many people participate in choice programs without understanding what they entail. Large proportions of participating parents report high rates of satisfaction with the programs, and particularly with the McKay Scholarship Program, which suggests that uninformed decision-making is not widespread.[73] However, since informed decision-making by parents is key to functional private school choice programs, it is vital that parents understand their rights within them and choose to participate accordingly. States and program officers should do their utmost to help parents make informed choices, as this issue does not deal directly with the structure of choice programs, but with their efficient function.

There is also a flip side to this argument. If informed decision-making for participating families requires that they be fully informed about their rights, the same should hold for program-eligible students attending public schools. Some states aim to increase awareness of and access to private choice programs by obligating public school officials to notify qualifying students about the existence of their available options.[74] Such requirements for full information for eligible families can promote informed decision-making for all students with disabilities in a state.

C. Inadequate Funding

The third category of criticism is that private choice programs are underfunded and therefore only provide choice to families that can afford to pay the difference between the public funding and the tuition and fees at their chosen private schools. This argument is often levied against all types of choice programs, but it has particular salience for programs tailored to students with disabilities because the cost of private educational services is often higher for those students. This argument is rooted more in economic feasibility than in students' rights because its premise is not that private providers are unwilling to deliver an appropriate education for students with disabilities, but that they are unable to do so with the available funding.

It is true that political compromises sometimes leave school choice programs with designs that offer funding levels that do not cover the full costs of providing adequate services for students with disabilities. When political compromises create programs with very low funding levels, they are likely to provide school choice in name only, benefitting relatively few students whose families can afford to bear a substantial portion of the cost of their education. Programs that are too weak to provide real choices, or to provide them equitably, should be improved or abandoned. More often, programs offer a substantial amount of funding that gives most families viable choices, as evidenced by families' decisions to participate and their high rates of satisfaction. States should be attentive to how effectively and equitably their programs extend choices to families, and they should be willing to adjust the amount and structure of funding to meet the needs of students with disabilites in their state.

Criticism of private choice programs for students with disabilities because of inadequate funding stands in stark contrast to the primacy IDEA gives to the rights of students with disabilities over the costs to the government. Using the same logic that costs should not dictate services makes it easy to flip such a critical argument on its head. If state legislatures believe their are students with disabilities in their state that deserve private choice options, the solution is not to end inadequately-funded programs;

72 Dana Goldstein, *Special Ed School Vouchers May Come With Hidden Costs*, N.Y. Times, April 11, 2017; Dana Goldstein, *Special Ed School Vouchers and the Burden of a "Simple Fix"*, N.Y. Times, April 12, 2017.

73 *See* Jay P. Greene & Greg Forster, Manhattan Institute, Vouchers for Special Education Students: An Evaluation of Florida's McKay Scholarship Program (June 2003), https://www.manhattan-institute.org/html/vouchers-special-education-students-evaluation-floridas-mckay-scholarship-program-5818.html.

74 *See* Georgia's Special Needs Scholarship Program, Ga. Code Ann. § 20-2-2113(a) ("The resident school system shall provide specific written notice of the options available under this article to the parent at the initial Individualized Education Program (IEP) meeting in which a disability of the parent's child is identified. Thereafter, the resident school system shall annually notify prior to the beginning of each school year the parent of a student with a disability by letter, electronic means, or by such other reasonable means in a timely manner of the options available to the parent under this article."); *see also* Miss. Code Ann. § 37-181-9(3).

rather, it is to design adequately funded programs that provide real choices for students.[75]

D. Harm to Public Schools

A fourth category of criticism deals with the effects choice programs have on public schools. Again, this argument often begins with the observation that many choice programs are not adequately funded. That inadequate funding only delivers choice for students with less severe and therefore less expensive disabilities, for students whose families can afford to supplement public funding, or both. Since school districts that lose these relatively advantaged students to private choice programs also lose funding proportionally, they must provide for the remaining students, who have more acute disabilities and are relatively more expensive to educate, with a lower overall amount of financial support.[76]

These concerns are understandable, but they should not stand in opposition to the rights of individuals with disabilities in the context of choice programs any more than they do under IDEA. This argument shifts from a focus on individual rights to a focus on protecting public schools. More than a shift, this argument pits the individual rights of some students with disabilities (namely, those with minor disabilities or higher family incomes) against the needs of public schools. This argument is not made regarding students parentally placed and funded in private schools, not because students with higher incomes deserve more liberty, but because these students do not cause a shift in public school funding. Nor is it made regarding students with more severe disabilities, both because such students are less likely to be served by underfunded choice programs and because their participation would increase public schools' per-pupil resources. The students who might be parentally placed through school choice programs are the locus of the threat to public schools because they, and the funds that come with them, are viewed as the natural purview of public schools.

One solution to these concerns should be to design programs that, like Florida's McKay program, fund students equitably and in proportion to their individual needs. Programs designed in this manner will not result in sorting by funding amounts, but by students' individual needs. Said another way, such programs would not harm public schools and would give parents choices that are not based on the severity of their child's disability or their household income. Certainly, adjusting the funding mechanism is a solution more immediate to the problem than ending such programs.

V. Conclusion

Federal protections and funding under IDEA have been remarkably successful at improving the education of students with disabilities in the past half century. However, those provisions are not ideal or sufficient for all students. When school districts fail to deliver FAPE, or when better private options are available at a reasonable cost, the concept of a single best system holds students back.

Well-designed educational choice programs provide additional options for students with disabilities and allow families to find the best placement for their child, regardless of their financial means. When parents pursue private options for their children, either using their own funds or through choice programs, they do so because they believe that private placement is best for their child. Parents should make such decisions carefully and with the understanding that parental placements do not enjoy the same legal protections as public ones, and that market protections are only effective when parents make active and informed choices. However, engaged parents are in the best position to make those decisions for their children and should be trusted to do so.

Critics' principal argument against educational choice programs is that they force students to forego the legal protections that apply in public schools, and thereby pose them harm. Those arguments are premised on the faulty assumption that those legal protections are uniformly sufficient to guarantee not only that students with disabilities receive FAPE, but also that a publicly provided FAPE will be the best fit for a student at a given cost. School choice programs provide students for whom that assumption is not true with options that they can take or reject. Since families unsatisfied with private schools can return to public schools at any time, choice programs do not limit students' rights under IDEA, but give them additional educational options beyond the public school system.

75 Nat Malkus, *The Real Problem with School Voucher Programs*, American Enterprise Institute (May 2, 2017), https://www.aei.org/publication/the-real-problem-with-school-voucher-programs/.

76 Lex Frieden, *School Vouchers and Students with Disabilities*, National Council on Disability (April 15, 2003), http://www.ncd.gov/publications/2003/April152003.

Criminal Law & Procedure

Luis v. United States: The Distinction That Makes All the Difference

By Dean A. Mazzone

Note from the Editor:

This article discusses the Supreme Court's 2016 decision in *Luis v. United States*, which dealt with asset forfeiture and the Sixth Amendment right to counsel. After summarizing the arguments of the plurality, concurring, and dissenting opinions, the author briefly discusses asset forfeiture more broadly and the potential ramifications of *Luis*.

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This article represents the opinions and legal conclusions of its author and not necessarily those of the Office of the Attorney General. Opinions of the Attorney General are formal documents rendered pursuant to specific statutory authority.

In *Luis v. United States*, the United States Supreme Court found itself faced with what some would consider a distinction without a difference.[1] The issue of government forfeiture of alleged criminal assets has become fraught with controversy over the past several years.[2] Allegations of government overreach have nearly overwhelmed what was once a safe consensus in favor of the notion that no person should enjoy the benefit of their ill-gotten gains. The change is evident in the legal analysis of the *Luis* majority, and in the case's outcome.

In October 2012, the federal government charged Sila Luis with paying kickbacks, conspiring to commit fraud, and other health care related crimes.[3] The federal government alleged that she had stolen approximately $45 million dollars through an array of health care scams, and had already spent the bulk of it.[4] Luis still had about $2 million in her possession, however, and the government, seeking to preserve those funds for restitution and criminal fines and penalties, obtained a pretrial order from the district court restraining Luis from dissipating these funds in any fashion:[5]

> To establish its entitlement to a restraining order, the Government showed that Luis and her co-conspirators were dissipating the illegally obtained assets. In particular, they were transferring money involved in the scheme to various individuals and entities, including shell corporations owned by Luis' family members. As part of this process, Luis opened and closed well over 40 bank accounts and withdrew large amounts of cash to hide the conspiracy's proceeds. Luis personally received almost $4.5 million in funds and used at least some of that money to purchase luxury items, real estate, and automobiles, and to travel.[6]

Having made that showing, the government stipulated that these funds were "untainted" assets. That is, it stipulated that the funds were not traceable to the criminal acts at issue, and that, because of the government's seizure of these assets, Luis would not be able to afford private counsel to represent her in the criminal case.[7] In its ruling, the district court acknowledged that its order might prevent Luis from retaining a lawyer of her choice, but "that there is no Sixth Amendment right to use untainted, substitute

1 136 S. Ct. 1083 (2016).

2 *See* Dick M. Carpenter II et al., Institute for Justice, *Policing for Profit: The Abuse of Civil Asset Forfeiture* (2d ed. 2015), https://ij.org/wp-content/uploads/2015/11/policing-for-profit-2nd-edition.pdf (visited April 13, 2017).

3 *Luis*, 136 S. Ct. at 1087.

4 *Id.*

5 *Id.* at 1087-1088.

6 *Id.* at 1104 (Kennedy, J., dissenting).

7 *Id.* at 1088.

assets to hire counsel."[8] The Eighth Circuit upheld the district court's order, and the United States Supreme Court granted Luis' petition for certiorari.[9]

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."[10] The Supreme Court has observed, "[i]t is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice."[11] The Court in *Luis*, determining that in the circumstances the constitutional question was unavoidable, held that "the pretrial restraint of legitimate, untainted assets needed to retain counsel of choice violates the Sixth Amendment."[12] Sila Luis could keep her money.

After a brief sojourn outlining the contours and history of the Sixth Amendment and the Court's cases construing it, the plurality opinion, penned by Justice Breyer and joined by the Chief Justice and Justices Ginsburg and Sotomayor, got to the heart of the matter:

> The Government cannot, and does not, deny Luis' right to be represented by a qualified attorney whom she chooses and can afford. But the Government would undermine the value of that right by taking from Luis the ability to use the funds she needs to pay for her chosen attorney.[13]

Acknowledging this fact, the government nonetheless argued that its actions were plainly justified. The government claimed that it needed to freeze Luis' assets in order "to guarantee that those funds will be available later to help pay for statutory penalties (including forfeiture of untainted assets) and restitution, should it secure convictions."[14] The government further asserted that it stood on solid legal ground, rooted in the well-settled precedent of the Court's own cases regarding the Sixth Amendment and asset seizures.[15] Those cases, according to the government, stood for a commonsense proposition relied upon by all levels of law enforcement all across the United States: that property of a criminally accused is subject to pretrial restraint by the government if that property may in the future be deemed forfeitable by a court.[16] The *Luis* majority disagreed.

The difference in this case, the Court observed, was that prior cases "involved the restraint only of tainted assets, and thus [the Court] had no occasion to opine in those cases about the constitutionality of pretrial restraints of other, untainted assets."[17] That difference is crucial; the assets at issue "belong[] to the defendant, pure and simple. In this respect it differs from a robber's loot, a drug seller's cocaine, a burglar's tools, or other property associated with the planning, implementing, or concealing of a crime."[18] Colorfully put, and highly instructive. While the government can freeze, and even seize, assets such as those described above, "untainted" assets are in a wholly different category, as far as concerns the Sixth Amendment and its guarantees.[19] And the government had conceded in this case that the property was in fact untainted.[20]

This concession, in the end, rendered the government's reliance on Supreme Court precedent untenable. In both *Caplin & Drysdale* and *Monsanto*, the government's seizure of funds, in one case pretrial and in the other after a conviction, prevented the defendants from using those funds to hire and pay lawyers of their choosing.[21] The Court held in those cases that the seizures did not violate the Sixth Amendment.[22] In each, the contested property was tainted, that is, traceable to the crime. As the Court pointedly noted:

> The distinction that we have discussed is an important one, not a technicality. It is the difference between what is yours and what is mine. In *Caplin & Drysdale* and *Monsanto*, the Government wanted to impose restrictions upon (or seize) property that the Government had probable cause to believe was the proceeds of, or traceable to, a crime. The relevant statute said that the Government took title to those tainted assets as of the time of the crime. And the defendants in those cases consequently had to concede that the disputed property was in an important sense the Government's at the time the court imposed the restrictions.[23]

In such circumstances, the Court observed, the government had a "substantial" interest, a sort of lien, in the property as a result of its likely criminal provenance, a situation that concededly did not obtain in Luis' case.[24]

> As soon as [the possessor of the forfeitable asset committed the violation] . . . , the forfeiture . . . *took effect*, and (though needing judicial condemnation to perfect it) operated *from that time* as a statutory conveyance to the United States of all right, title, and interest then remaining in the [possessor];

8 *Id.*

9 *Id.*

10 U.S. Const. amend. VI.

11 Powell v. Alabama, 287 U.S. 45, 53 (1932).

12 *Luis*, 136 S. Ct. at 1088.

13 *Id.* at 1089.

14 *Id.*

15 *See* Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 631 (1989); United States v. Monsanto, 491 U.S. 600, 616 (1989).

16 *Id.*

17 *Luis*, 136 S. Ct. at 1091.

18 *Id.* at 1090.

19 *Id.*

20 *Id.* at 1088.

21 *Id.* at 1090.

22 *Id.*

23 *Id.* at 1092 (internal citations omitted).

24 *Id.*

and was as valid and effectual, against all the world, as a recorded deed.[25]

This was not the end of the analysis, however. Importantly, the government also relied on a federal statute, 18 U.S.C. sec. 1345(a)(2)(B)(i), which, it argued, conferred upon a district court the power to enjoin a defendant in a criminal case from disposing of untainted "property of equivalent value" to tainted property.[26] The Court was not persuaded. Noting that Luis needed some of that property to pay for a lawyer, the Court held that the interests protected by the seizure of that property ran headlong into that interest expressly protected by the Sixth Amendment, and that the Sixth Amendment prevailed. Those governmental interests included:

> [T]he Government's contingent interest in securing its punishment of choice (namely, criminal forfeiture) as well as the victims' interest in securing restitution (notably, from funds belonging to the defendant, not the victims). While these interests are important, to deny the Government the order it requests will not inevitably undermine them, for, at least sometimes, the defendant may possess other assets—say, 'tainted' property—that might be used for forfeitures and restitution. Nor do the interests in obtaining payment of a criminal forfeiture or restitution order enjoy constitutional protection. Rather, despite their importance, compared to the right to counsel of choice, these interests would seem to lie somewhat further from the heart of a fair, effective criminal justice system.[27]

For those reasons, the Court explained, and because the Court could find no historical support for the practice of pretrial restraint of untainted assets, the rights afforded by the Sixth Amendment necessarily trumped the government's various asserted, but in the end unavailing, interests.[28]

In a characteristically comprehensive and thought-provoking concurrence, Justice Thomas concurred in the judgment, but not in its particular analytical approach. Noting that, where the Sixth Amendment provides for the right to counsel of choice, it does not, in turn, allow for "unchecked [government] power to freeze a defendant's assets before trial simply to secure potential forfeiture upon conviction," Justice Thomas goes further.[29] He goes on to observe that "[t]he law has long recognized that the 'authorization of an act also authorizes a necessary predicate act.'"[30] The Sixth Amendment, then, implicitly and necessarily provides some protection for the lawful ability to pay for one's counsel of choice. That ability need not be subsidized, but neither can it be handicapped by government action. "Constitutional rights thus implicitly protect those closely related acts necessary to their exercise."[31]

Justice Thomas goes on to cite some examples. He avers first to the Second Amendment and its right to keep and bear arms, which would mean nothing without corresponding rights to obtain the bullets necessary for their use and to acquire and maintain proficiency in the use of those arms.[32] Justice Thomas also points to the right to express one's opinion protected by the First Amendment and its concomitant "right to engage in financial transactions that are the incidents of its exercise."[33] In a similar fashion, one must have the right to use the assets one lawfully possesses in order to fully exercise the right to hire an attorney of one's choice. And certainly the government may not hamper or restrict that right in any way, directly or indirectly.

Justice Thomas also carefully and eruditely limns the historical parameters and evolution of the right at issue, and notes plainly that "[p]retrial freezes of untainted forfeitable assets did not emerge until the late 20th century."[34] Tainted assets, however, were always subject to forfeiture, and the seizure before trial of contraband and stolen goods based on probable cause to believe they are such items has a venerable Fourth Amendment pedigree that is similarly unquestioned.[35] Pretrial seizure of untainted property, however, was another matter.[36] According to Justice Thomas, the common law itself "offers an administrable line: A criminal defendant's untainted assets are protected from Government interference before trial and judgment. His tainted assets, by contrast, may be seized before trial as contraband or through a separate *in rem* proceeding."[37]

Justice Thomas takes issue with what he calls the "plurality's atextual balancing analysis."[38] Gently chiding the plurality for its reasoning while quoting it forthrightly, Justice Thomas states that he has "no idea whether, compared to the right to counsel of choice, the Government's interests in securing forfeiture and restitution lie further from the heart of a fair, effective criminal justice system."[39] Repairing to the authority of one of the Court's landmark cases, Thomas admits that "[j]udges are not well suited to strike the right 'balance' between [two] incommensurable interests. Nor do I think it is our role to do so. The People, through ratification, have already weighed the policy tradeoffs

25 *Id.*, quoting United States v. Stowell, 133 U.S. 1, 19 (1890) (emphases in original).

26 *Id*. at 1093.

27 *Id.* (internal citation and quotation omitted).

28 *Id*. at 1093-94.

29 *Id*. at 1097.

30 *Id.* (citing Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 192 (2012) (discussing the "predicate act canon")).

31 *Id.*

32 *Id.* at 1097-98 (citing and quoting Jackson v. City and County of San Francisco, 746 F.3d 953, 967 (9th Cir. 2014) and Ezell v. Chicago, 651 F.3d 684, 704 (7th Cir. 2011)).

33 *Id.* (quoting McConnell v. Federal Election Comm'n, 540 U.S. 93, 252 (2003) (Scalia, J., concurring in part, concurring in judgment in part, and dissenting in part)).

34 *Id.* at 1099.

35 *Id.* at 1100.

36 *Id.*

37 *Id.* at 1101.

38 *Id.*

39 *Id.* (internal quotation marks omitted).

that constitutional rights entail."[40] That weighing being done, according to Thomas, the Court's present task is straightforward. Noting further the well-settled proposition that incidental governmental burdens on fundamental constitutional rights do not necessarily violate those rights,[41] Justice Thomas explains that the burden at issue in *Luis* is decidedly *not* incidental.[42] Instead, "it targets a defendant's assets, which are necessary to exercise that right, simply to secure forfeiture upon conviction."[43] In Justice Thomas' view, then, the law at issue simply does not comport with the right that the Sixth Amendment guarantees.

Justice Kennedy, joined in dissent by Justice Alito, saw things quite differently:

> The plurality and Justice Thomas find in the Sixth Amendment a right of criminal defendants to pay for an attorney with funds that are forfeitable upon conviction so long as those funds are not derived from the crime alleged. That unprecedented holding rewards criminals who hurry to spend, conceal, or launder stolen property by assuring them that they may use their own funds to pay for an attorney after they have dissipated the proceeds of their crime. It matters not, under today's ruling, that the defendant's remaining assets must be preserved if the victim or the Government is to recover for the property wrongfully taken.[44]

Justice Kennedy points out what some would consider an obvious flaw in the holding of the case, by way of a particularly provocative illustration:

> Assume a thief steals $1 million and then wins another $1 million in a lottery. After putting the sums in separate accounts, he or she spends $1 million. If the thief spends his or her lottery winnings, the Government can restrain the stolen funds in their entirety. The thief has no right to use those funds to pay for an attorney. Yet if the thief heeds today's decision, he or she will spend the stolen money first; for if the thief is apprehended, the $1 million dollars won in the lottery can be used for an attorney."[45]

Justice Kennedy considers this outcome to be self-evidently unfair, and he would hold that the Sixth Amendment in no way compels it.[46]

Justice Kennedy argued that the Court's holding was actually foreclosed by its prior cases.[47] He observes that, whether tainted or untainted, the government has no property right whatsoever in forfeitable assets "until the Government wins a judgment of forfeiture or the defendant is convicted."[48] But that does not mean it cannot restrain those assets in order to prevent their potential dissipation. Indeed, according to Justice Kennedy, that was the rule of the Court's prior cases; nothing turned on whether the assets at the time of the restraint were traceable to the crimes at issue, and such a determination was irrelevant to the cases' respective outcomes.[49] The plurality argued that only where assets are connected to the crime does the government have a type of property interest in those assets at the time the crime is committed, and thus the concomitant authority to seek pretrial restraint.[50] Justices Kennedy and Alito, however, see no such distinction, and thus they see no constitutional violation. In other words, where, as here, there is statutory authority to seize substitute assets in order to provide restitution to victims of a crime,[51] those assets, whatever their nature or provenance, may be restrained:

> True, the assets in *Caplin & Drysdale* and *Monsanto* happened to be derived from the criminal activity alleged; but the Court's reasoning in those cases was based on the Government's entitlement to recoup money from criminals who have profited from their crimes, not on tracing or identifying the actual assets connected to the crime. For this reason, the principle the Court announced in those cases applies whenever the Government obtains (or will obtain) title to assets upon conviction.[52]

Contra Justice Thomas and like the plurality, Justice Kennedy expressly considers the government's interest and balances it against the defendant's. And, in his analysis, the defendant—the possessor of what are conceded to be wholly innocent assets—comes up short. "This case implicates the Government's interest in preventing the dissipation, transfer, and concealment of stolen funds, as well as its interest in preserving for victims any funds that remain. Those interests justify, in cases like this one, the pretrial restraint of substitute assets."[53] The *Luis*

40 *Id. See* District of Columbia v. Heller, 554 U.S. 570, 634-635 (2008) ("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. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.") (emphasis in original).

41 *See, e.g.*, Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U.S. 872, 878-882 (1990) ("[T]he right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).") (internal citation omitted).

42 *Luis*, 136 S. Ct. at 1102.

43 *Id.*

44 *Id.* at 1103.

45 *Id.*

46 *Id.*

47 *Id.* at 1105 (citing *Caplin & Drysdale*, 491 U.S. at 625, and *Monsanto*, 491 U.S. at 616).

48 *Id.* at 1106.

49 *Id.* at 1106-1107.

50 *Id.* at 1090.

51 *See* 18 U.S.C.A. § 1345.

52 *Luis,* 136 S. Ct. at 1108.

53 *Id.*

plurality did not agree, however, and the dissenting opinion laments what it sees as an unnecessary impediment to making victims whole, and a complete windfall for malefactors of all kinds, including Luis herself:

> Notwithstanding that the Government established probable cause to believe that Luis committed numerous crimes and used the proceeds of those crimes to line her and her family's pockets, the plurality and Justice Thomas reward Luis' decision to spend the money she is accused of stealing rather than her own. They allow Luis to bankroll her private attorneys as well as "the best and most industrious investigators, experts, paralegals, and law clerks" money can buy. A legal defense team Luis claims she cannot otherwise afford.[54]

The picture painted by Justice Kennedy, conveyed with palpable passion, is surely not a pretty one.

The dissent goes on to note that while Luis, if her assets were frozen, may not be able to retain her particular counsel of choice, the Sixth Amendment will nonetheless ensure that she receives constitutionally effective counsel, that is, a public defender.[55] Justice Kennedy also maintains that, where the Court's holding is based on the Sixth Amendment, "the States' administration of their forfeiture schemes" is now called into question: "[l]ike the Federal Government, States also face criminals who engage in money laundering through extensive enterprises that extend to other States and beyond."[56]

Further, Justice Kennedy observes that it is not always easy to determine just what assets are "tainted" and what are "untainted."[57] On this score, Justice Kennedy provides another provocative example:

> The plurality appears to agree that, if a defendant is indicted for stealing $1 million, the Government can obtain an order preventing the defendant from spending the $1 million he or she is believed to have stolen. The situation gets more complicated, however, when the defendant deposits the stolen $1 million into an account that already has $1 million. If the defendant then spends $1 million from the account, it cannot be determined with certainty whether the money spent was stolen money rather than money the defendant already had. The question arises, then, whether the Government can restrain the remaining million.[58]

A vexing question, indeed. Justice Kennedy then cites a learned treatise, one noted favorably by the plurality, that instructs that in a situation where misappropriated and lawful monies are commingled in a single account, money may be recovered from that account regardless of whether it can be demonstrated that the money recovered is in fact the misappropriated portion.[59] Money is fungible, after all. That being so, notes Justice Kennedy, why should it matter if the monies are instead in two separate bank accounts, one account containing money from before the crime, the other containing the stolen assets?[60] In the principal dissent's opinion, the holding in *Luis* simply "creates perverse incentives and provides protection for defendants who spend stolen money rather than their own."[61]

Justice Kagan penned a separate dissent. She explained first that she found *Monsanto*—which held that the government may freeze a defendant's tainted assets pretrial so long as there is probable cause to believe they may be forfeitable, even if the assets were going to be used to hire a lawyer—to be a "troubling" decision which she would like to revisit.[62] It seemed, to Justice Kagan, to be putting the proverbial cart before the horse.[63] But the correctness of *Monsanto* was not before the Court in *Luis*. Constrained by *Monsanto*, Justice Kagan, like Justice Kennedy, saw no real distinction between it and the facts of *Luis*: "Indeed, the plurality's use of the word 'tainted,' to describe assets at the pre-conviction stage, makes an unwarranted assumption about the defendant's guilt. Because the Government has not yet shown that the defendant committed the crime charged, it also has not shown that allegedly tainted assets are actually so."[64] Justice Kagan's dissent here sounds an ominous note for certain well-established law enforcement practices regarding pretrial asset forfeiture.

In that vein, certain developments outside of Supreme Court jurisprudence are noteworthy. Since the Court's decision in *Luis*, caselaw considering it and its commands have been relatively sparse.[65] Nonetheless, as Justice Kennedy noted,[66] the rule of *Luis* will likely have a substantial effect on the quantity of such pretrial seizures in an enormous number of cases. In any event, and quite beyond the facts and holding of *Luis* itself, the future of civil asset forfeiture, both state and federal, is in a state of flux as a matter

54 *Id.* at 1109 (internal citation omitted).

55 *Id.* at 1110.

56 *Id.*

57 *Id.*

58 *Id.* at 1110-1111.

59 *Id.* at 1111.

60 *Id.*

61 *Id.* at 1112.

62 *Id.*

63 *Id.*

64 *Id.* at 1112-1113.

65 *See, e.g.*, United States v. Johnson, WL 1226100 (4th Cir. April 3, 2017) (affirming seizure of funds where probable cause existed to seize all of defendant's funds as tainted assets); Estate of Lott v. O'Neill, 2017 WL 462184 (Me. February 3, 2017) (Sixth Amendment right to assistance of counsel not violated when plaintiff in civil wrongful death action attaches funds defendant intends to use for legal defense to homicide charges based on death at issue in civil case); United States v. Malik, 2017 WL 491225 (D. Md. February 2, 2017) (allowing defendant's motion for reconsideration of pretrial restraining order in light of *Luis*, where no contention defendant's assets were tainted); United States v. Lindell, 2016 WL 4707976 (D. Haw. Sept. 8, 2016) (holding *Luis* inapplicable where seized funds were tainted); United States v. Marshall, 2016 WL 3937514 (N.D.W.Va. July 18, 2016) (holding all seized funds but one untainted, and thus available to pay for lawyer under *Luis*).

66 *Luis*, 136 S. Ct. at 1110.

of both constitutional law and policy.[67] In a statement respecting the Court's decision to deny certiorari in a case challenging the constitutionality of the procedures used by the state of Texas to adjudicate the seizure of the petitioner's property under Texas' asset forfeiture law, Justice Thomas observed that:

> [T]he Court has justified its unique constitutional treatment of civil forfeiture largely by reference to a discrete historical practice that existed at the time of the founding . . . . In the absence of this historical practice, the Constitution presumably would require the Court to align its distinct doctrine governing civil forfeiture with its doctrines governing other forms of punitive state action and property deprivation.[68]

Because the petitioner raised her due process argument for the first time before the Supreme Court, Justice Thomas was compelled to concur in the denial of certiorari; but, he said, "[w]hether this Court's treatment of the broad modern forfeiture practice can be justified by the narrow historical one is certainly worthy of consideration in greater detail."[69] Based on the various opinions that came out of *Luis*, all forcefully argued and ably presented, on a topic of great import to civil and criminal justice, it would seem that that moment of further consideration will arrive sooner rather than later.

67 *See, e.g.*, Lee McGrath and Nick Sibilla, *Trump Should Be Appalled by Police Asset Forfeiture*, Wall Street Journal, March 5, 2017, https://www.wsj.com/articles/trump-should-be-appalled-by-police-asset-forfeiture-1488751876.

68 Leonard v. Texas, 137 S. Ct. 847 (2017) (statement of Justice Thomas respecting denial of certiorari).

69 *Id.*

Morally Innocent, Legally Guilty: The Case for Mens Rea Reform

By John G. Malcolm

Note from the Editor:

This article discusses the concept of mens rea, argues that too few federal laws contain adequate mens rea standards, and urges Congress to take up mens rea reform.

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 links to other perspectives on the issue, including ones opposed to the position taken in the article. We also invite responses from our readers. To join the debate, please email us at info@fedsoc.org.

- Leslie R. Caldwell, Assistant Attorney General, Criminal Division, Statement before the Senate Judiciary Committee, Hearing on the Adequacy of Criminal Intent Standards in Federal Prosecutions (Jan. 20, 2016), https://www.judiciary.senate.gov/imo/media/doc/01-20-16%20Caldwell%20Testimony.pdf.
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In 1997, three-time Indy 500 winner Bobby Unser was convicted of a federal crime that exposed him to a $5,000 fine and a six-month prison sentence. He and a friend were riding a snowmobile and got caught in a horrific blizzard in the woods. They abandoned the snowmobile and sought shelter. They were trapped for two days and two nights and nearly died from hypothermia.

What heinous thing did Unser do that incensed the federal government and justified his punishment? He had abandoned his snowmobile in a federal wilderness area, which is a crime. Unser had not known that this was a crime, and certainly had no intention of violating federal law—he was merely seeking shelter to save his own life. Nevertheless, the justice system found him guilty of a federal offense.[1]

Proof of mens rea—a guilty mind—has traditionally been required to punish someone for a crime because intentional wrongdoing is more morally culpable than accidental wrongdoing; our justice system has usually been content to evaluate accidents that injure others as civil wrongs, but criminal punishment has been reserved for people who do bad acts on purpose. But that has changed as legislators and regulators have begun to see the criminal justice system, not as a forum for ascertaining moral blameworthiness and meting out punishment accordingly, but as just another tool in the technocratic toolbox for shaping society and preventing social harm. Mens rea reform, if Congress implements it, would constitute an important step toward restoring justice by preventing criminal punishment for actions like Bobby Unser's leaving his snowmobile on federal land during a snowstorm. Ensuring that there are adequate mens rea standards in our criminal laws is one of the greatest safeguards against overcriminalization—the misuse and overuse of criminal laws and penalties to address every societal problem. While some critics argue that mens rea reform would only benefit wealthy corporations and their executives who flout environmental and other health and safety regulations, the truth is that such corporations and their high-ranking executives are able to hire lawyers to navigate complex regulations and avoid prosecution, while individuals and small businesses lack the time, money, and expertise to avoid accidentally violating obscure rules. Mens rea reform is necessary to ensure that our criminal justice system punishes in accordance with commonly held beliefs about right and wrong, which is important if it is to maintain its legitimacy in the eyes of all Americans.

I. Historical Justification for the Necessity of Mens Rea

The notion that a crime ought to involve a culpable intent has a solid historical grounding. The threat of unknowable, unreasonable, and vague laws—all of which pertain to one's ability to act with a "guilty mind"—troubled our Founding Fathers. In *Federalist* No. 62, James Madison warned:

> It will be of little avail to the people that 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

1 *See* Conn Carroll, *Bobby Unser vs the Feds*, Daily Signal (Mar. 14, 2011), http://dailysignal.com/2011/03/14/bobby-unser-vs-the-feds/.

understood . . . [so] that no man who knows what the law is today, can guess what it will be like tomorrow."[2]

Long before the growth of the administrative state and the proliferation of regulatory crimes, the Founders recognized that there is a serious problem when people are branded as criminals for violating laws or regulations that they did not know existed, had no intent to violate, and would not have understood to apply to their actions even if they had known about them.

Supreme Court Justice Robert Jackson—a former U.S. Attorney General and special prosecutor during the Nuremberg trials—wrote in 1952 in *Morissette v. United States*:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.[3]

In 2001, in *Rogers v. Tennessee*, the Supreme Court of the United States cited "core due process concepts of notice, foreseeability, and, in particular, the right to fair warning as those concepts bear on the constitutionality of attaching criminal penalties to what previously had been innocent conduct."[4] By having adequate mens rea standards, we ensure that moral blameworthiness is front and center in the criminal justice system.

II. How Mens Rea Standards Have Changed

Traditionally, the criminal law held that that commission of a criminal act requires both mens rea, or "a guilty mind," and an actus reus, or "a bad act." Neither element on its own was sufficient to justify criminal sanctions; it was only when both of these elements were present that a case would be dealt with in the criminal system. A bad act without a guilty mind (e.g., a car accident where you are at fault) would go to the civil tort system if it caused injury, and a guilty mind without a bad act (e.g., your desire to kill someone that you never act on) would be a matter for your conscience or religious confession.[5] Today, with increasing frequency, the system has turned away from this requirement, severely weakening or abandoning altogether the mens rea standards that were once commonplace.

This change has come about as the orientation of the criminal justice system has evolved. In addition to seeking to punish those who act out of willfulness or malice, the system now seeks to punish those who do things that result in some harm that we do not like, regardless of any intentionality or malice on their part. The scope of the criminal justice system has expanded beyond the prosecution of traditional, common law offenses known as "malum in se" offenses—acts that are bad in themselves like rape, murder, robbery, and fraud—to the prosecution of regulatory offenses known as "malum prohibitum" offenses—acts that are bad simply because the law prohibits them. Absent sufficient mens rea standards, prosecuting malum prohibitum violations can result in unwitting individuals being labeled as criminals and incarcerated for committing acts that are not inherently immoral and that a reasonable person might not realize could subject them to criminal liability. Under traditional common law, if someone claimed not to know it was against the law to commit murder or robbery, it could fairly be said, to quote a great legal maxim, that "ignorance of the law is no excuse." If a person knew something was morally blameworthy when he did it, it shouldn't surprise him to discover it was also a crime too.

That is no longer the case. Today, the United States Code and the Code of Federal Regulations contain an estimated nearly 5,000 statutes[6] and more than 300,000 regulations that carry criminal penalties for violations.[7] These figures rise each year, and that's just at the federal level. With so many criminal laws and regulations on the books, it stretches credulity to assume that every citizen is

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2 The Federalist No. 62, at 323–24 (James Madison) (George W. Carey & James McClellan eds., 2001).

3 342 U.S. 246, 250 (1952).

4 532 U.S. 451, 459 (2001).

5 Paul Rosenzweig, *Congress Doesn't Know Its Own Mind—And That Makes You a Criminal*, Heritage Foundation Legal Memorandum No. 98 (July 18, 2013), *available at* http://www.heritage.org/research/reports/2013/07/congress-doesnt-know-its-own-mind-and-that-makes-you-a-criminal.

6 *The Crimes on the Books and Committee Jurisdiction: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. (2014) (testimony of John Baker), *available at* http://judiciary.house.gov/_cache/files/44135b93-fe36-43dc-a91b-3412fe15e1f4/baker-testimony.pdf. *See also* Gerald E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 Law & Contemp. Probs. 23, 37 (1997) ("Legislatures, concerned about the perceived weakness of administrative regimes, have put criminal sanctions behind administrative regulations governing everything from interstate trucking to the distribution of food stamps to the regulation of the environment."). For an interesting discussion about the emergence and expansion of regulatory crimes, see Paul J. Larkin, Jr., *Regulatory Crimes and the Mistake of Law Defense*, Heritage Foundation Legal Memorandum No. 157 at 2-3 (July 9, 2015), *available at* http://www.heritage.org/research/reports/2015/07/regulatory-crimes-and-the-mistake-of-law-defense; Paul J. Larkin, Jr., *Strict Liability Offenses, Incarceration, and the Cruel and Unusual Punishments Clause*, 37 Harv. J. L. & Pub. Pol'y 1065, 1072–77 (2014). *See also Morissette*, 342 U.S. at 253–54 (stating that the Industrial Revolution "multiplied the number of workmen exposed to injury from increasingly powerful and complex mechanisms" and resulted in "[c]ongestion of cities and crowding of quarters [that] called for health and welfare regulations undreamed of in simpler times").

7 *See, e.g.,* John Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, Heritage Foundation Legal Memorandum No. 26 (June 16, 2008); John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"? Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. Rev. 193, 216 (1991); Larkin, *Regulatory Crimes and the Mistake of Law Defense*, *supra* note 6 ("[T]he number of regulations affecting the reach of the criminal code has been estimated to exceed 300,000."); *Over-Criminalization of Conduct/Over-Federalization of Criminal Law: Hearing Before the Subcomm. on Crime, Terrorism & Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 7 (2009) (testimony of Former Attorney General Dick Thornburgh), *available at* http://judiciary.house.gov/_files/hearings/pdf/Thornburgh090722.pdf. The CFR spans 50 titles and approximately 200 volumes and is more than 80,000 pages long. *See* U.S. Government Printing Office, Code of Federal Regulations (CFRs) in Print, http://bookstore.gpo.gov/catalog/laws-regulations/code-federal-regulations-cfrs-print#4.

aware of them all. Consider how many people would know that the following are actually federal crimes:

- To make unauthorized use of the 4-H club logo,[8] the Swiss Confederation coat of arms,[9] or the "Smokey the Bear" or "Woodsy Owl" characters.[10]
- To transport water hyacinths, alligator grass, or water chestnut plants.[11]
- To keep a pet on a leash that exceeds six feet in length on federal park land.[12]
- To picnic in a non-designated area on federal land.[13]
- To poll a service member before an election.[14]
- To sell malt liquor labeled "pre-war strength."[15]
- To write a check for an amount less than $1.[16]
- To roll something down a hillside or mountainside on federal land.[17]
- To park your car in a way that inconveniences someone on federal land.[18]
- To "allow . . . a pet to make a noise that . . . frightens wildlife on federal land."[19]
- To "fail to turn in found property" to a national park superintendent "as soon as practicable."[20]

In the case of these crimes and numerous others, prosecutors rarely need to prove both an individual's mens rea and his actus reus; often, the bad act alone is enough to result in jail time. This is because many criminal laws lack an adequate—or *any*—mens rea requirement, meaning that a prosecutor does not even have to prove that the accused knew he was violating a law or that he was doing something wrong in order to convict him. Thus, innocent mistakes or accidents can become crimes.

It is important to clarify that, with respect to malum in se crimes, it is completely appropriate to bring the moral force of the government to bear in the form of a criminal prosecution in order to maintain order and respect for the rule of law, even if an individual were to claim, for example, that he did not know arson was a crime. However, as the examples above illustrate, some criminal statutes and many regulatory crimes do not fit into this category. These are malum prohibitum offenses because they are not inherently blameworthy; an average citizen would not stop to consider whether picnicking in an undesignated area in a federal park is a crime before opening up her lunchbox. Such conduct is prohibited—and prosecutable—only because a legislature or bureaucrat has said that it is. In recent decades, this category of offenses has become so voluminous that no one, not even Congress or the Department of Justice, knows precisely how many criminal laws and regulatory crimes currently exist.[21] Many of these offenses are vague, overly broad, or highly technical, and they criminalize conduct that is not obviously morally wrong. This results in a vast web of criminalized conduct that creates risks for an unwary public. Numerous morally blameless individuals and companies end up unwittingly committing acts which constitute crimes, and some of them get prosecuted for that conduct.[22]

There are different mens rea standards providing varying degrees of protection to the accused (or, depending on one's perspective, challenges for the prosecution). The following recitation of is somewhat broad and simplified—and courts often differ in how they define these standards, which can make a huge difference in close cases—but it gives a general idea of the different mens rea standards:[23]

- The standard that provides the highest level of protection to an accused is "willfully," which essentially requires proof

8 18 U.S.C. § 707 (2014).

9 18 U.S.C. § 708 (2014).

10 18 U.S.C. § 711–711a (2014).

11 18 U.S.C § 46 (2014).

12 *Id.* at (a)(2).

13 36 C.F.R. § 2.11 (2016).

14 18 U.S.C. § 596 (2014).

15 27 U.S.C. §§ 205, 207 (2014); 27 C.F.R. §7.29(f) (2016).

16 18 U.S.C. § 336 (2014).

17 36 C.F.R. §2.1(a)(3) (2016).

18 36 C.F.R. § 261.10(f) (2016).

19 36 C.F.R. § 2.15(a)(4) (2016).

20 36 C.F.R. § 2.22(a)(3) (2016).

21 It is worth noting that Congress is currently considering a proposal that would require the U.S. Attorney General and the heads of all federal regulatory agencies to compile a list of all criminal statutory and regulatory offenses, including a list of the mens rea requirements and all other elements for such offenses, and to make such indices available and freely accessible on the websites of the Department of Justice and the respective agencies. *See* Smarter Sentencing Act of 2015 §7. The Senate version of this bill, which was introduced by Sen. Mike Lee (R–UT) and Sen. Richard Durbin (D–IL), is S. 502, and the House version of the bill, which was introduced by Rep. Raul Labrador (R–ID), is H.R. 920.

22 There are additional problems with respect to regulatory crimes, that is, regulations in which violations are punishable as criminal offenses. In addition to the fact that many regulations are vague and overbroad, many are so abstruse that they may require a technical or doctoral degree in the discipline covered by the regulations to understand them. Further, there are so many regulations located in so many places that lay people and small companies subject to those regulations would be unable to locate them, much less understand them, even if they had the resources to do so. In addition to actual regulations, there are also agency guidance documents and frequently asked questions that agencies sometimes claim have the same legal effect as regulations.

23 *See, e.g.*, Model Penal Code § 2.02 (General Requirements of Culpability); United States v. Bailey, 444 U.S. 394, 403–07 (1980) (discussing different standards and noting the difficulty of discerning the proper definition of mens rea required for any particular crime); United States v. Pomponio, 429 U.S. 10, 12 (1976) (term "willfulness" requires proof of "an intentional violation of a known legal duty") (citing United States v. Bishop, 412 U.S. 346, 360 (1973)); Bryan v. United States, 524 U.S. 184, 191–92 (1998) ("As a general matter, when used in the criminal context, a 'willful' act is one undertaken with a 'bad purpose.' In other words, in order to establish a 'willful' violation of a statute, 'the Government must prove that the defendant acted with knowledge that his conduct was unlawful.'") (quoting Ratzlaf v. United States, 510 U.S. 135, 137 (1994) (footnote omitted)); Holloway v. United States, 526 U.S. 1 (discussing the use of "intentional" and not reading it to require

that the accused acted with the knowledge that his or her conduct was unlawful.

- A "purposely" or "intentionally" standard requires proof that the accused engaged in conduct with the conscious objective to cause a certain harmful result.
- A "knowingly" standard provides less protection, but the precise level of protection depends on how knowledge is defined. Some courts have required the prosecution to prove (1) that the accused was aware of what he was doing (e.g., he was not sleepwalking) and (2) that he was aware to a practical certainty that his conduct would lead to a harmful result. Other courts have defined the term to require only the former.
- A standard of "recklessly" or "wantonly" requires proof that the accused was aware of what he was doing, that he was aware of the substantial risk that his conduct could cause harm, and that he nevertheless acted in a manner that grossly deviated from the standard of conduct that a reasonable, law-abiding person would have employed in those circumstances.
- Another standard that does not offer much protection at all is "negligently," which requires proof that the accused did not act in accordance with how a reasonable, law-abiding person would have acted in the same circumstances. "Negligently" is the relevant standard in criminal statutes that define mens rea based on what a defendant "reasonably should have known." Negligence is a term traditionally used in tort law and is ill-suited to criminal law because it deals with accidents, even though they are accidents due to carelessness that might be somewhat blameworthy. Arguably, negligence is not a mens rea standard at all, since someone who simply has an accident by being slightly careless can hardly be said to have acted with a "guilty mind."

Numerous regulatory crimes and other malum prohibitum offenses do not incorporate adequate—or any—mens rea standards among their elements, leaving defendants without this fundamental protection against prosecution if they accidentally commit one of these crimes.

III. Why and How Mens Rea Reform Should Be Enacted

Harm will inevitably occur from time to time, whether through willfulness, negligence, or sheer accident; however, the intent of the actor who causes the harm should make a difference in whether that person is criminally prosecuted or dealt with, perhaps even severely, through the civil or administrative justice systems. As Oliver Wendell Holmes, Jr., who was later appointed to the Supreme Court, once observed, "even a dog distinguishes between being stumbled over and being kicked."[24]

In 2015, in *Elonis v. United States*, the Supreme Court emphasized the need for an adequate mens rea requirement in criminal cases. In that case, the Court reversed a man's conviction for violating 18 U.S.C. §875(c) by transmitting threatening communications after he posted some deeply disturbing comments about his estranged wife and others on his Facebook page that the wife quite reasonably regarded as threatening.[25] The Court noted that while the statute clearly required that a communication be transmitted and contain a threat, it was silent as to whether the defendant must have any mental state with respect to those elements and, if so, what that state of mind must be. The Court stated that "[t]he fact that the statute does not specify any required mental state, however, does not mean that none exists" and, quoting from *Morissette*, observed that the "'mere omission from a criminal enactment of any mention of criminal intent' should not be read 'as dispensing with it.'"[26]

The Court, citing to four other cases in which it had provided a missing mens rea element,[27] proceeded to read into the statute a mens rea requirement and reiterated the "basic principle that 'wrongdoing must be conscious to be criminal.'"[28] The Court focused on the actor's intent rather than the recipient's perception: "Having the liability turn on whether a 'reasonable person' regards the communication as a threat—regardless of what the defendant thinks—'reduces the culpability on the all-important element of the crime to negligence.'"[29] While the Court declined to identify exactly what the appropriate mens rea standard is under that statute and whether recklessness would suffice, it recognized that a defendant's mental state is critical when he faces criminal liability and that when a federal criminal statute is "silent on the required mental state," a court should read the statute as incorporating "that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'"[30]

If it were a guarantee that courts would always devise and incorporate an appropriate mens rea standard into every criminal statute when one was missing, there might be no need for Congress to do so. As the *Elonis* Court noted, however, there are exceptions to the "'general rule' . . . that a guilty mind is 'a necessary element in the indictment and proof of every crime.'"[31] Courts, including the Supreme Court, on occasion

proof of knowledge of illegality); United States v. Cooper, 482 F.3d 658, 667–68 (4th Cir. 2007) (discussing "knowing" standard); United States v. Sinskey, 119 F.3d 712, 715–16 (8th Cir. 1997) (discussing "knowing" standard); United States v. Hopkins, 53 F.3d 533, 537–41 (2d Cir. 1995) (discussing "knowing" standard); United States v. Weitzenhoff, 35 F.3d 1275, 1284 (9th Cir. 1993) (en banc) (discussing "knowing" standard); United States v. Baytank (Houston), Inc., 934 F.2d 599, 613 (5th Cir. 1991) (discussing "knowing" standard); United States v. Ortiz, 427 F.3d 1278, 1282–83 (10th Cir. 2005) (discussing "negligence" standard); United States v. Hanousek, 176 F.3d 1116, 1121 (9th Cir. 1999) (discussing "negligence" standard); United States v. Frezzo Bros., Inc., 602 F.2d 1123, 1129 (3d Cir. 1979) (discussing "negligence" standard).

24 Oliver Wendell Holmes, Jr., The Common Law 3 (1881).

25 Elonis v. United States, 135 S.Ct. 2001 (2015).

26 *Id.* at 2009 (quoting *Morissette*, 342 U.S. at 250).

27 United States v. X-Citement Video, Inc., 513 U.S. 64 (1994); Posters 'N' Things, Ltd. v. United States, 511 U.S. 513 (1994); Liparota v. United States, 471 U.S. 419 (1985); *Morissette*, 342 U.S. 246.

28 *Elonis*, 135 S.Ct. at 2009 (quoting *Morissette*, 342 U.S. at 252).

29 *Id.* at 2011.

30 *Id.* at 2010 (quoting Carter v. United States, 530 U. S. 255, 269 (2000)).

31 *Id.* at 2009 (quoting United States v. Balint, 258 U.S. 250, 251 (1922)).

have upheld criminal laws lacking a mens rea requirement based on a presumption that Congress must have deliberated and made a conscious choice to create a strict liability crime.[32]

Although this is a doubtful proposition to begin with, the moral stakes are too high to leave it up to a court to guess whether Congress truly intended to create a strict liability offense or, more likely, in the rush to pass legislation simply neglected to consider the issue. Even if a court concludes that Congress did not mean to create a strict liability crime, there is also the ever-present risk that a court will pick an inappropriate standard that does not provide adequate protection, given the circumstances, to the accused.

By turning to the state level, we see that successful mens rea reform is possible. In a number of states, most recently Michigan and Ohio, legislatures have enacted default mens rea provisions—in which a designated mens rea standard is automatically inserted into any criminal statute that lacks one unless the legislature evinces a clear intent to enact a strict liability offense. These reforms have been adopted with overwhelming bipartisan support. Even in states with such provisions, prosecutions have continued apace and defendants are still being convicted of the crimes with which they have been charged.[33] Not only has the criminal justice system continued without interruption, but the public's respect for the moral force of the criminal law in those states has also likely been enhanced.

Given the importance of the goals of mens rea reform and the fact that several laboratories of democracy[34] have already proven its effectiveness, Congress should follow a three-part approach to mens rea reform.

First, it is critical that Congress give greater consideration to mens rea requirements when passing criminal legislation, both to make sure that they are appropriate for the type of activity involved and to ensure that the standard separates those who truly deserve the government's highest form of condemnation and punishment—criminal prosecution and incarceration—from

32 *See, e.g.*, Shevlin-Carpenter Co. v. Minnesota*,* 218 U.S. 57 (1910) (holding that a corporation can be convicted for trespass without proof of criminal intent); *Balint*, 258 U.S. at 254 (holding that a real person can be convicted of the sale of narcotics without a tax stamp without proof that he knew that the substance was a narcotic;) ("Congress weighed the possible injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to danger from the drug, and concluded that the latter was the result preferably to be avoided."); United States v. Behrman, 258 U.S. 280 (1922) (*Balint* companion case) (holding that a physician can be convicted of distributing a controlled substance not "in the course of his professional practice" without proof that he knew this his actions exceeded that limit); United States v. Dotterweich*,* 320 U.S. 277, 284-85 (1943) (holding that the president and general manager of a company can be convicted of distributing adulterated or misbranded drugs in interstate commerce without proof that he even was aware of the transaction) ("Hardship there doubtless may be under a statute which thus penalizes the transaction though consciousness of wrongdoing be totally wanting. Balancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless."); United States v. Park, 421 U.S. 658 (1975) (upholding conviction of company president for unsanitary conditions at a corporate warehouse over which he had supervisory authority, but not hands-on control); United States v. Goff, 517 Fed. Appx. 120, 123 (4th Cir. 2013) (holding that the government need not prove that a defendant knew blasting caps qualified as explosives or detonators, and that government need not prove that a defendant knew that he had stored blasting caps in an illegal manner) ("We cannot believe that Congress set out to police a myriad of dangerous explosives regardless of their explosive power but considered the policing of detonators necessary only when they actually possess an ability to detonate."); United States v. Burwell, 690 F.3d 500 (D.C. Cir. 2012) (holding that the government need not prove that a defendant knew the weapon he carried was capable of firing automatically in order to support sentence enhancement for use of a machine gun while committing a violent crime) (Rogers, J. dissenting) ("Thus, neither of the first two interpretative rules—grammatical rules of statutory construction nor the presence of otherwise innocent conduct—counseled in favor of requiring proof of mens rea, and the Court thus held that no such proof was required. In so holding, the Court did not, however, classify the provision as a public welfare offense. Nor did it frame the question before it as a choice between offenses that have mens rea requirements and public welfare offenses that do not.); United States v. Langley, 62 F.3d 602, 605 (4th Cir. 1995) (holding that the government does not need to prove that a defendant knew of his status as a convicted felon in order to prove knowing possession of a firearm by someone who has been convicted of a felony) (Because "Congress is presumed to enact legislation with…the knowledge of the interpretation that courts have given to an existing statute . . . . [W]e may assume that Congress was aware that: (1) no court prior to FOPA required the government to prove knowledge of felony status and/or interstate nexus in prosecutions under [the statute's] predecessor statutes; (2) the only knowledge the government was required to prove in a prosecution under [the statute's] predecessor statutes was knowledge of the possession, transportation, shipment, or receipt of the firearm; and (3) Congress created the FOPA version of [the statute] consistent with these judicial interpretations."); United States v. Harris, 959 F.2d 246, 258 (D.C. Cir. 1992) (holding that Congress intended to apply strict liability to the machinegun provision of § 924(c)) ("The language of the section is silent as to knowledge regarding the automatic firing capability of the weapon. Other *indicia*, however, namely the structure of section 924(c) and the function of *scienter* in it, suggest to us a congressional intent to apply strict liability to this element of the crime."); United States v. Montejo, 353 F. Supp.2d 643 (E.D. Va 2005) (holding that a defendant need not have knowledge that identification actually belonged to another person to be convicted under the Aggravated Identity Theft Penalty Enhancement Act) (The Court found against the defendant even though it recognized that the defendant "correctly points out that the conduct that Congress appeared most concerned with when it enacted [the statute] was that of individuals who steal the identities of others for pecuniary gain . . . . However, Congress did not make pecuniary gain and victimization elements of the offense. So long as the language and structure of the statute do not countervail the clearly expressed intent of the legislature—to prevent identity theft and for other purposes—the statute cannot be said to be ambiguous."); United States v. Averi, 715 F. Supp. 1508, 1509 (M.D. Ala 1989) (holding that the government need not prove a defendant knew about record-keeping requirements as an element of a crime of "knowingly" failing to maintain records) (". . . Congress may have used the term "knowingly" in [the statute] to mean only that the defendant must have been aware that he was not maintaining reasonably informative records on his usage of controlled substances. . . . "[T]his statute falls into "the expanding regulatory area involving activities affecting public health, safety and welfare" in which the traditional rule of guilty purpose or intent has been relaxed.") (quoting United States v. Freed, 401 U.S. 601, 607 (1971)).

33 *See* Josh Siegel, *How Michigan and Ohio Made It Harder to Accidentally Break the Law*, Daily Signal (Jan. 27, 2016), http://dailysign.al/21L3b0L [perma.cc/8F4W-L6J7]; John S. Baker, Jr., *Mens Rea and State Crimes*, Federalist Society White Paper (2012), http://bit.ly/1QwwzRq [perma.cc/5QFF-4AHB] (noting states that have default mens rea provisions, including Alaska, Arkansas, Delaware, Hawaii, Illinois, Kansas, Missouri, North Dakota, Oregon, Pennsylvania, Tennessee, Texas, and Utah).

34 *See* New State Ice Co. v. Liebmann, 285 U.S. 262 (1932).

those deserving a lesser form of sanction. Absent extraordinary circumstances, it should not be enough for the government to prove that the accused possessed "an evil-doing hand"; the government should also have to prove that the accused had an "evil-meaning mind."[35]

Second, Congress should begin the arduous task of reviewing existing criminal statutes and regulations to see whether they contain adequate and appropriate mens rea standards, and it should pass a default mens rea provision that would apply to crimes in which no mens rea has been provided. In other words, if an element of a criminal statute or regulation is missing a mens rea requirement, a default mens rea standard—preferably a robust one—should automatically be inserted with respect to that element.[36] It is important to remember that such a provision would come into play only if Congress passes a criminal statute that does not contain any mens rea requirement. Congress can always obviate the need to resort to this provision by including its own preferred mens rea element with respect to the statute in question.

Third, on those (hopefully rare) occasions when Congress wishes to pass a criminal law with no mens rea requirement whatsoever—a strict liability offense—it should make its intentions clear by stating in the statute itself that Members have made a conscious decision to dispense with a mens rea requirement for the particular conduct in question. Such an extraordinary act—which can result in branding someone a criminal for engaging in conduct without any intent to violate the law or cause harm—should not be the result of sloppy legislative drafting or guesswork by a court trying to divine whether the omission of a mens rea requirement in a statute was intentional or not. This should not be an onerous requirement. Congress could, for example, choose to make its intent clear by adding a provision to a criminal statute such as: "This section shall not be construed to require the Government to prove a state of mind with respect to any element of the offense defined in this section."

IV. Beneficiaries of Mens Rea Reform

Like Congress, regulators have succumbed to the temptation to criminalize any behavior that may lead to a bad outcome.[37] Such individuals and agencies, acting out of an understandable desire to protect the public, believe it is appropriate—indeed, advantageous—to promulgate criminal statutes and regulations with weak mens rea standards or none at all (so-called strict liability offenses) in order to prosecute those who engage in harmful conduct, whether they mean to or not. They point out that, while a number of commentators have criticized strict liability criminal provisions,[38] the Supreme Court of the United States has upheld the constitutionality of such criminal provisions on several occasions.[39] They believe, or at least fear, that insisting

35 *See Morissette*, 342 U.S. at 251–52 ("Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil.").

36 Of course, such a requirement could be dispensed with if the element involved was purely jurisdictional or related to establishing the proper venue. For more on the erosion of mens rea requirements and the establishment of a default mens rea requirement, see Brian W. Walsh and Tiffany Joslyn, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law*, Heritage Foundation Special Report No. 77 (May 5, 2010), *available at* http://www.heritage.org/research/reports/2010/05/without-intent; Rosenzweig, *supra* note 5.

37 *See* Lawrence M. Friedman, *Crime and Punishment in American History*, Heritage Foundation Legal Memorandum 282–83 (1993) ("There have always been regulatory crimes, from the colonial period onward . . . . But the vast expansion of the regulatory state in the twentieth century meant a vast expansion of regulatory crimes as well. Each statute on health and safety, on conservation, on finance, on environmental protection, carried with it some form of criminal sanction for violation . . . . Wholesale extinction may be going on in the animal kingdom, but it does not seem to be much of a problem among regulatory laws. These now exist in staggering numbers, at all levels. They are as grains of sand on the beach.") Indeed, the mere existence of criminal regulations dramatically alters the relationship between the regulatory agency and the regulated power. All an agency has to do is suggest that a regulated person or entity *might* face criminal prosecution and penalties for failure to follow an agency directive, and the regulated person or entity will likely fall quickly into line without questioning the agency's authority. For an excellent article discussing the pressures that companies face when confronted with the possibility of, and the lengths to which they will go to avoid, criminal prosecution, see Richard A. Epstein, *The Dangerous Incentive Structures of Nonprosecution and Deferred Prosecution Agreements*, Heritage Foundation Legal Memorandum No. 129 (June 26, 2014), *available at* http://www.heritage.org/research/reports/2014/06/the-dangerous-incentive-structures-of-nonprosecution-and-deferred-prosecution-agreements. *See also* James R. Copeland, *The Shadow Regulatory State: The Rise of Deferred Prosecution Agreements*, Manhattan Inst. for Policy Research (May 2012), *available at* http://www.manhattan-institute.org/html/cjr_14.htm.

38 *See, e.g.*, Lon L. Fuller, The Morality of Law 77 (rev. ed. 1969) ("Strict criminal liability has never achieved respectability in our law."); H.L.A. Hart, *Negligence, Mens Rea, and Criminal Responsibility*, *in* H.L.A. Hart, Punishment and Responsibility: Essays in the Philosophy of Law 136, 152 (1968) ("strict liability is odious"); Francis B. Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55, 72 (1933) ("To subject defendants entirely free from moral blameworthiness to the possibility of prison sentences is revolting to the community sense of justice; and no law which violates this fundamental instinct can long endure."); A. P. Simester, *Is Strict Liability Always Wrong?*, *in* Appraising Strict Liability 21 (A. P. Simester ed., 2003) (Strict liability is wrong because it "leads to conviction of persons who are, morally speaking, innocent."); Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 Harv. L. Rev. 1097, 1109 (1952) ("The most that can be said for such provisions [prescribing liability without regard to any mental factor] is that where the penalty is light, where knowledge normally obtains and where a major burden of litigation is envisioned, there may be some practical basis for a stark limitation of the issues; and large injustice can seldom be done. If these considerations are persuasive, it seems clear, however, that they ought not to persuade where any major sanction is involved."); Richard G. Singer, *The Resurgence of Mens Rea: The Rise and Fall of Strict Criminal Liability*, 30 B.C. L. Rev. 337, 403–04 (1989); Rollin M. Perkins, *Criminal Liability Without Fault: A Disquieting Trend*, 68 Iowa L. Rev. 1067, 1067–70 (1983).

39 *See, e.g.*, *Shevlin-Carpenter,* 218 U.S. 57 (holding that a corporation can be convicted for trespass without proof of criminal intent); *Balint,* 258 U.S. 250 (holding that a real person can be convicted of the sale of narcotics without a tax stamp without proof that he knew that the substance was a narcotic); *Behrman*, 258 U.S. 280 (*Balint* companion case) (holding that a physician can be convicted of distributing a controlled substance not "in the course of his professional practice" without proof that he knew this his actions exceeded that limit); *Dotterweich,* 320 U.S. 277 (holding that the president and general manager of a company could be convicted of distributing adulterated or misbranded drugs in interstate commerce without proof that he even was aware of the transaction); *Park*, 421 U.S. 658 (upholding conviction of a company president for unsanitary

upon robust mens rea standards in our criminal laws will give a pass to those who engage in conduct that harms our environment or society—most likely, in their view, wealthy executives working for large, multinational corporations. Mens rea reform, according to many of these critics, is not about protecting the "little guy."

These critics are wrong. After all, many executives at large corporations work in heavily regulated industries. They can hire lawyers on retainer to keep abreast of complex regulations as they change over time to adapt to evolving conditions. Their corporations are normally given explicit warnings by government officials, usually as a condition of licensure, about what the law requires and the potential criminal penalties for violating it. Therefore, they cannot reasonably or credibly claim that they were not aware that their actions might subject them to criminal liability, and would therefore be unlikely to benefit from more protective mens rea standards. In contrast, individuals and small businesses are far less likely to be able to afford expert lawyers to advise them; as my Heritage Foundation colleague Paul Larkin has asserted:

> Corporate directors, chief executive officers (CEOs), presidents, and other high-level officers are not involved in the day-to-day operation of plants, warehouses, shipping facilities, and the like. Lower level officers and employees, as well as small business owners, bear that burden. What is more, the latter individuals are in far greater need of the benefits from [mens rea reform[40]] precisely because they must make decisions on their own without resorting to the expensive advice of counsel. The CEO for DuPont has a white-shoe law firm on speed dial; the owner of a neighborhood dry cleaner does not. Senior officials may or may not need the aid of the remedies proposed here; lower-level officers and employees certainly do.[41]

Consider two examples. Wade Martin, a native Alaskan fisherman, sold 10 sea otters to a buyer he thought was a Native Alaskan. The authorities informed him that was not the case and that his actions violated the Marine Mammal Protection Act of 1972,[42] which criminalizes the sale of certain species, including sea otters, to non-native Alaskans. Because prosecutors would not have to prove that he knew the buyer was not from Alaska, Martin pleaded guilty to a felony charge and was sentenced to two years' probation and ordered to pay a $1,000 fine.[43]

Lawrence Lewis was chief engineer at Knollwood, a military retirement home in Washington, DC.[44] Some of the elderly patients at Knollwood would stuff their adult diapers in the toilets, causing a blockage and sewage overflow. To prevent harm to the patients, Lewis and his staff would divert the backed-up sewage into a storm drain that they believed was connected to the city's sewage-treatment system, as they were trained to do. It turned out, however, that the storm drain emptied into a remote part of Rock Creek, which ultimately connects with the Potomac River. Although Lewis was unaware of any of this, federal authorities charged him with felony violations of the Clean Water Act, which required only proof that Lewis committed the physical acts that constitute the violation, regardless of any knowledge of the law or intent to violate it. To avoid a felony conviction and potential long-term jail sentence, Lewis was persuaded to plead guilty to a misdemeanor and was sentenced to one year of probation.[45]

Wade Martin and Lawrence Lewis were not corporate executives, the alleged beneficiaries of mens rea reform, yet the absence of mens rea standards in the laws under which they were prosecuted means that both carry the stigma of a criminal conviction and all of its attendant collateral consequences. If corporate bosses are advised as to what the law is and they intentionally violate it, they should be prosecuted. Mens rea reform is about protecting people who unwittingly commit acts that turn out to be crimes and are prosecuted for those offenses.

When society turns to the criminal law to address harms that are better left to the civil justice system, not only are lives adversely and perhaps irreparably affected, but the public's respect for the fairness and integrity of our criminal justice system is diminished. That diminished respect and trust should concern everyone. As Columbia Law Professor Francis Sayre said in a classic law review article in 1933, "to subject defendants entirely free from moral blameworthiness to the possibility of prison sentences is revolting to the community sense of justice; and no law which violates this fundamental instinct can long endure."[46]

There is a significant difference between regulations that carry civil or administrative penalties for violations and those that carry criminal penalties. People caught up in the latter may find

conditions at a corporate warehouse over which he had managerial control but not hands-on control).

40 In his article, Larkin discusses "remedies" for the problem of overcriminalization; however, the same argument applies with respect to mens rea reform, which Larkin and former U.S. Attorney General Michael Mukasey have endorsed elsewhere. *See* Michael B. Mukasey & Paul J. Larkin, Jr., *The Perils of Overcriminalization*, Heritage Foundation Legal Memorandum No. 146 (Feb. 12, 2015), *available at* http://www.heritage.org/research/reports/2015/02/the-perils-of-overcriminalization.

41 Paul J. Larkin, Jr, *Public Choice Theory and Overcriminalization*, 36 Harv. J. L. & Pub. Pol'y 715, 792 (2013) (footnotes omitted).

42 16 U.S.C. §§ 1371–1423.

43 *See* Gary Fields & John R. Emshwiller, *As Federal Crime List Grows, Threshold of Guilt Declines*, Wall St. J., Sept. 27, 2011, *available at* http://online.wsj.com/articles/SB10001424053111904060604576570801651620000.

44 To hear Lawrence Lewis describe what happened to him in his own words, see https://www.youtube.com/watch?v=CqEtlp0x50s.

45 See Gary Fields & John R. Emshwiller, *A Sewage Blunder Earns Engineer a Criminal Record*, Wall St. J., Dec. 12, 2011, http://online.wsj.com/articles/SB10001424052970204903804577082770135339442; *Regulatory Crime: Identifying the Scope of the Problem*, Hearing Before the Over-Criminalization Task Force of the H.Comm. on the Judiciary, 113th Cong. (2013) (testimony of Lawrence Lewis), *available at* http://judiciary.house.gov/_files/hearings/113th/10302013/Lawrence%20Lewis%20Testimony.pdf. For a videotaped interview with Lawrence Lewis, see http://dailysignal.com/2013/07/05/diverted-from-the-straight-and-narrow-path-for-diverting-sewage/.

46 Sayre, *supra* note 38 at 72.

themselves deprived of their liberty and stripped of their rights to vote, sit on a jury, and possess a firearm, among other penalties that simply do not apply when someone violates a regulation that carries only civil or administrative penalties. There is also a unique stigma that is associated with being branded a criminal. A person stands to lose not only his liberty and certain civil rights, but also his reputation—an intangible yet invaluable commodity, precious to entities and people alike, that once damaged can be nearly impossible to repair. In addition to standard penalties that are imposed on those who are convicted of crimes, a series of burdensome collateral consequences often imposed by state or federal laws can follow a person for life.[47] These affect not only the guilty party, but his or her dependents as well. For businesses, just being charged with violating a regulatory crime can sometimes result in the "death sentence" of debarment from participation in federal programs.[48] In the current system, all of these consequences can descend on individuals who did not even know they were breaking the law. With so much on the line, absent extraordinary circumstances, a criminal conviction should be reserved only for those who commit morally blameworthy acts with some awareness that they were doing something that was wrong when they acted.

V. Conclusion

The differences between criminal laws and regulations are many, the most important of which is that they largely serve different purposes.[49] Criminal laws are meant to enforce a commonly accepted moral code that is set forth in language the average person can readily understand[50] and that clearly identifies the prohibited conduct, backed by the full force and authority of the government to punish those who engage in such conduct. Regulations, on the other hand, are meant to establish rules of the road to curb excesses and address consequences in a complex, rapidly evolving, highly industrialized society. This is why laws authorizing regulatory actions are often drafted using broad, aspirational language: They are designed to provide agencies with the flexibility they need to address health hazards and other societal concerns, respond to new problems, and adapt to changing circumstances, including scientific and technological advances.

Rather than continue the current system's acceptance of criminal penalties for unwitting violations of little-known regulations, we should reserve the severity of a criminal penalty for those who act with mens rea, a guilty mind. Some people or entities *intentionally* pollute our air and water, or deliberately engage in other conduct *knowing* that there is a substantial risk it will cause harm; in those cases, criminal prosecution is entirely appropriate. However, it is inevitable that bad outcomes will occur from time to time, by sheer accident or by negligent acts. In these cases, the intent of the actor should make a difference in whether he is criminally prosecuted or is dealt with through the civil or administrative justice systems. Restoring moral blameworthiness to greater prominence in our criminal laws through mens rea reform will revitalize our criminal justice system and preserve its moral authority, which, in turn, will engender respect for the rule of law.

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47 An inventory of collateral consequences is maintained by the American Bar Association. *See* American Bar Association, National Inventory of the Collateral Consequences of Conviction, *available at* http://www.abacollateralconsequences.org/. In short, individuals convicted of crimes face consequences extending beyond the end of their actual sentences, potentially lasting their entire lives. Examples include being barred from entering a variety of licensed professional fields and receiving federal student aid. The Internet has spawned numerous websites designed specifically to catalog, permanently retain, and publicize individuals' criminal histories—all but guaranteeing perpetual branding as a criminal. These websites can demand payment from individuals in exchange for removing their mug shots and related personal information. For additional discussion about the detrimental nature of collateral consequences, see *Collateral Damage: America's Failure to Forgive or Forget in the War on Crime*, Nat'l Ass'n of Crim. Defense Lawyers (May 2014), *available at* http://thf_media.s3.amazonaws.com/2014/pdf/Collateral%20Damage%20FINAL%20Report.pdf.

48 *See, e.g.*, Peggy Little, *The Debarment Power—No Do Business With No Due Process*, Executive Branch Review (Apr. 25, 2013), http://executivebranchproject.com/the-debarment-power-no-do-business-with-no-due-process/#sthash.ord4YN0x.dpuf; Steven Gordon & Richard Duvall, *It's Time To Rethink the Suspension and Debarment Process*, Mondaq (July 3, 2013), http://www.mondaq.com/unitedstates/x/248174/Government+Contracts+Procurement+PPP/Its+Time+To+Rethink+The+Suspension+And+Debarment+Process.

49 *See* Larkin, *supra* note 6.

50 *See, e.g.*, United States v. Harriss, 347 U.S. 612, 617 (1954) (government cannot enforce a criminal law that cannot be understood by a person of "ordinary intelligence"); Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926) (referring to persons of "common intelligence").

Federalism & Separation of Powers

Forgotten Cases: *Worthen v. Thomas* and the Contract Clause

By David F. Forte

Note from the Editor:

This article discusses the history of interpretation of the Contract Clause and suggests that contemporary commentators have misunderstood that history by emphasizing the *Blaisdell* case at the expense of the more significant *Worthen* decision.

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• Kathleen M. Sullivan & Noah Feldman, Constitutional Law, 19th ed. 639 (2016).

• Geoffrey Stone et al., Constitutional Law, 7th ed. 980 (2013).

• Erwin Chemerinsky, Constitutional Law, 4th ed. 647 (2013).

• James W. Ely, Jr., The Contract Clause: A Constitutional History 224 (2016).

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There is a standard narrative about the demise of the Contract Clause. In January 1934, the Supreme Court decided *Home Building Ass'n v. Blaisdell.* Constitutional law scholars and textbooks tell us that the coalition of justices that formed the majority in *Blaisdell* would soon remove the Court from monitoring the economic policies of the state and federal governments.[1] We are told that *Blaisdell* took away the limitation to state economic legislation that the Impairment of Contracts Clause had previously imposed.[2] But it was a harbinger of much more, the narrative continues. Soon other constitutional dominos would fall. Two months later, the same five-Justice majority of Hughes, Roberts, Stone, Brandeis, and Cardozo killed the substantive due process right of contract in *Nebbia v. New York*,[3] and they buried it three terms later in *West Coast Hotel v. Parrish*.[4] Finally, the same line-up laid to rest restrictions on Congress' power under the Commerce Clause in *NLRB v. Jones & Laughlin*,[5] completing the defeat of any constitutional restrictions on economic legislation.

But the story told by the textbooks is not true. Chief Justice Hughes and his majority did not kill or even mortally wound the Contract Clause in *Blaisdell* in 1934. Five months later, the Court reaffirmed the vitality of the Contract Clause in *Worthen v. Thomas*, and it did so unanimously.[6]

I. Before *Worthen*

By 1934, the Impairment of Contracts Clause had had a long and not altogether coherent interpretive history. Under

1 Home Bldg. Ass'n v. Blaisdell, 290 U.S. 398 (1934).

2 U.S. Const. art. 1 § 10. ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts."). For example, in Kathleen M. Sullivan & Noah Feldman, Constitutional Law, 19th ed. (2016) there is a large excerpt of Hughes' opinion, a small snippet of Sutherland's dissent, and an implication that *Blaisdell* cleared the decks of nearly all Contract Clause claims, with *Worthen* mentioned as only an exception. *Id.* at 639. In Geoffrey Stone et al., Constitutional Law, 7th ed. (2013), following a large except from *Blaisdell*, the authors write, "After *Blaisdell*, what does the contract clause prohibit? The answer appears to be very little." *Id.* at 980. In this volume containing a plethora of cases, *Worthen* is missing. In Erwin Chemerinsky, Constitutional Law, 4th ed. (2013), *Blaisdell* is excerpted following a note that "the Contract Clause was made superfluous by the Court's protection of freedom of contract under the Due Process Clause of the Fifth and Fourteenth Amendments." *Id.* at 647. *Worthen* is missing.

3 291 U.S. 502 (1934).

4 300 U.S. 379 (1937).

5 NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

6 W. B. Worthen Co. v. Thomas, 292 U.S. 426 (1934). *Blaisdell* was argued on November 8-9, 1933 and decided on January 8, 1934. *Worthen* was decided on May 28, 1934. In his compendious work on the Contract Clause, James W. Ely, Jr. notes some of the limiting language in *Blaisdell* and states that "the *Blaisdell* opinion did not sound the immediate death knell for the contract clause," mentioning *Worthen v. Thomas*. James w. Ely, Jr., The Contract Clause: A Constitutional History 224 (2016). But he still credits *Blaisdell* as the source of the effective end

Supreme Court precedents, the Clause applied to both public contracts (in which the state was a party) and private contracts (*Fletcher v. Peck*).[7] It also applied to state charters of corporations (*Dartmouth College v. Woodward*),[8] though state obligations under such charters were to be strictly construed (*Charles River Bridge v. Warren Bridge*).[9] The Clause was primarily retrospective, but contracts were to be subject to existing state laws when made (*Ogden v. Saunders*).[10] The Clause did not limit the state's inherent power of eminent domain (*West River Bridge v. Dix*),[11] nor did it prevent a state from adjusting its regime of legal remedies, so long as the newly imposed remedy did not materially impair a party's substantive rights under a contract (*Sturges v. Crowninshield*).[12] However, a state could use its police power to make illegal as *contra bona mores* previously concluded contracts (*Stone v. Mississippi*),[13] and the state could not alienate its reserved police powers to prevent it from legislating for the public welfare (*e.g. Chicago & A.R. Co. v. Tranbarger*),[14] including economic welfare (*Noble State Bank v. Haskell*).[15] Within each of the aforementioned doctrines, there were exceptions if not contradictions in the Court's precedents.

Then came *Home Building Ass'n v. Blaisdell*. In order to forestall a massive foreclosure crisis in the midst of the Great Depression, Minnesota passed the Minnesota Mortgage Moratorium Act in 1933. Under the Act, after a property had been foreclosed, the mortgagor could have his redemption period extended, during which he could cure the default. Moreover, during the extended redemption period, the mortgagor could remain in possession of the property, but had to pay to the mortgagee the fair market value in rent. The Act's available benefits were to lapse after two years. In 1934, the Minnesota Mortgage Moratorium Act came before the Supreme Court to be tested against the Impairment of Contracts Clause.

The two most important questions in in the *Blaisdell* case were 1) Could a state use its police power to restructure *economic* relationships in the private sphere even though that restructuring might affect contractual rights and duties under existing contracts? And 2) Did the state's adjustment of remedies for contractual breach materially alter the obligations and rights of the parties to the contract?

The question of whether the state's police power extended not only to health, safety, and morals, but also to "the general welfare," including economic betterment, had long been debated in the cases, but by 1934, the issue had been well settled in favor of its permissibility.[16] Nonetheless, when a state legislated on economic matters, the impact on contracts was often not merely incidental, as when the state abates a nuisance, but quite direct, thus involving the Contract Clause. That is why the appellant in *Blaisdell* spent much effort in arguing for the legitimacy of such economic legislation, and presumably why Chief Justice Hughes devoted a great deal of his opinion to justifying Minnesota's legislation as a legitimate exercise of the police power. Hughes concluded that the police power permitted the state to take drastic economic measures in a situation of dire emergency, and that the law's extension of the period of redemption was justified in order to stave off a catastrophic collapse of the mortgage market, the Contract Clause notwithstanding.

In dissent, Justice Sutherland (joined by Justices McReynolds, Van Devanter, and Butler) did not deny that economic regulation was within the state's police power, and he did not deny that there was an emergency. But, he stated unequivocally, "the difficulty is that the contract impairment clause forbids state action under any circumstances, if it have the effect of impairing the obligation of contracts."[17] In addition, Sutherland insisted, the original purpose of the Impairment of Contracts Clause was to forbid precisely the kinds of remedies that Minnesota imposed, for they invaded the core set of obligations of the contracting parties. To justify his position, Sutherland marshaled extensive historical evidence from the founding period.

To counter Sutherland's daunting arguments, Hughes took two tacks. The first was to deny the constitutional relevance of historical evidence altogether:

> It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If, by the statement that what the Constitution meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and

of Contract Clause protections. I think *Blaisdell* and *Worthen* created a workable compromise that was not upset until Justices Black and Frankfurter made more of *Blaisdell* than even Chief Justice Hughes would have wanted.

7 10 U.S. 87 (1810).

8 17 U.S. 518 (1819).

9 36 U.S. 420 (1837).

10 25 U.S. 213 (1827).

11 47 U.S. 507 (1848).

12 17 U.S. 122 (1819).

13 101 U.S. 814 (1880).

14 238 U.S. 67 (1915).

15 219 U.S. 104, *opinion amended*, 219 U.S. 575 (1911).

16 *E.g.*, Manigault v. Springs, 199 U.S. 473, 480-81 (1905) ("This power, which in its various ramifications is known as the police power, is an exercise of sovereign right of the Government to protect the lives, health, morals, comfort, and general welfare of the people, and is paramount to any rights under contracts between individuals . . . . Although [the Act] was not an exercise of that power in its ordinarily accepted sense of protecting the health, lives and morals of the community, it is defensible in its broader meaning of providing for the general welfare of the people . . . ."). Atlantic C.L.R. v. Goldsboro, 232 U.S. 548, 558 (1914) ("For it is settled that neither the "contract" clause nor the "due process" clause has the effect of overriding the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or of the State to establish all regulations that are necessary to secure the health, safety, good order, comfort or general welfare of the community; . . .").

17 *Blaisdell*, 290 U.S. at 473 (Sutherland, J., dissenting).

> outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning—"We must never forget that it is a *constitution* we are expounding" (*McCulloch v. Maryland*, 4 Wheat. 316, 17 U.S. 407)—"a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs."[18]

In rejecting the relevance of the Framers' interpretation of the clauses of the Constitution, Hughes' position would have destroyed the very relevance of the Constitution. If Hughes had really followed Marshall's opinion in *McCulloch v. Maryland* and had written instead that the Constitution need not be confined to the *applications* of the clauses that the Framers would have engaged in, considering their particular circumstances, it would have been more defensible.

Hughes' second tack was more weighty. He argued that the purpose of the Contract Clause was to protect the integrity of a bona fide contract from material disruption by the state. He emphasized that the law permitting a temporary delay in foreclosure actually preserved the underlying mortgage relationship between the parties:

> The statute does not impair the integrity of the mortgage indebtedness. The obligation for interest remains. The statute does not affect the validity of the sale or the right of a mortgagee-purchaser to title in fee, or his right to obtain a deficiency judgment if the mortgagor fails to redeem within the prescribed period. Aside from the extension of time, the other conditions of redemption are unaltered.[19]

Moreover, the purpose of the law was to stabilize the mortgage market so that thousands of other mortgages would not be put at risk:

> It cannot be maintained that the constitutional prohibition should be so construed as to prevent limited and temporary interpositions with respect to the enforcement of contracts if made necessary by a great public calamity such as fire, flood, or earthquake. The reservation of state power appropriate to such extraordinary conditions may be deemed to be as much a part of all contracts as is the reservation of state power to protect the public interest in the other situations to which we have referred. And if state power exists to give temporary relief from the enforcement of contracts in the presence of disasters due to physical causes such as fire, flood or earthquake, that power cannot be said to be nonexistent when the urgent public need demanding such relief is produced by other and economic causes.[20]

In his dissent, Justice Sutherland understood how Hughes had dangerously interpreted Marshall's notion of an adaptable Constitution. He homed in on Hughes' mistake:

> The provisions of the Federal Constitution, undoubtedly, are pliable in the sense that, in appropriate cases, they have the capacity of bringing within their grasp every new condition which falls within their meaning. But their *meaning* is changeless; it is only their *application* which is extensible.[21]

More to the point, it was precisely to prevent this kind of remedy in this kind of emergency that the Contract Clause had been framed. Minnesota's Act was precisely the type of legislation that the Clause had removed from state discretion. Clearly alarmed at the majority's view, Sutherland predicted that permitting Minnesota to make such a reform in these circumstances would be a wedge for further and more extensive incursions into the protections that the Constitution provided. Yet only a few months later, in *Worthen v. Thomas*, Hughes and Sutherland renewed their debate, but with a markedly different result.

II. Enter *Worthen*

In Little Rock, Arkansas, Mr. and Mrs. Ralph Thomas owned a harness company and rented their business premises from W.B. Worthen Company. Worthen brought suit when the Thomases failed to keep up with their rental payments, and it gained a judgment of $1,200. Ralph Thomas then passed away, and Worthen discovered that he had a life insurance policy worth $5,000 payable to his wife. Worthen then served a writ of garnishment on the insurance company. Subsequently, the Arkansas legislature passed a law that exempted from process of attachment any proceeds of a life or accident insurance policy. Because of the new law, the insurance company then moved to dismiss the writ of garnishment; Worthen answered, asserting that the Arkansas law contravened the Impairment of Contracts Clause of the U.S. Constitution.

The Supreme Court unanimously agreed with Worthen. Again, Hughes wrote the Court's opinion, joined by Roberts, Stone, Brandeis, and Cardozo. He took pains to show why *Blaisdell* constituted a narrow exception to the sweep of the Contract Clause's prohibition. No longer did he claim that the interpretation of the meaning of the Constitution had to change with circumstances. Rather, he fashioned a test (analogous to what later courts would denominate a strict scrutiny test) to apply whenever a state sought to justify an action that would normally constitute an impairment of an existing contract:

> We held that, when the exercise of the reserved power of the state, in order to meet public need because of a pressing public disaster, relates to the enforcement of existing contracts, that action must be limited by reasonable conditions appropriate to the emergency . . . . Accordingly, in the case of *Blaisdell*, we sustained the Minnesota

18 *Id.* at 443.

19 *Id.* at 425.

20 *Id.* at 439-40 (citations omitted).

21 *Id.* at 451 (Sutherland, J., dissenting).

mortgage moratorium law in the light of the temporary and conditional relief which the legislation granted.[22]

In *Worthen*, Mrs. Thomas had argued that the state had merely adjusted certain remedies with only an incidental impact on existing contracts, but the Court found that argument "unavailing," for there were—as later Courts might put it—no narrowly drawn limitations to meet a compelling need:

> There is no limitation of amount, however large. Nor is there any limitation as to beneficiaries, if they are residents of the State. There is no restriction with respect to particular circumstances or relations . . . . The profits of a business, if invested in life insurance, may thus be withdrawn from the pursuit of creditors to whatever extent desired.[23]

This time, Hughes quoted John Marshall—a strong defender of the broad sweep of the Impairment of Contracts Clause—more appropriately from his opinion in *Sturges v. Crowninshield*: "Future acquisitions are, therefore, liable for contracts; and to release them from this liability impairs their obligation."[24]

Justice Sutherland and his three allies concurred "unreservedly" in the judgment.[25] But they insisted that they found no difference in the situation of *Blaisdell* compared to *Worthen*. There must be no "emergency" (or "strict scrutiny") exception to the clause:

> We were unable then, as we are now, to concur in the view that an emergency can ever justify, or, what is really the same thing, can ever furnish an occasion for justifying, a nullification of the constitutional restriction upon state power in respect of the impairment of contractual obligations. . . . We reject as unsound and dangerous doctrine, threatening the stability of the deliberately framed and wise provisions of the Constitution, the notion that violations of those provisions may be measured by the length of time they are to continue or the extent of the infraction, and that only those of long duration or of large importance are to be held bad. Such was not the intention of those who framed and adopted that instrument.[26]

III. The *Worthen* Rule Prevails

Well then, was *Worthen* just a temporary hiccup on the way to granting states an unfettered right to exercise their police power to affect the terms of pre-existing contracts? Or was *Blaisdell* the blip? In subsequent Contract Clause cases in the 1930s, when *Blaisdell* or *Worthen* was mentioned, there is no doubt that whatever tension there was between them was resolved in favor of the latter. For example, a week after *Worthen* was decided, Justice Brandeis noted in his opinion in *Lynch v. United States*, "[c]ontracts between individuals or corporations are impaired within the meaning of the Constitution whenever the right to enforce them by legal process is taken away or materially lessened," citing *Worthen* and "cases cited by Mr. Justice Sutherland in *Home Building & Loan Assn. v. Blaisdell*."[27] It is striking that Brandeis, who had sided with Chief Justice Hughes in *Blaisdell*, here cited *Worthen* and the strong defense of the Impairment of Contracts Clause in Justice Sutherland's dissent in *Blaisdell*.

The dominance of *Worthen* is not hard to understand. First, *Worthen* was unanimously decided. Second, Chief Justice Hughes took pains to limit the impact of *Blaisdell*'s rule to truly emergency situations where a state used very narrow and temporary means that upheld the fundamental contractual relationship between the parties. In fact, from *Worthen v. Thomas* onward, there was an uptick in Contract Clause cases before the Court under Chief Justice Hughes. From the time when Hughes became Chief Justice in 1930 until *Blaisdell* was decided in 1934, the Court heard eight Contract Clause cases. But from 1934's *Worthen v. Thomas* through 1937, twenty Contract Clause cases came before the Court, and the Court struck down the state law at issue in five of them.[28] In sum, *Blaisdell* did not signal the Court's retreat from considering Contract Clause cases or its reluctance to decide against the state.

W.B. Worthen Company returned to the Supreme Court in 1935, and it won, again unanimously, in *W.B. Worthen v. Kavanaugh*.[29] Under Arkansas law, municipalities were permitted to issue bonds to pay for improvements to city property. The security given to the bondholders in case of municipal default was to allow them to foreclose on properties of homeowners who had failed to pay their assessment for the improvement in question. In the midst of the Depression, presumably with municipalities defaulting, Arkansas passed debtor relief measures, extending the foreclosure period from 65 days to at least two and a half years, and reducing the penalty on the delinquent home owner from 20% to 3%. For the unanimous Court, Justice Cardozo found that, considering all the statutorily permitted delays, "A minimum of six and a half years is thus the total period during which the holder of the mortgage is without an effective remedy."[30] Arkansas' claim that it was meeting an emergency was unconvincing. Cardozo concluded, "Not Blaisdell's case, but Worthen's supplies the applicable rule."[31]

The same year, Chief Justice Hughes himself further narrowed the emergency exception of *Blaisdell* in *A.L.A. Schechter Poultry Corp. v. United States*.[32] In deciding that the National Recovery Act exceeded the powers of Congress, and citing *Blaisdell*, Hughes declared in words that could have been written by Sutherland:

> We are told that the provision of the statute authorizing the adoption of codes must be viewed in the light

22 *Worthen*, 292 U.S. at 433-34.

23 *Id.* at 431.

24 17 U.S. at 198.

25 *Worthen*, 292 U.S. at 434.

26 *Id.* at 434-35.

27 Lynch v. United States, 292 U.S. 571, 580 n.8 (1934).

28 Benjamin Fletcher Wright, Jr., The Contract Clause of the Constitution 99 (1937).

29 295 U.S. 56 (1935).

30 *Id.* at 61.

31 *Id.* at 63.

32 295 U.S. 495 (1935).

> of the grave national crisis with which Congress was confronted. Undoubtedly, the conditions to which power is addressed are always to be considered when the exercise of power is challenged. Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power.[33]

Also in 1935, the refinement and limitation of *Blaisdell* continued in an opinion by Justice Brandeis in which he noted:

> Statutes for the relief of mortgagors, when applied to preexisting mortgages, have given rise, from time to time, to serious constitutional questions. The statutes were sustained by this Court when, as in *Home Building & Loan Assn. v. Blaisdell,* they were found to preserve substantially the right of the mortgagee to obtain, through application of the security, payment of the indebtedness. They were stricken down, as in *W.B. Worthen Co. v. Kavanaugh,* when it appeared that this substantive right was substantially abridged. Compare *W.B. Worthen Co. v. Thomas.*[34]

The following year, 1936, the Court—again unanimously—struck down a state law under the Impairment of Contracts Clause in *Treigle v. Acme Homestead Ass'n*.[35] Louisiana had enacted a law that removed a shareholder's right to recoup his investment and share of the profits when he withdrew from a building and loan association. Although the Acme Homestead Association asserted that the law was framed to deal with an existing emergency, Justice Roberts, writing for the Court, simply dismissed the argument: "It does not purport to deal with any existing emergency and the provisions respecting the rights of withdrawing members are neither temporary nor conditional. Compare *W.B. Worthen Co. v. Thomas*."[36]

Thus, in three Contract Clause cases that came before the Supreme Court soon after *Blaisdell*, the Court unanimously struck down the state statues at issue in each case for unconstitutionally impairing contracts. Moreover, three justices who had been in the *Blaisdell* majority took pains to restrict and limit the impact of that decision when they wrote the subsequent opinions. By 1937, *Worthen* and a now limited *Blaisdell* had solidified into a workable rule: a state law that materially impairs an obligation of one of the parties to a pre-existing contract violates the Contract Clause, unless there is such an emergency that a narrow and limited exception can be permitted, but only if that exception preserves the underlying benefits of the contract to the parties.

The Court had reached an extraordinary and virtually unanimous consensus. Of the twenty cases that the Court decided after *Blaisdell* through 1937 in which the Contract Clause was at issue, there was a dissent in only one of them.[37]

It is noteworthy that, in a number of cases in which the Court upheld state legislation that significantly altered the remedial rights of one of the parties to a contract, the Court emphasized that the new remedy preserved the underlying value of the contract so that one party would not gain a windfall benefit not contemplated in the original contract. This ensured that the *Blaisdell* exception to the general rule of the Contract Clause, as set forth in *Worthen*, would remain limited. Thus, in *Richmond Mortgage & Loan Corp. v. Wachovia Bank and Trust Co.*, Justice Roberts began by stating the standard:

> The applicable principle is not in dispute. The legislature may modify, limit or alter the remedy for enforcement of a contract without impairing its obligation, but in so doing, it may not deny all remedy or so circumscribe the existing remedy with conditions and restrictions as seriously to impair the value of the right. The particular remedy existing at the date of the contract may be altogether abrogated if another equally effective for the enforcement of the obligation remains or is substituted for the one taken away.[38]

But, he continued, in this case:

> The act alters and modifies one of the existing remedies for realization of the value of the security, but cannot fairly be said to do more than restrict the mortgagee to that for which he contracted, namely, payment in full. It recognizes the obligation of his contract and his right to its full enforcement but limits that right so as to prevent his obtaining more than his due.[39]

Chief Justice Hughes applied the same rationale two years later in *Honeyman v. Jacobs*,[40] and Justice Douglas declared another

33 *Id.* at 528.

34 Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 580 (1935) (striking down a newly enacted provision of federal bankruptcy law that had relieved adjudged debtors of their obligations under existing mortgage contracts. Brandeis applied Contract Clause jurisprudence to the Due Process Clause of the Fifth Amendment).

35 297 U.S. 189 (1936).

36 *Id.* at 195.

37 Puget Sound Power & Light Co. v. Seattle, 291 U.S. 619 (1934); Seattle Gas Co. v. Seattle, 291 U.S. 638 (1934); *Worthen*, 292 U.S. 426; United States Mortg. Co. v. Matthews, 293 U.S. 232 (1934); *Kavanaugh* 295 U.S. 56; *Treigle*, 297 U.S. 189; Violet Trapping Co. v. Grace, 297 U.S. 119 (1936); Ingraham v. Hansen, 297 U.S. 378 (1936); Wright v. Central Kentucky Natural Gas Co., 297 U.S. 537 (1936); International Steel & Iron Co. v. National Surety Co., 297 U.S. 657 (1936); Schenebeck v. McCrary, 298 U.S. 36 (1936); Barwise v. Sheppard, 299 U.S. 33 (1936); Midland Realty Co. v. Kansas City Power & Light Co., 300 U.S. 109 (1937); Richmond Mortg. & Loan Corp. v. Wachovia Bank & Trust Co., 300 U.S. 124 (1937); Stockholders of Peoples Banking Co. v. Sterling, 300 U.S. 175 (1937); Henderson Co. v. Thompson, 300 U.S. 258 (1937); Phelps v. Board of Education, 300 U.S. 319 (1937); Wright v. Vinton Branch of Mountain Trust Bank, 300 U.S. 440 (1937); Dodge v. Board of Education, 302 U.S. 74 (1937); Hale v. State Board of Assessment & Review, 302 U.S. 95 (1937) (Sutherland, J., dissenting, joined by McReynolds and Butler, JJ.).

38 300 U.S. at 128-29 (1937).

39 *Id.* at 130.

40 306 U.S. 539 (1939).

two years later in a similar case, "Mortgagees are constitutionally entitled to no more than payment in full."[41]

IV. Transition

Contrary to the traditional tale, the *Blaisdell-Worthen* rule survived the judicial revolution of 1937-38, though there were signs of changes to come. In 1938, Justice Van Devanter resigned and was replaced by Hugo Black. Justice Sutherland was no longer on the Court, and Justice Cardozo was too ill to participate in most of the Court's business. Nonetheless, the Court did invalidate an Indiana law under the Impairment of Contract Clause, but on grounds that could make future invocations of the Clause's protection more problematical.

The Indiana Teachers' Tenure Act of 1927, which was incorporated into teachers' contracts with school districts, gave tenure to teachers who had served for five years; subsequent termination was allowed only for just cause. But the 1927 Act was repealed in 1933 for certain classes of jurisdictions (townships as opposed to cities). Subsequently, a tenured teacher in a township had her contract terminated. She challenged the termination and ultimately had her case decided by the Supreme Court in 1938. In *Indiana ex rel. Anderson v. Brand*, the Court held that the repeal of the Tenure Act of 1927 violated the Impairment of Contracts Clause.[42] But in articulating the rule, Justice Roberts took the bite out of any future invocations of the Contract Clause:

> Our decisions recognize that every contract is made subject to the implied condition that its fulfillment may be frustrated by a proper exercise of the police power but we have repeatedly said that, in order to have this effect, the exercise of the power must be for an end which is in fact public and the means adopted must be reasonably adapted to that end, and the Supreme Court of Indiana has taken the same view in respect of legislation impairing the obligation of the contract of a state instrumentality [citing *Home Bdg. & Loan Ass'n v. Blaisdell*; *Worthen Co. v. Thomas*, *Worthen Co. v. Kavanaugh*; and *Treigle v. Acme Homestead Ass'n*].[43]

The ground in this case, however, for invalidating the law was that "the repeal of the earlier Act by the latter was not an exercise of the police power for the attainment of ends to which its exercise may properly be directed."[44] In effect, the decision was based on a hidden Equal Protection grounding, for Roberts, writing for the majority, thought the law's distinguishing between townships and cities was irrational. In his dissent, Justice Black began a campaign to disable the Contract Clause, asserting that the teacher held her position not under contract but under a statute regulating economic policy over which the state has plenary discretion subject only to the checks of the state's political process.[45]

Justice Roberts had one last hurrah for the Contract Clause in *Wood v. Lovett* in 1941.[46] In 1935, Arkansas had passed a statute that guaranteed distressed sale purchasers of land clear title despite irregularities in proceedings prior to the sale. In those disrupted economic times, Arkansas wanted such purchasers to enjoy clear title. But in 1937, Arkansas repealed the 1935 law, placing earlier land purchasers at risk of having their titles contested. By a 5-3 vote, the Court voided the repeal statute. Justice Black again dissented, this time joined by Justices Douglas and Murphy. Black emphasized the sovereign capacity of the state to alter its land and taxation statutes. Citing *Blaisdell* no less than nineteen times, Black made it the centerpiece of his theory of the Contract Clause: "The *Blaisdell* decision represented a realistic appreciation of the fact that ours is an evolving society and that the general words of the contract clause were not intended to reduce the legislative branch of government to helpless impotency."[47] Neither the majority nor Justice Black mentioned *Worthen v. Thomas*.

Justice Black's position soon became the norm as the Court accorded more and more deference to states' judgment in exercising their police power over economic affairs. Already in 1940, the Court had upheld, against a Contract Clause challenge, New Jersey statutes that revised the rights of shareholders of building and loan associations.[48] For the Court, Justice Reed had declared:

> In *Home Building & Loan Association v. Blaisdell* this Court considered the authority retained by the State over contracts "to safeguard the vital interests of its people." The rule that all contracts are made subject to this paramount authority was there reiterated. Such authority is not limited to health, morals and safety. It extends to economic needs as well. Utility rate contracts give way to this power, as do contractual arrangements between landlords and tenants.[49]

Reed gave no emergency or strict scrutiny-like qualification.

V. *Blaisdell* Redux

By 1945, the Court was ready to give the coup de grace. Every year since 1933, New York State had passed one-year moratoriums on foreclosure proceedings on mortgages that were in default.[50] In 1944, East New York Savings Bank brought a foreclosure proceeding in which it contested the constitutionality of New York's latest moratorium act. In his opinion for the Court, Justice Frankfurter made no mention of *Worthen v. Thomas*. Instead, he raised *Blaisdell* to the highest level of authority and

41 Gelfert v. Nat'l City Bank, 313 U.S. 221, 233 (1941).

42 303 U.S. 95 (1938).

43 *Id.* at 108-09, n. 17.

44 *Id.* at 109.

45 *Id.* at 110 (Black, J., dissenting).

46 313 U.S. 362 (1941).

47 *Id.* at 383 (Black, J., dissenting).

48 Veix v. Sixth Ward Bldg. & Loan Ass'n, 310 U.S. 32 (1940).

49 *Id.* at 38-39.

50 In 1941, the extension had been for two years. E. N.Y. Sav. Bank v. Hahn, 326 U.S. 230 (1945).

took it far beyond the limitations that Hughes had originally established in the case and in subsequent refinements:

> Since *Home Bldg. & L. Assn*. v. *Blaisdell*, there are left hardly any open spaces of controversy concerning the constitutional restrictions of the Contract Clause upon moratory legislation referable to the depression. The comprehensive opinion of Mr. Chief Justice Hughes in that case cut beneath the skin of words to the core of meaning. After a full review of the whole course of decisions expounding the Contract Clause—covering almost the life of this Court—the Chief Justice . . . put the Clause in its proper perspective in our constitutional framework. The *Blaisdell* case and decisions rendered since (*e.g., Honeyman v. Jacobs*, 306 U.S. 539; *Veix v. Sixth Ward Assn*., 310 U.S. 32; *Gelfert v. National City Bank*, 313 U.S. 221; *Faitoute Co. v. Asbury Park*, 316 U.S. 502), yield this governing constitutional principle: when a widely diffused public interest has become enmeshed in a network of multitudinous private arrangements, the authority of the State "to safeguard the vital interests of its people," is not to be gainsaid by abstracting one such arrangement from its public context and treating it as though it were an isolated private contract constitutionally immune from impairment.[51]

And just in case one might think that deference was due to a legislature only in emergency situations, Justice Frankfurter declared, "Justification for the 1943 enactment is not negatived because the factors that induced and constitutionally supported its enactment were different from those which induced and supported the moratorium statute of 1933."[52]

The post-New Deal Court had decided that it was inappropriate for a judicial body to second-guess economic decisions by legislative bodies, whether state legislatures or Congress, and that the property protections in specific parts of the Constitution, such as the Contract Clause and the Takings Clause, had to be turned into issues determinable by the political branches.

Frankfurter's *Blaisdell*-centric reinterpretation of the Contract Clause stuck. Twenty years later, in *El Paso v. Simmons*, Justice White championed Frankfurter's position.[53] In that case, land purchased from but forfeited to the state of Texas could be reclaimed under certain conditions. Texas later passed a law that limited the period for a reinstatement claim to five years. On an assertion of a Contract Clause violation, the Supreme Court found for El Paso (which had bought the land from the state). Justice White declared:

> The *Blaisdell* opinion, which amounted to a comprehensive restatement of the principles underlying the application of the Contract Clause, makes it quite clear that "not only is the constitutional provision qualified by the measure of control which the State retains over remedial processes, but the State also continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end 'has the result of modifying or abrogating contracts already in effect.' *Stephenson v. Binford*, 287 U.S. 251, 276. Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order . . ." 290 U.S. at 434-435. Moreover, the "economic interests of the State may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts." *Id*. at 437. The State has the "sovereign right . . . to protect the . . . general welfare of the people . . . . Once we are in this domain of the reserve power of a State we must respect the 'wide discretion on the part of the legislature in determining what is and what is not necessary.'" *East New York Savings Bank v. Hahn*, 326 U.S. 230, 232-233.[54]

On the other hand, Justice Black, who a quarter century earlier had championed *Blaisdell* and the near unfettered discretion of the state to order economic relationships, now dissented and took the opposite position:

> The cases the Court mentions do not support its reasoning. *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398, which the Court seems to think practically read the Contract Clause out of the Constitution, actually did no such thing, as the *Blaisdell* opinion read in its entirety shows and as subsequent decisions of this Court were careful to point out . . . . Chief Justice Hughes, the author of *Blaisdell*, later reiterated and emphasized that that case had upheld only a temporary restraint which provided for compensation, when four months later he spoke for the Court in striking down a law which did not. *W.B. Worthen Co. v. Thomas*, 292 U.S. 426.[55]

After Justice Black passed away in 1971, there was a brief, but ultimately pallid resurgence of the Contract Clause. In *United States Trust Co. v. New Jersey*, the Court struck down the repeal of a statutory covenant that had guaranteed to bondholders that revenues from a public transportation system would not be diverted to subsidize upgrades and maintenance.[56] Justice Blackmun's opinion asserted that the Contract Clause had greater bite when applied to a state's repudiation of its own contracts, and imposed in such a case a middle tier test: "The Contract Clause is not an absolute bar to subsequent modification of a State's own financial obligations. As with laws impairing the obligations of private contracts, an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose."[57] It did not mention *Worthen v. Thomas*.

A year later, in *Allied Structural Steel Co. v. Spannaus*, the Court voided a Minnesota law that forced a revision of a private

51 *Id*. at 231-32.

52 *Id*. at 235.

53 379 U.S. 497 (1965).

54 *Id*. at 508-09.

55 *Id*. at 523-24, 526 (Black, J., dissenting).

56 United States Trust Co. v. N.J., 431 U.S. 1 (1977).

57 *Id*. at 25.

company's pension obligations.[58] There, Justice Stewart accurately summarized the law emanating from *Blaisdell* and *Worthen*, but instead of applying the *Blaisdell-Worthen* standard, he continued to use the middle tier test from Justice Blackmun's opinion in *United States Trust*: "[T]he first inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship."[59] If the answer to that question is affirmative, then, was the legislation "necessary to meet an important general social problem"?[60]

Allied Structural Steel was the high point of the Contract Clause's effectiveness in the years after the New Deal. In finding for the state a few years later in *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*,[61] a unanimous Court weakened the middle-tier test even further: "If the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation," but when the state is not a party to the contract, "courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure."[62] Subsequent cases have returned to the near total deferential model.[63] In fact, since *Allied Structural Steel*, the Supreme Court has not voided any state law under the Contract Clause.

VI. Conclusion

In 1934, by folding *Blaisdell* into *Worthen*, the Supreme Court had reached a workable standard under which courts could judge cases in which state legislation had impaired pre-existing contracts: a state law that materially impairs an obligation of one of the parties to a pre-existing contract violates the Contract Clause, unless there is such an emergency that a narrow and limited exception can be permitted, and which exception preserves the underlying benefits of the contract to the parties. The near-unbroken run of unanimous decisions following *Worthen* through the 1930s demonstrates that a workable consensus had been reached.

Today, following the post-New Deal judiciary that believed that the validity of economic and social legislation should be left to the state's political branches to decide, all that remains of the Contract Clause's protective sweep is an asymmetric middle-tier test that has little analytic benefit and virtually no effect.

It was different in the 1930s. In the midst of an era when the Court struggled with the appropriate constitutional doctrine to use in judging economic disputes, *Worthen v. Thomas* and its redefinition of *Blaisdell* worked with hardly a ripple. It could work again.

58 438 U.S. 234 (1978).

59 *Id*. at 244.

60 *Id*. at 247.

61 Energy Reserves Group, Inc. v. Kan. Power & Light Co., 459 U.S. 400 (1983).

62 *Id*. at 411-12 (citing *United States Trust*).

63 *See, e.g.,* Exxon Corp. v. Eagerton, 462 U.S. 176 (1983).

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Christie v. NCAA: Anti-Commandeering or Bust

By Jonathan Wood & Ilya Shapiro

Note from the Editor:

This article argues that the Supreme Court should find unconstitutional the application of a federal statute barring states from authorizing gambling in this term's *Christie v. NCAA*.

The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the authors. Whenever we publish an article that advocates for a particular position, as here, we offer links to other perspectives on the issue, including ones opposed to the position taken in the article. We also invite responses from our readers. To join the debate, please email us at info@fedsoc.org.

• Mark Tushnet, *Anticommandeering, Preemption, and the Common Law: The PASPA Case*, Balkinization (Aug. 15, 2017), https://balkin.blogspot.com/2017/08/anticommandeering-preemption-and-common.html (response at https://balkin.blogspot.com/2017/08/if-federal-law-prohibits-sports.html).

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• Steven Schwinn, *Symposium: It's time to abandon anti-commandeering (but don't count on this Supreme Court to do it)*, SCOTUSblog (Aug. 17, 2017), http://www.scotusblog.com/2017/08/symposium-time-abandon-anti-commandeering-dont-count-supreme-court/.

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In 1992, Congress made it illegal for any state to authorize gambling on amateur or professional sports by passing the Professional and Amateur Sports Protection Act (PASPA).[1] Two decades later, New Jersey enacted the Sports Wagering Act, authorizing regulated sports betting at casinos and racetracks within the state.[2] The National Collegiate Athletic Association (NCAA) and the four major professional sports leagues sued under PASPA and were granted a permanent injunction against the New Jersey law.[3] The Third Circuit affirmed, holding that the Sports Wagering Act violated PASPA's prohibition against a state's authorizing sports betting, but also adding that nothing in PASPA's text "*requires* that the states keep any law in place."[4] In accordance with this ruling, New Jersey passed another statute in 2014 providing (with limited exceptions) for the repeal of any state laws or regulations prohibiting sports betting at casinos in Atlantic City or racetracks throughout the state.[5] When this second legalization effort was challenged, the Third Circuit abandoned as dicta its prior distinction between "authorization" and "repeal," and therefore again decided in favor of the NCAA. This forced New Jersey to maintain laws that its elected officials had acted to eliminate.[6] In June 2017, the Supreme Court granted certiorari; it will hear oral argument on December 4.

The lower court rulings in *Christie v. NCAA* fundamentally misapplied Tenth Amendment and Commerce Clause jurisprudence. As the Supreme Court held in the same year that PASPA was enacted, "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to [its] instructions."[7] And yet PASPA does just that by dictating what states' own sports betting laws shall be.[8] The Constitution forbids Congress from "commandeering" the states by compelling them to enact or administer federal policy; it should also be held to forbid Congress from compelling states to continue enforcing past state policy after it has proven ineffective, unpopular, or both.[9]

That the states voluntarily adopted the sports betting bans that PASPA now compels them to maintain is irrelevant. Today, New Jersey officials and voters have no say in the state's own gambling laws. Federal law commands that those laws remain what they were 25 years ago—and that state officials continue to enforce them—because any reform would "authorize" sports betting. These facts separate this case from cases that question

1 28 U.S.C. § 3701 *et seq.*

2 N.J. Stat. Ann. §§ 5:12A–1 *et seq.* (2012).

3 *See* NCAA v. Christie, 926 F. Supp. 2d 551 (D.N.J. 2013).

4 NCAA v. Governor of New Jersey, 730 F.3d 208, 232 (3d Cir. 2013) (emphasis in original).

5 *See* N.J. Stat. Ann. § 5:12A–7 (2014).

6 NCAA v. Governor of New Jersey, 832 F.3d 389, 396–97 (3d Cir. 2016) (en banc).

7 New York v. United States, 505 U.S. 144, 162 (1992).

8 28 U.S.C. § 3702 (forbidding states from "authoriz[ing]" sports betting "by law").

9 *New York*, 505 U.S. at 162.

Congress' constitutional powers to regulate interstate commerce and preempt conflicting state laws.

Allowing Congress to hijack states' law-making authority and thereby prevent reform would undermine the two primary values underlying the anti-commandeering principle: federalism and political accountability.[10] Such a loophole in the anti-commandeering principle would frustrate federalism by allowing Congress to block state experimentation and innovation. And it would reduce political accountability by obscuring the politicians who should be held accountable if a policy proves to be ineffective or unpopular. To avoid undermining these constitutional values, the Supreme Court should extend the anti-commandeering doctrine to forbid Congress from requiring states to keep unwanted laws on the books.

I. Existing Anti-Commandeering Doctrine

The Constitution forbids Congress from "commandeering" the states, either by requiring states to adopt a policy or by compelling state officials to implement one.[11] The Supreme Court has twice struck down federal laws under this principle. In *New York v. United States*, it declared unconstitutional a federal law requiring states to either regulate nuclear waste disposal according to federal standards or accept possession of it.[12] And in *Printz v. United States*, the Court invalidated a federal law requiring state officials to perform background checks for prospective gun sales.[13]

Together, these cases establish that states alone set state policy and the federal government sets federal policy; Congress can no more dictate what state policy shall be than the states can dictate policy to Congress.[14] Absent this constitutional restraint, the federal government could enlarge its power immeasurably by pressing the states and their officers into service at no cost to itself. That would threaten federalism and undermine the political process. Furthermore, commandeering is unnecessary because Congress can implement its chosen policies without it.

"As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government."[15] This system—federalism—provides decentralized government "sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry."[16] Commandeering, if allowed, would threaten federalism by converting states from independent sovereigns into instrumentalities of the federal government. The Framers consciously rejected such a system, after seeing the problems it created under the Articles of Confederation.[17] "[T]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States."[18] States cannot be "reduce[d] . . . to puppets of a ventriloquist Congress."[19] Preserving state autonomy from federal encroachment allows states to discover better public policies through experimentation.[20] Federal commandeering, on the other hand, threatens to impose one-size-fits-all policies on states and stifle innovation.[21]

Commandeering also undermines the political process by obscuring the officials who are responsible for a given policy. If it were permissible, state officials might take the fall for unpopular policies over which they have no control.[22] Likewise, federal politicians could claim credit for addressing a serious problem while foisting the difficult questions of how to do so and at what cost onto state officials.[23] "The resultant inability to hold either branch of the government answerable to the citizens is more dangerous even than devolving too much authority to the remote central power."[24] Because federalism violations undermine the political process, political safeguards are insufficient to protect federalism on their own. Courts must intervene when the federal government violates the Constitution's structural protections for federalism.[25] "[T]he federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far."[26]

The anti-commandeering principle does not limit *what* the federal government can do, only *how* it may do it. Consequently, the Supreme Court has steadfastly refused to balance the principle against short-term political expediency.[27] The Court should

10 *Id.* at 161-69.

11 *See* Printz v. United States, 521 U.S. 898, 927-28 (1997); *New York*, 505 U.S. at 161; Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 288 (1981).

12 505 U.S. at 169-70.

13 521 U.S. at 933-35.

14 *See id.* at 918-28.

15 Gregory v. Ashcroft, 501 U.S. 452, 457 (1991).

16 *Id.* at 458; *see* Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484, 1491-1511 (1987).

17 *See Printz*, 521 U.S. at 919-20; The Federalist No. 15, at 109 (Alexander Hamilton) (J. Cooke ed., 1961).

18 *New York*, 505 U.S. at 166.

19 Brown v. E.P.A., 521 F.2d 827, 839 (9th Cir. 1975).

20 *See*, *e.g.*, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 49-50 (1973): New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

21 *See* Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 Vand. L. Rev. 1563, 1581 (1994) ("To put it bluntly, we need long-term sources of regulatory creativity more than we need short-term efficiency.").

22 *See* Andrew B. Coan, *Commandeering, Coercion, and the Deep Structure of American Federalism*, 95 B.U. L. Rev. 1, 8 (2015).

23 *Id.*; *see also* Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?*, 111 Harv. L. Rev. 2180, 2201 (1998).

24 United States v. Lopez, 514 U.S. 549, 577 (1995) (Kennedy, J., concurring).

25 *See Gregory*, 501 U.S. at 460-61; John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. Cal. L. Rev. 1311, 1404 (1997).

26 *Lopez*, 514 U.S. at 578 (Kennedy, J., concurring).

27 *New York*, 505 U.S. at 178 ("*No matter how powerful the federal interest involved*, the Constitution simply does not give Congress the authority to require the States to regulate.") (emphasis added). *Id.* at 187. ("[T]he

continue to adhere to that hard line. The federal government has plenty of ways to address pressing issues without eroding the Constitution's structural protections. It can directly regulate the activity itself and preempt contrary state regulation.[28] It can give states a choice of cooperating or ceding an area to federal regulation—so-called "conditional preemption."[29] Or it can use its spending power, under appropriate circumstances, to entice states to cooperate, provided that it does not cross the line between encouraging state participation and coercing it.[30]

The Supreme Court has carefully distinguished unconstitutional commandeering from Congress' preemption power.[31] Preemption is constitutional because, "'if a State does not wish'" to participate in the enforcement of federal regulations, "'the full regulatory burden will be borne by the Federal Government.'"[32] Congress can incentivize states to cooperate with it, but states must have the option to decline participation.[33] If the state may withdraw and let "the full regulatory burden" fall on the federal government, it has not been commandeered.[34] If the state does not retain this right, however—if it must embrace some policy chosen by Congress—it has been unconstitutionally commandeered.

II. Congress Should Not Be Allowed to Forbid States from Repealing or Amending Their Own Laws

"[P]reventing the state from repealing an existing law is no different from forcing it to pass a new one; in either case, the state is being forced to regulate conduct that it prefers to leave unregulated."[35] Either way, the federal government dictates what state law shall be, leaving states no right to refuse to participate in the federal policy.[36] The Supreme Court has already rejected the argument that the anti-commandeering principle is limited to when the federal government affirmatively requires a state to enact a new policy.[37] It should do so again in this case. A federal power to forbid states from amending or repealing their own laws poses the same federalism and political accountability problems that existing anti-commandeering doctrine was designed to address.

A. A Federal Power to Prevent States from Reforming Their Own Laws Would Undermine Federalism

Allowing the federal government to forbid states from amending or repealing their own laws would undermine federalism by blocking state experimentation and innovation. Recent state efforts to take advantage of the benefits of federalism in the realm of marijuana policy give some indication of what might be lost in such a regime. Over the last decade, several states have experimented with decriminalizing or legalizing marijuana.[38] This has only been possible because "the federal government cannot require states to enact *or maintain on the books* any laws prohibiting marijuana."[39] State-level reform does not bar the federal government from enforcing the federal marijuana prohibition, of course. However, the results of state experimentation can inform both the federal government and other states. Many states have followed their neighbors' lead and reformed their laws.[40] And Congress has forbidden the use of appropriated funds to enforce federal laws prohibiting marijuana possession in situations where the possession is legal under state law.[41] If the federal government could forbid this reform experiment, states would not have had the breathing room to experiment, depriving other states and the federal government of the benefit of seeing the results of the experiment.

Limiting the anti-commandeering principle to allow Congress to prevent states from reforming or repealing existing laws could lead federal politicians to block any state-level reform they may oppose. The federal government could force states and local governments that have participated in enforcing federal immigration laws to continue doing so forever, even if the state or local government would prefer to leave that enforcement to the federal government alone.[42] Congress could prevent the further spread of right-to-work laws or, if those laws someday prove unwise, require states to maintain them anyway.[43] It could forbid states from increasing gun control or relaxing existing

Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.").

28 *See* Geier v. Am. Honda Motor Co., Inc., 529 U.S. 861 (2000).

29 *New York*, 505 U.S. at 167-68.

30 *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 578-79 (2012).

31 *New York*, 505 U.S. at 160.

32 *Id.* at 161 (quoting *Hodel*, 452 U.S. at 288).

33 *See* Ernest Young, *Federalism as a Constitutional Principle*, 83 U. Cin. L. Rev. 1057, 1074 (2015) ("Congress must persuade, not command, States to participate in cooperative federalism schemes.").

34 *New York*, 505 U.S. at 161 (quoting *Hodel*, 452 U.S. at 288).

35 Conant v. Walters, 309 F.3d 629, 646 (9th Cir. 2002) (Kozinski, J., concurring).

36 *See Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 578-79 (interpreting *New York* as recognizing a state right of refusal to participate in any federal scheme).

37 *See Printz*, 521 U.S. at 927-28 (holding that the anti-commandeering principle does not distinguish between a requirement that a state affirmatively enact a policy and a requirement that it implement or enforce one).

38 *See* Erwin Chemerinsky, et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. Rev. 74, 81-89 (2015).

39 *Id.* at 102-03 (emphasis added); *see* Austin Raynor, *The New State Sovereignty Movement*, 90 Ind. L.J. 613, 626 (2015); Sam Kamin, *Cooperative Federalism and State Marijuana Regulation*, 85 U. Colo. L. Rev. 1105, 1107 (2014).

40 *See* Jacob Sullum, *Victories for Eight of Nine Marijuana Initiatives Hasten the Collapse of Prohibition*, Reason.com (Nov. 9, 2016), http://reason.com/blog/2016/11/09/victories-for-eight-of-nine-marijuana-in (voters in eight more states legalized recreational marijuana in the 2016 elections).

41 *See* Consolidated Appropriations Act of 2016, Pub. L. No. 114-113, § 542, 129 Stat. 2242, 2332-33 (2015); United States v. McIntosh, 833 F.3d 1163 (9th Cir. 2016) (forbidding federal prosecutions for activity permitted by state law).

42 *See* Spencer E. Amdur, *The Right of Refusal: Immigration Enforcement and the New Cooperative Federalism*, 35 Yale L. & Pol'y Rev. 87 (2016).

43 *Cf.* Richard Vedder & Jonathan Robe, *The High Cost of Big Labor: An Interstate Analysis of Right to Work Laws*, Competitive Enterprise Institute (2014), http://cei.org/sites/default/files/Richard%20Ved

gun regulations.[44] It could forbid states from modifying school curricula or testing requirements.[45] And Congress could block states from altering controversial bathroom policies in light of local debates over social norms.[46]

If this loophole in the anti-commandeering principle were to be created, it would also likely affect "cooperative federalism" arrangements, in which the federal government and states cooperate to develop and implement a federal policy.[47] In environmental policy, for instance, these arrangements often involve Congress setting a federal standard that states agree to implement.[48] These arrangements can themselves be unconstitutionally coercive.[49] But even if kept within their proper scope, giving Congress free reign to forbid states from reforming their own laws would make cooperative federalism arrangements far more treacherous. Any state that voluntarily agreed to cooperate at one time could find itself coerced into enforcing a costly, ineffective, or unpopular policy forever, if Congress forbade subsequent state reform. This would discourage state participation, undermining benefits that can be derived from cooperative federalism.

B. A Federal Power to Forbid State Reform Would Frustrate Political Accountability

A federal prohibition against states' amending their own laws poses the same political accountability concerns as a federal requirement that states affirmatively enact a policy. In either case, political accountability is frustrated at both the federal and state level. These incentive effects are the same whether a state's initial adoption of the policy was voluntary or not.

By forcing states to maintain laws favored by Congress, federal politicians could ensure the continued enforcement of their preferred policies while avoiding political consequences.[50] They would be shielded from the backlash if the policy proves wrongheaded, unpopular, or too expensive because voters will mistake it for a state policy.[51] A federal bar against state reform would also undermine accountability at the state level by inducing state voters to cast their ballots based on policies that the state politicians have no say in. State officials should be held accountable for the policies they enact, including when they choose to participate in cooperative federalism arrangements that prove unpopular or unwise.[52] But where federal law dictates that a policy must be maintained, any votes cast against state incumbents in disapproval of that policy are pointless; although it is really federal policy, voters will reasonably mistake the policy written into state law and enforced by state officials as state policy and vote accordingly. This case furnishes an example: New Jersey voters approved a referendum by an overwhelming 2-to-1 margin calling for the reform of the state's sports gambling laws, acting on the mistaken belief that the state had a say in its own laws.[53]

Although it is easy to presume that voters will recognize when the federal government is dictating policy to states, that presumption rests on a too cheery view of politics. In reality, politics is characterized by widespread political ignorance.[54] This ignorance extends to basic civics. A 2006 poll found that only 42 percent of Americans can name all three branches of government established by the Constitution.[55] Most Americans cannot name a single member of the Supreme Court of the United States, even though surveys show that an overwhelming majority (more than 90 percent) believe that its decisions affect their daily lives.[56]

Pervasive political ignorance is a rational response to incentives and the incomprehensible size of modern government.[57] The chances that any one person's vote will impact an election, much less a particular policy issue, are statistically insignificant, roughly the same as being struck by lightning.[58] In a world where attention is at a premium, anything that blurs which government officials are responsible for a policy reduces voters' ability to hold the responsible officials accountable. Forbidding the federal

der%20and%20Jonathan%20Robe%20-20An%20Interstate%20Analysis%20of%20Right%20to%20Work%20L.

44 *See Printz*, 521 U.S. at 933-35.

45 *But see* Milliken v. Bradley, 418 U.S. 717, 741-42 (1974).

46 *Cf.* G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd., 822 F.3d 709 (4th Cir. 2016).

47 *See*, *e.g.*, Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. Envtl. L.J. 179 (2005).

48 See Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 Yale L.J. 1196, 1243-50 (1977).

49 *See Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 575-89 (Congress can encourage state cooperation but cannot use an inducement so strong that it becomes coercive); Mario Loyola & Rick Esenberg, *Shining a Light on Coercion in Federal "Assistance" to States: A Model Policy for Resisting Federal Coercion*, WILL Report, July 2016, https://www.will-law.org/wp-content/uploads/2017/07/CCF-Resist-FInal.pdf.

50 *See Printz*, 521 U.S. at 930 ("Members of Congress can take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes.").

51 *See* Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 61-62 (1988).

52 *See New York*, 505 U.S. at 168.

53 *See New Jersey Voters Endorse Making Sports Betting Legal*, Chicago Tribune, Nov. 8, 2011, http://articles.chicagotribune.com/2011-11-08/ sports/chi-new-jersey-voters-endorse-making-sports-betting-legal-20111108_1_amateur-sports-protection-act-legal-bets-oregon-and-montana.

54 *See* Ilya Somin, Democracy and Political Ignorance: Why Smaller Government is Smarter (2013); Frank Bruni, *America the Clueless*, N.Y. Times, May 11, 2013, http://www.nytimes.com/2013/05/12/opinion/ sunday/bruni-america-the-clueless.html.

55 *See* Ilya Somin, *Political Ignorance in America*, in The State of the American Mind: 16 Leading Critics on the New Anti-Intellectualism 163 (2015), http://www.soamcontest.com/sites/default/files/2 01603/Somin-%20Political%20Ignorance%20in%20America.pdf.

56 *See* Robert Green & Adam Rosenblatt, *C-Span/PSB Supreme Court Survey* (2017), https://static.c-span.org/assets/documents/scotus Survey/CSPAN%20PSB%20Supreme%20Court%20Survey%20COMPREHENSIVE%20AGENDA%20sent%2003%2013%2017.pdf.

57 *See* Democracy and Political Ignorance, *supra* note 54 at 61-89.

58 *See* Andrew Gelman, *What Are the Chances Your Vote Matters?*, Slate (Nov. 7, 2016), http://www.slate.com/articles/news_and_politics/politics/2016/11/here_are_the_chances_your_vote_matters.html; National Weather Service, *How Dangerous is Lightning?*, NOAA.gov, http://www.lightningsafety.noaa.gov/odds.shtml.

government from depriving states of the ability to change their own laws would make the responsibility clearer and improve accountability. If the federal government wishes to see a policy maintained, it must either induce states to participate or enforce the policy itself and face the political consequences directly.

By preserving political accountability, the anti-commandeering principle aligns government with the preferences of the governed and creates incentives for states to find better, smarter ways to promote the public interest, without necessarily favoring more or less government. Like federalism generally, the anti-commandeering principle favors neither conservative nor liberal results, and should enjoy bipartisan support.[59] Consequently, all should be concerned about the risks of creating an easily manipulated loophole in this core constitutional protection.

III. Conclusion

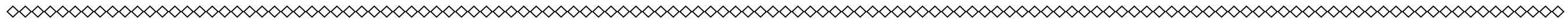
By forbidding states from amending their own sports-betting laws, PASPA dictates to states what their own laws must be and, therefore, violates the anti-commandeering principle. This undermines the important constitutional values of federalism and political accountability. PASPA deprives states of their sovereign power to define their own laws according to their voters' wishes, as is their prerogative in our federalist system. Instead of announcing a federal standard, and facing the political consequences that would come with it, Congress chose to shield its role in the policy from voters and circumvent the democratic process.

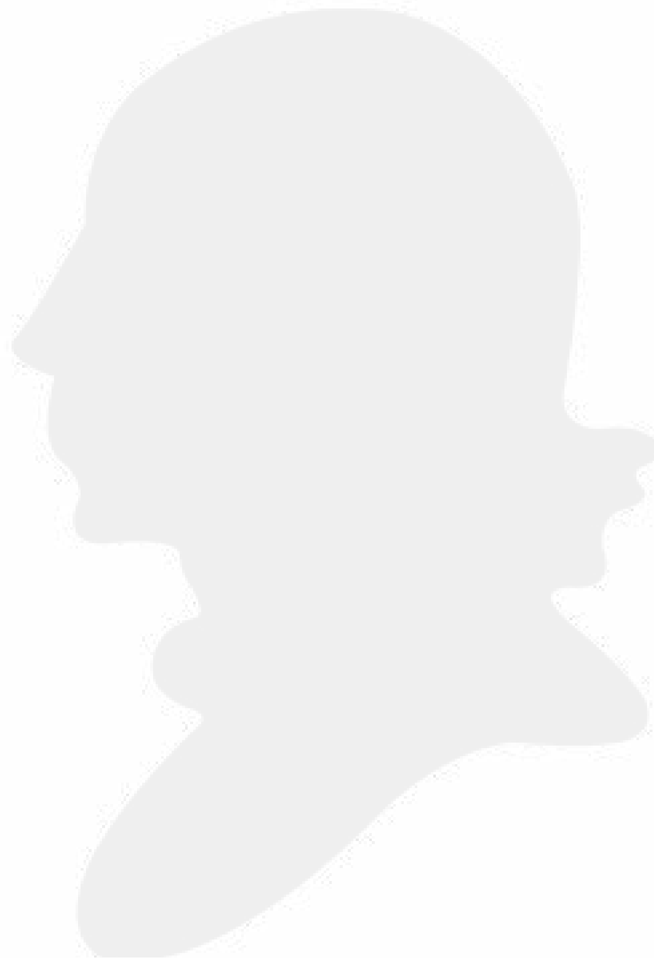
This is different from preemption; the defining characteristic of preemption is that states retain the option to refuse to participate, at which point enforcement falls to the federal government. But laws like PASPA remove that discretion. The Third Circuit's decision does not preempt New Jersey's role in regulating sports betting and shift "the full regulatory burden" to the federal government.[60] Instead, it nullifies the state's partial repeal of those regulations, putting them back into effect and reimposing the regulatory burden on the state. The only thing that distinguishes this case from *New York* is that, more than a quarter-century ago, state politicians approved of the sports-betting bans that PASPA now compels the states to maintain. From the perspective of present politicians and voters, the impact of PASPA and the law at issue in *New York* is precisely the same. A state's past endorsement of a policy should not change a court's analysis under the anti-commandeering principle.[61] The anti-commandeering doctrine should therefore be extended to prohibit the federal government from requiring states to maintain existing laws.

59 *See* Heather K. Gerken, *A New Progressive Federalism*, Democracy (2012), http://democracyjournal.org/magazine/24/a_new_progressive_federalism; Heather K. Gerken, *Foreword: Federalism All The Way Down*, 124 Harv. L. Rev. 4, 44-55 (2010); Robert D. Alt, *Is Federalism Conservative?*, Nat'l Rev., Apr. 29, 2003, http://www.nationalreview.com/article/206732/ Federalism-conservative-robert-d-alt.

60 *See New York*, 505 U.S. at 161 (quoting *Hodel*, 452 U.S. at 288).

61 *See id.* at 182 ("[T]he departure from the constitutional plan cannot be ratified by the 'consent' of state officials.").





Free Speech & Election Law

Helping Americans to Speak Freely

By Jeremy Rosen & Felix Shafir

Note from the Editor:

This article discusses different types of state anti-SLAPP laws and argues that federal anti-SLAPP legislation would help to improve the legal landscape for free speech by offering a backstop for targets of speech-suppressing litigation.

The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the authors. Whenever we publish an article that advocates for a particular position, as here, we offer links to other perspectives on the issue, including ones opposed to the position taken in the article. We also invite responses from our readers. To join the debate, please email us at info@fedsoc.org.

- Hon. Brian M. Hoffstadt, *SLAPPing Cobras*, Association of Business Trial Lawyers Report (Spring 2016), http://www.abtl.org/report/la/abtlla_spring2016.pdf. (*See also* response at http://abtl.org/report/la/abtlla_summer2016.pdf.)

- Davis v. Cox, 183 Wn.2d 269, 351 P.3d 862 (2015), http://caselaw.findlaw.com/wa-supreme-court/1702446.html.

- Vikram David Amar, *The Vexing Nature of California's Attempt to Protect Free Speech Through its Anti-SLAPP Statute*, Verdict (Aug. 12, 2016), https://verdict.justia.com/2016/08/12/vexing-nature-californias-attempt-protect-free-speech-anti-slapp-statute (discussing *Nam v. Regents of the Univ. of Cal.*, No. C074796 (Cal. Ct. App. July 29, 2016), *available at* http://law.justia.com/cases/california/court-of-appeal/2016/c074796.html).

- Jesse J. O'Neill, Note, *The Citizen Participation Act Of 2009: Federal Legislation As An Effective Defense Against SLAPPs*, 38 B.C. Envtl. Aff. L. Rev. 477 (2011), http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1697&context=ealr.

- Eric Goldman, *59 Legal Scholars Sign Letter Supporting SPEAK FREE Act To Create Federal Anti-SLAPP Law*, Forbes (Sept. 16, 2015), http://www.forbes.com/sites/ericgoldman/2015/09/16/59-legal-scholars-sign-letter-supporting-speak-free-act-to-create-federal-anti-slapp-law/#6e3819641aff.

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Introduction

The rights to free speech and to petition the government for redress of grievances are fundamental rights protected by the First Amendment.[1] Indeed, each of these ranks amongst the "most precious" of constitutional rights.[2]

More than a quarter century ago, professors George W. Pring and Penelope Canan identified a disturbing litigation trend that sought to chill these vital constitutional rights: strategic lawsuits against public participation, or SLAPPs.[3] Their research demonstrated that, at a minimum, "thousands" of these lawsuits had been filed, "tens of thousands of Americans" had been subjected to the lawsuits' chilling effect, "and still more ha[d] been muted or silenced by the threat."[4] The research revealed these lawsuits were increasingly "found in every jurisdiction, at every government level, and against" a wide range of "public issue[s]."[5]

The targets of these lawsuits were "typically not extremists"; rather, they were normal Americans, thousands of whom had "been sued into silence."[6] These lawsuits struck "at a wide variety of traditional American political activities"—for example, "writing to government officials, attending public hearings, testifying before government bodies, circulating petitions for signature, lobbying for legislation, campaigning in initiative or referendum elections," or being parties in lawsuits.[7]

Through their research, professors Pring and Canan observed what happened when the targets of these lawsuits were "suddenly confronted" with "summonses, depositions, attorneys, and the trauma of a multi-million-dollar damage claim hanging over their lives."[8] The professors "saw the 'role reversals'" as citizens "were frightened into silence, supporters dropped out, resources

1 Smith v. Silvey, 149 Cal. App. 3d 400, 406 (1983).

2 United Mine Workers of America, District 12 v. Illinois Bar Assn., 389 U.S. 217, 222 (1967); San Francisco Forty-Niners v. Nishioka, 75 Cal. App. 4th 637, 647 (1999).

3 George W. Pring & Penelope Canan, SLAPPs: Getting Sued for Speaking Out ix-xi (1996) [hereinafter Getting Sued] (explaining how research demonstrated that these "'intimidation lawsuits'" attacked "not just free speech" but also "the right to petition government for a redress of grievances").

4 *Id.* at xi; *see also* Penelope Canan & George W. Pring, *Strategic Lawsuits Against Public Participation*, 35 Social Problems 506 (1988); Penelope Canan & George W. Pring, *Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches*, 22 Law & Soc'y Rev. 385 (1988).

5 George W. Pring & Penelope Canan, *"Strategic Lawsuits Against Public Participation" ("SLAPPS"): An Introduction for Bench, Bar and Bystanders* 12 Bridgeport L. Rev. 937, 940 (1992) [hereinafter *Introduction to SLAPPs*].

6 George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation* 7 Pace Envtl. L. Rev. 3, 3 (1989) [hereinafter *SLAPPs*].

7 *Id.* at 5.

8 Getting Sued, *supra* note 3, at x.

drained away, campaigns foundered," and organizations "died."[9] In short, these civil actions were meant to "send a clear message: that there is a 'price' for speaking out"—that price being "a multimillion-dollar lawsuit and the expenses, lost resources, and emotional stress such litigation brings."[10]

After extensively studying this phenomenon, professors Pring and Canan concluded that tens of thousands of Americans had been victimized by such civil actions, and that although these lawsuits rarely succeeded on the merits, the mere fact of filing the lawsuit led to the goal of silencing those who had been speaking out.[11] Such lawsuits achieved their aims even when the plaintiffs lost because the civil actions successfully "'chill[ed]' present and future political involvement, both of the targets and of others in the community, and have worked to assure that those citizens never again participate freely and confidently in the public issues and governance of their own town, state, or country."[12] As one court put it in describing these lawsuits' devastating "'ripple effect,' '[s]hort of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined.'"[13]

In response to the research identifying this disturbing trend, California and New York enacted anti-SLAPP laws that provide a mechanism to enable victims of SLAPP lawsuits to promptly dismiss and deter them.[14] Thereafter, many other states enacted their own anti-SLAPP statutes, including Arizona, Arkansas, Illinois, Missouri, New Mexico, Oregon, Texas, Utah, and Washington.[15] As one commentator recently explained, "this is not a red or a blue state issue. It is a speech issue that transcends both [political] parties" and goes to "the heart of [American] patriotism."[16]

Today, nearly 30 states (as well as Washington, DC) have enacted some form of anti-SLAPP legislation.[17] But the breadth and scope of these anti-SLAPP laws vary widely.[18] Notably, some of these laws provide substantial protection while others offer significantly more limited safeguards.

This article examines examples of the variation among the broad spectrum of anti-SLAPP statutes by comparing California's broad anti-SLAPP law with New York's far more limited one. The exploration of these differences in the protection afforded to speakers in New York and California will show why it is a good idea to enact federal anti-SLAPP legislation. SLAPP plaintiffs currently have forum shopping incentives to sue Americans for speaking freely and petitioning the government in states with limited or no protection against SLAPPs, and a federal anti-SLAPP law would remove these incentives and provide more broad, even protection.

I. The Sharp Differences Between California's and New York's Anti-SLAPP Laws

A. Introduction to California's Anti-SLAPP Law

California's anti-SLAPP statute "allows a court to strike any cause of action that arises from the defendant's exercise of his or her constitutionally protected rights of free speech or petition for redress of grievances."[19] This special motion to strike calls for a "two-step process."[20]

"First, the moving defendant must make a prima facie showing 'that the act or acts of which the plaintiff complains were taken "in furtherance of the [defendant's] right of petition or free speech under the United States or California Constitution in connection with a public issue,"'" as defined by California's anti-SLAPP statute.[21] This is known as the "first prong" of the test for striking a claim under the state's anti-SLAPP law.[22]

California's Legislature "spelled out the kinds of activity it meant to protect" under the anti-SLAPP law in subdivision (e) of California Code of Civil Procedure section 425.16.[23] "Because of these specifications, courts determining whether a cause of action arises from protected activity are not required to wrestle with difficult questions of constitutional law, including distinctions between federal and state protection of free expression."[24] Instead, they need only examine whether the defendant's activities in question fall "within one of the four categories described in subdivision (e)."[25]

The first of subdivision (e)'s categories protects "any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law."[26] The second protected category encompasses "any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law."[27] The purpose of these two categories "is essentially to protect the

9 *Id.*

10 *SLAPPs*, *supra* note 6, at 6.

11 Getting Sued, *supra* note 3, at xi-xii.

12 *Introduction to SLAPPs*, *supra* note 5, at 943.

13 *Id.* at 944.

14 *Introduction to SLAPPs*, *supra* note 5, at 938, 959-60.

15 Laura Lee Prather, *The Texas Citizens Participation Act—5 Years Later*, Law360 (June 16, 2016), http://www.law360.com/articles/802155/the-texas-citizens-participation-act-5-years-later [hereinafter *Texas Citizens Participation Act*].

16 *Id.*

17 *See State Anti-SLAPP Laws, Public Participation Project*, http://www.anti-slapp.org/your-states-free-speech-protection/ (last visited 11/5/16).

18 Lori Potter & W. Cory Haller, *SLAPP 2.0: Second Generation of Issues Related to Strategic Lawsuits Against Public Participation,* 45 Envtl. L. Rep. News & Analysis 10136, 10137-38 (2015) [hereinafter *SLAPP 2.0*].

19 Flatley v. Mauro, 39 Cal.4th 299, 311-312 (2006).

20 City of Montebello v. Vasquez, 1 Cal.5th 409, 420 (2016).

21 *Id.*

22 Decamabre v. Rady Children's Hosp., 235 Cal. App. 4th 1, 22 (2015).

23 *City of Montebello*, 1 Cal.5th at 422.

24 *Id.* at 433.

25 *Id.*

26 Cal. Civ. Proc. Code § 425.16(e)(1) (2015).

27 Cal. Civ. Proc. Code § 425.16(e)(2).

activity of petitioning the government for redress of grievance *and* petition-related statements and writings."[28]

If a defendant invokes the protection of either of these two categories, he or she "need not demonstrate the existence of a public issue" because California's Legislature "equated a 'public issue' with the authorized official proceeding to which [the statement] connects."[29] In short, "'the context or setting'" in which these statements occur "'itself makes the issue a public issue: all that matters is that the First Amendment activity take place in an official proceeding or be made in connection with an issue being reviewed by an official proceeding.'"[30]

The third category protected by subdivision (e) includes "any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest."[31] Similarly, subdivision (e)'s fourth category protects "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest."[32] Both of these categories "require a specific showing the action concerns a matter of public interest" whereas the first two categories described above "do not require this showing."[33] California courts broadly construe issues of public interest to include "private communications concerning issues of public interest."[34]

If a court concludes that the defendant has met its first prong burden of "demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out" in subdivision (e), the court turns to the second prong of the anti-SLAPP statute: "determin[ing] whether the plaintiff has demonstrated a probability of prevailing on the claim."[35] To meet this burden, the plaintiff must "state and substantiate a legally sufficient claim."[36] "Put another way, the plaintiff must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited."[37]

Where the anti-SLAPP statute applies and the plaintiff fails to establish that it has a probability of prevailing, the claim subject to the anti-SLAPP statute "shall be stricken."[38] Moreover, once the anti-SLAPP motion has been filed, all discovery is automatically stayed and plaintiff can secure a lifting of this stay only by filing a noticed motion and showing "good cause."[39] Furthermore, parties have a right to immediately appeal an order granting or denying an anti-SLAPP motion[40]—and such appeals automatically stay "all further trial court proceedings on the merits upon the causes of action affected by the motion."[41] Also, the prevailing defendant is entitled to the reasonable fees it incurred both in the trial court and on appeal to prosecute the anti-SLAPP motion, but a prevailing plaintiff can only secure fees if the anti-SLAPP motion was frivolous or filed solely for the purpose of delay.[42]

California's expansive anti-SLAPP statute has long had its critics. For example, responding to the bill that became the anti-SLAPP law while it was still in its formative stages, the California Judges Association voiced concern "that the bill's provisions were 'too broad.'" This challenge proved insufficient to derail the ultimate passage of the law; the Legislature simply added a provision to "specify[] 'the First Amendment conduct protected by the bill.'"[43]

Even after the Legislature enacted the law, some Courts of Appeal tried to narrow the statute, but, time and again, these efforts were rebuffed by the Legislature, the California Supreme Court, or both.[44] Similarly, when SLAPP scholars Pring and Canan recommended amending California's anti-SLAPP to include the immediate right of appeal, California's Judicial Council opposed this course on the ground that the availability of review by writ proceeding at a Court of Appeal's discretion was sufficient. The Council was rebuffed by the Legislature, which enacted the right of appeal on concluding that writ review was so rarely granted that it was insufficient to protect the vital constitutional rights at stake in an anti-SLAP motion.[45]

Undeterred, a few California courts have continued to issue the occasional decision suggesting that litigants are systematically abusing California's broad anti-SLAPP statute because of the number of motions and appeals the law generates; this vocal minority urges legislative reform to fix the harm they believe

28 Du Charme v. Int'l Brotherhood of Elec. Workers, Local 45, 110 Cal. App. 4th 107, 114 (2003).

29 Sipple v. Found. for Nat'l Progress, 71 Cal. App. 4th 226, 237 (1999).

30 Briggs v. Eden Council for Hope & Opportunity, 19 Cal.4th 1106, 1116 (1999) (quoting Braun v. Chronicle Publishing Co., 52 Cal. App. 4th 1036, 1047 (1997)).

31 Cal. Civ. Proc. Code § 425.16(e)(3).

32 *Id.* § 425.16(e)(4).

33 Damon v. Ocean Hills Journalism Club, 85 Cal. App. 4th 468, 474 (2000).

34 Terry v. Davis Community Church, 131 Cal. App. 4th 1534, 1545-1546 (2005).

35 Navellier v. Sletten, 29 Cal.4th 82, 88 (2002).

36 *City of Montebello*, 1 Cal.5th at 420.

37 Oasis West Realty, LLC v. Goldman, 51 Cal.4th 811, 820 (2011) (citation omitted).

38 Simpson Strong-Tie Co., Inc. v. Gore, 49 Cal.4th 12, 21 (2010).

39 Cal. Civ. Proc. Code § 425.16(g).

40 *Id.* §§ 425.16(i), 904.1(a)(13).

41 Varian Medical Systems, Inc. v. Delfino, 35 Cal.4th 180, 186 (2005).

42 Cal. Civ. Proc. Code § 425.16(c); Mendoza v. ADP Screening and Selection Services, Inc., 182 Cal. App. 4th 1644, 1659 (2010).

43 Jerome Braun, *Increasing SLAPP Protection: Unburdening the Right of Petition in California*, 32 U.C. Davis L. Rev. 965, 1002 (1999) [hereinafter *Increasing SLAPP Protection*].

44 Briggs, 19 Cal. 4th at 1114, 1120-21, 1123 n. 10; Equilon Enterprises LLC v. Consumer Cause, Inc., 29 Cal. 4th 53, 58-59, 68 n. 5 (2002).

45 *See Increasing SLAPP Protection*, *supra* note 43 at 1008, 1011 & n. 182; Jerome Braun, *California's Anti-SLAPP Remedy After Eleven Years*, 34 McGeorge L. Rev. 731, 778-79 & fn. 280 (2003); Varian Medical Systems, Inc., 35 Cal. 4th at 193; Doe v. Luster, 145 Cal. App. 4th, 139, 144-45 (2006).

the statute causes to the judicial system.[46] But objective data demonstrates that California's anti-SLAPP law is not being systematically abused, either in the trial courts or on appeal, and has instead operated successfully in accordance with the Legislature's expectations by permitting thousands of defendants (if not more) to dismiss meritless lawsuits that targeted their exercise of First Amendment rights.[47]

B. The Significant Differences Between New York's and California's Anti-SLAPP Laws

1. New York's anti-SLAPP law applies to a far narrower range of activities than California's law

Like California, New York passed legislation in 1992 to provide protections against SLAPP suits.[48] But "New York's anti-SLAPP statute is much narrower than California's,"[49] particularly with respect to the differing range of activities protected by each of these laws.

California's anti-SLAPP statute protects four categories of activities that, collectively, "are quite broad."[50] Thus, California's anti-SLAPP statute has been applied to a diverse array of activities, of which the following are just a few examples:

- Fox News Network's television broadcast of "Manhunt at the Border," a story featuring an anti-illegal immigration activist who claimed that he was attacked by several immigrants seeking work as day laborers.[51]
- Consumer group's service of a notice of intent to sue on gas stations in California who had allegedly been polluting groundwater.[52]
- Companies' lobbying of regulatory and legislative bodies.[53]
- Television station's decision to hire a young, female weather news anchor rather than an older, male applicant.[54]
- Archaeology professor's criticism of efforts to put a strip mall on the site of an ancient Native American village.[55]
- Community church's publication of a report that allegedly falsely accused church youth group leaders of having an inappropriate sexual relationship with a minor female.[56]
- Homeowner's criticism of a charitable organization that sought to convert a house in her neighborhood into a shelter for battered women.[57]
- Non-profit organization's efforts to assist a tenant with filing a complaint with the Department of Housing and Urban Development against the owners of residential rental

46 *See, e.g.*, Hewlett-Packard Co. v. Oracle Corp., 239 Cal. App. 4th 1174, 1196 (2015); Grewal v. Jammu, 191 Cal. App. 4th 977, 944-1003 (2011).

47 *See, e.g.*, Felix Shafir & Jeremy Rosen, *California's Anti-SLAPP Law Is Not Systematically Abused*, Law360 (June 30, 2016), http://www.law360.com/articles/812761/california-s-anti-slapp-law-is-not-systematically-abused.

48 Hariri v. Amper, 854 N.Y.S.2d 126, 128 (N.Y. App. Div. 2008).

49 Elizabeth Troup Timkovich, *Risk of SLAPP Sanction Appears Lower for Internet Identity Actions in New York than in California,* 74-APR N.Y. St. B.J. 40, 40 (2002) [hereinafter *Risk of SLAPP Sanction*]; *see also* London Wright-Pegs, Comment, *The Media SLAPP Back: An Analysis of California's Anti-SLAPP Statute and the Media Defendant,* 16 UCLA Ent. L. Rev. 323, 330 (2009) [hereinafter *Media SLAPP Back*]; *Increasing SLAPP Protection*, *supra* note 43, at 1036-37.

50 Wilbanks v. Wolk, 121 Cal. App. 4th 883, 893 (2004).

51 Balzaga v. Fox News Network, LLC, 173 Cal. App. 4th 1325 (2009).

52 Equilon Enterprises v. Consumer Causes, Inc., 29 Cal.4th 53 (2002).

53 DuPont Merck Pharm. Co. v. Super. Ct., 78 Cal. App. 4th 562 (2000).

54 Hunter v. CBS Broad., Inc., 221 Cal. App. 4th 1510 (2013).

55 Dixon v. Super. Ct., 30 Cal. App. 4th 733 (1994).

56 *Terry*, 131 Cal. App. 4th 1534.

57 Averill v. Super. Ct., 42 Cal. App. 4th 1170 (1996).

property as well as to assist another of the owners' tenants with prosecuting a small claims court action against them.[58]

- Supervisors' litigation-related investigation into whether, and determination that, an employee was not entitled to a bonus for being bilingual.[59]
- Talk radio show hosts' disparaging remarks about a reality show contestant.[60]
- A community activist's campaign to persuade a city council to end pony rides and a petting zoo at a local farmers' market.[61]
- Husband and wife's alleged interference with the sale of a house through their purported disclosure, or threat to disclose, that a registered sex offender lived nearby.[62]
- Non-profit organization's demonstrations and public picketing in front of a fashion retailer's stores based on allegedly abusive working conditions.[63]
- Hospital's peer review proceedings that resulted in an injunction requiring a doctor to attend anger management classes and prohibiting him from bringing a firearm to a hospital.[64]
- A lawyer's pre-litigation demand letter on behalf of a client seeking to settle an anticipated lawsuit before it was filed.[65]

In sharp contrast, New York's anti-SLAPP law does not protect a broad category of wide-ranging activities. Instead, New York's statute applies only to "an action involving public petition and participation,"[66] which the New York law defines narrowly to include only those actions "brought by a public applicant or permittee" and which are "materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission."[67] The law likewise defines a "public applicant or permittee" narrowly to "mean any person who has applied for or obtained a permit, zoning change, lease, license, certificate or other entitlement for use or permission to act from any government body, or any person with an interest, connection or affiliation with such person that is materially related to such application or permission."[68]

Applying this narrow statutory language, New York courts have held that, for New York's anti-SLAPP statute to apply, a party "must [have] directly challenge[d] an application."[69] For example, a court held that the anti-SLAPP law did not apply where the parties trying to invoke the law were unaware of the application to the government when it was made and therefore "never participated in the application process in any manner."[70] Similarly, courts have held that the law does not apply "to a person who is entitled to engage in her proposed course of conduct without government permission or to a person who merely sought government funding for a project that could be financed privately."[71]

New York's anti-SLAPP law does bear some similarity to the scope of California's law in that it is not limited to statements made solely before a government body. For example, New York courts have found that challenges to a permit or an application that were made via the press or in public protests rather than directly to a government agency were protected under the law.[72] Thus, New York's law was held to apply to trespass allegations where the protestors trespassed on the plaintiff corporation's private property because their protests were designed to demand a meeting with the company's CEO to challenge the company's application for a renewal of its permit with a public agency.[73] As one court put it, allowing statements by critics of an application or permit to fall outside the law's scope "because they appeared in the newspaper and were not spoken directly to the public agency would be completely antithetical to the fundamental speech rights protected under the anti-SLAPP statute."[74]

But New York's anti-SLAPP law cannot apply to statements made to the public rather than to a public agency unless the communications "identify, at least in general terms, the application or permit being challenged or commented on," and are "substantially related to such application or permit."[75]

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58 *Briggs*, 19 Cal.4th at 1106.

59 Gallanis-Politis v. Medina, 152 Cal. App. 4th 600 (2007).

60 Seelig v. Infinity Broad. Corp., 97 Cal. App. 4th 798 (2002).

61 Angel v. Winograd, No. B261707, 2016 WL2756622 (Cal. Ct. App. May 9, 2016).

62 Cross v. Cooper, 197 Cal. App. 4th 357 (2011).

63 Fashion 21 v. Coal. for Humane Immigrant Rights of Los Angeles, 117 Cal. App. 4th 1138 (2004).

64 Kibler v. N. Inyo Cty. Local Hosp. Dist., 39 Cal.4th 192 (2006).

65 Malin v. Singer, 217 Cal. App. 4th 1283 (2013).

66 N.Y. Civ. Rights Law § 70-a(1) (McKinney 2016).

67 *Id.* § 76-a(1)(a).

68 *Id.* § 76-a(1)(b).

69 Guerrero v. Carva, 779 N.Y.S.2d 12, 21 (N.Y. App. Div. 2004), *see also* Silvercorp Metals, Inc. v. Anthion Management LLC, 948 N.Y.S.2d 895, 900 (N.Y. Sup. Ct. 2012); Harfenes v. Seat Gate Ass'n, Inc., 647 N.Y.S.2d 329, 332-333 (N.Y. Sup. Ct. 1995).

70 *Harfenes*, 647 N.Y.S.2d at 332; *see also* Getting Sued, *supra* note 3 at 194 ("[I]n 1995, the first judicial interpretation of the New York law took a very narrow view" of the law's scope to hold that the law did "not cover [a] citizen petitioning three years after an application process, even if the applicant was acting illegally without a permit").

71 Chandok v. Klessig, 632 F.3d 803, 819 (2d Cir. 2011); *accord Silvercorp Metals, Inc.*, 948 N.Y.S.2d at 89 ("An entity is not a 'public participant or permittee' in circumstances where a government process is optional" but the government process need not "be local in nature").

72 Duane Reade, Inc. v. Clark, No. 107438/03, 2004 WL 690191, at *6-*7 (N.Y. Sup. Ct. 2004); Street Beat Sportswear, Inc. v. Nat'l Mobilization Against Sweatshops, 698 N.Y.S.2d 820, 824 (N.Y. Sup. Ct. 1999).

73 Nat'l Fuel Gas Distrib. Corp. v. PUSH Buffalo, 962 N.Y.S. 2d 599, 561-62 (N.Y. App. Div. 2013).

74 *Duane Reade, Inc.*, 2004 WL 690191, at *6.

75 *Guerrero*, 779 N.Y.S.2d at 22.

For example, a court declined to apply the law to flyers that (1) never identified any particular application or permit that the plaintiffs had either sought or received and (2) never cited any agency proceedings where the defendants had opposed such an application or permit.[76] Similarly, another court declined to apply New York's law where the plaintiff had done little more than aggressively advocate for a particular agenda at public meetings of a public agency and took steps to sue the agency.[77] Another court found that New York's law could not apply because the statements in question simply challenged the accuracy of a communication to an agency.[78]

Furthermore, even where the statements in question are made directly to an agency, they must address matters within the scope of the agency's oversight or courts will not deem them to be materially related to a challenge to the application or permit under New York's anti-SLAPP statute.[79]

In short, unlike the sweeping scope of California's anti-SLAPP statute, the New York law's "narrow definition" of a SLAPP "is well suited to the paradigmatic situation where, for an example, a developer applies for a permit and retaliates against citizen opponents, but it fails to provide any broader protection for the right of petition."[80] As a result, New York's anti-SLAPP statute "covers only about half of all SLAPPs," and "may cover even less."[81]

2. In certain respects, New York's anti-SLAPP statute provides narrower procedural protections than California's law

The differences between the California and New York anti-SLAPP statutes extend beyond the breadth of each statute's scope. The laws also provide meaningfully different procedural protections.

For example, unlike California's anti-SLAPP law, which expressly requires courts to interpret it broadly,[82] the majority of New York courts have said New York's law must be construed narrowly.[83] Also, while California's law requires a court to strike a challenged claim as long as it falls within the anti-SLAPP statute's scope and the plaintiff cannot show a probability of prevailing on it,[84] New York's law is more limited in that it allows for dismissal or summary judgment only if the SLAPP has no substantial basis in law or is unsupported by a substantial argument for an extension, modification, or reversal of existing law.[85] Moreover, whereas California law stays discovery until the anti-SLAPP motion is ruled on (unless the plaintiff demonstrates good cause for targeted discovery),[86] New York's law contains no such provision.

New York's law resembles California's law to the extent that both laws permit those who prevail on their anti-SLAPP motions to recover reasonable attorney's fees.[87] However, whereas prevailing defendants are statutorily entitled to their reasonable attorney's fees under California's law,[88] New York's anti-SLAPP statute gives courts the discretion to not award such fees.[89] And if a New York court exercises its discretion to award fees, it may only do so "upon a demonstration that the action involving public petition and participation was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law."[90] No such showing is required to recover fees under California's law.[91]

3. New York's anti-SLAPP law affords broader remedies than does California's

While New York's anti-SLAPP statute is significantly narrower than California's statute in the many ways described above, the New York law is broader in one material respect: it offers a more comprehensive range of remedies in response to a SLAPP.

To begin with, even if a SLAPP is not dismissed under New York's anti-SLAPP law and therefore proceeds to the merits, the plaintiff who filed the SLAPP may only recover damages if, "in addition to all other necessary elements," the plaintiff "establishe[s] by clear and convincing evidence that any communication which gives rise to the action was made with knowledge of its falsity or with reckless disregard of whether it was false, where the truth or falsity of such communication is material to the cause of action at issue."[92] California's statute includes no such protection. Furthermore, unlike California's law, New York's anti-SLAPP statute allows for the recovery of both compensatory and punitive damages "upon an additional demonstration that the action involving public petition and participation was commenced for the purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition, or

76 *Id.*

77 *Hariri*, 854 N.Y.S.2d at 130.

78 *Silvercorp Metals, Inc.*, 948 N.Y.S.2d at 901.

79 Clemente v. Impastato, 736 N.Y.S.2d 281, 281-82 (N.Y. App. Div. 2002); Niagara Mohawk Power Corp. v. Testone, 708 N.Y.S.2d 527, 530-31 (N.Y. App. Div. 2000).

80 *Increasing SLAPP Protection*, *supra* note 43 at 1037.

81 Getting Sued, *supra* note 3, at 194.

82 Cal. Civ. Proc. Code § 425.16(a).

83 *E.g.*, *Hariri*, 854 N.Y.S.2d at 129-130; *Guerrero*, 779 N.Y.S.2d at 21; *but see* T.S. Haulers, Inc. v. Kaplan, No. 7313/01, 2001 WL 1359106, at *2, n.4 (N.Y. Sup. Ct., May 2, 2001) (provisions of New York law defining a SLAPP "should be broadly construed" to achieve the legislative goal of full discussion).

84 Cal. Civ. Proc. Code § 425.16(b)(1).

85 N.Y. C.P.L.R. rules 3211(g), 3212(h) (Mckinney 2006); *see also Harfenes*, 647 N.Y.S.2d at 332 (New York's anti-SLAPP law allows "defendants in actions involving public petition and participation to obtain quick dismissal or summary judgment unless the plaintiff can demonstrate that 'the cause of action has a substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law'").

86 Cal. Civ. Proc. Code § 425.16(g).

87 N.Y. Civ. Rights Law § 70-a(1)(a); Cal. Civ. Proc. Code § 425.16(c)(1).

88 Ketchum v. Moses, 24 Cal.4th 1122, 1131 (2001).

89 *Nat'l Fuel Gas Distrib. Corp.,* 962 N.Y.S.2d at 562.

90 N.Y. Civ. Rights Law § 70-a(1)(a).

91 Cal. Civ. Proc. Code § 425.16(c)(1).

92 N.Y. Civ. Rights Law § 76-a(2).

association rights."[93] Professors Pring and Canan—whose research sparked the momentum toward anti-SLAPP legislation—saw this as "a solid reform," a "commendable step forward in procedures," but one "not without its compromises and limitations."[94]

II. Federal Anti-SLAPP Legislation

The California and New York anti-SLAPP laws are just two of the 28 state anti-SLAPP statutes, and many of these laws significantly differ from one another.[95] But the California and New York anti-SLAPP statutes offer a particularly apt illustration of how these types of laws differ across the country because California's law "is one of the broadest" in the United States[96] whereas New York's law is among the narrower laws.[97]

States throughout the country have either enacted laws that differ significantly in the breadth of protection they afford against SLAPPs or have failed to pass any anti-SLAPP legislation; this uneven patchwork of state legislation undermines efforts to effectively deter SLAPPs.[98] These variations can create an incentive for plaintiffs to forum shop and file suit in the states with either no anti-SLAPP protections or weaker protections.[99] As professors Pring and Canan put it, a federal anti-SLAPP law "would be a great step forward, given the very uneven results" produced by the differences between anti-SLAPP laws "from state to state."[100]

Consequently, a host of organizations—ranging from non-profit corporations to businesses, industry organizations, and trade associations—have supported the enactment of a federal anti-SLAPP statute to provide consistent protection throughout the country for free speech and petition rights. For some time, Congress preferred to let the states take the lead in enacting anti-SLAPP legislation.[101] But in recent years, Congress has increasingly shown an interest in adopting a federal anti-SLAPP law.

In 2009, Representative Steve Cohen of Tennessee introduced a federal anti-SLAPP bill—the Citizen Participation Act—which sought to provide a way for "SLAPPs to be quickly identified and dismissed before their costs can grow to excessive amounts."[102] The bill garnered a few cosponsors but ultimately stalled without even receiving a committee hearing.[103]

In the intervening years, however, the momentum for a federal anti-SLAPP bill has continued to grow. Thus, in May 2015, Representative Blake Farenthold of Texas introduced the "SPEAK FREE Act," which proposes the adoption of a federal anti-SLAPP law.[104] In May 2015, the House of Representatives referred this federal anti-SLAPP bill to the House Judiciary Committee, which in turn referred the bill to the Subcommittee on the Constitution and Civil Justice a month later.[105] This subcommittee held a hearing on the bill in June 2016.[106]

The SPEAK FREE Act would add several new statutory provisions to Title 28 of the United States Code.[107] Many of these provisions resemble California's broad anti-SLAPP statute far more than New York's narrower law. One of the proposed provisions—28 U.S.C. § 4202—would allow a defendant to file a "special motion to dismiss" a SLAPP suit in federal court.[108] Unlike New York's narrow law (but like California's broad one), this proposed statute defines a SLAPP in broad terms as any "claim" that "arises from an oral or written statement or other expression by the defendant that was made in connection with an official proceeding or about a matter of public concern."[109] Likewise, another of the proposed provisions—28 U.S.C. § 4208—would broadly define a "matter of public concern" to mean issues "related" to "health or safety," "environmental, economic, or community well-being," "the government," "a public official or public figure," or "a good, product, or service in the marketplace."[110] And like California's law, H.R. 2304 expressly provides that the federal anti-SLAPP law "shall be construed

93 *Id.* §§ 70-a(1)(b), (1)(c).

94 Getting Sued, *supra* note 3, at 195.

95 *See, e.g.*, *SLAPP 2.0*, *supra* note 18, at 10137-38 (examining significant variations among state anti-SLAPP statutes); *Increasing SLAPP Protection*, *supra* note 43, at 1036-44 (same); Getting Sued, *supra* note 3, at 191-201 (same).

96 *Risk of SLAPP Sanction*, *supra* note 49, at 43.

97 *See Media SLAPP Back*, *supra* note 49, at 330; *Increasing SLAPP Protection*, *supra* note 43, at 1036-44.

98 *See* Carson Hilary Barylak, Note, *Reducing Uncertainty In Anti-SLAPP Protection*, 71 Ohio State L.J. 845, 849 (2010).

99 *See id.* at 849-54 (addressing risk of forum shopping among SLAPP plaintiffs); Eric Goldman, Law Professor Letter in Support of SPEAK FREE Act (Sept. 16, 2005), http://digitalcommons.law.scu.edu/historical/1047/ (explaining that the "patchwork" of state anti-SLAPP laws "allows 'forum shopping' by plaintiffs, who can file abusive anti-speech lawsuits in jurisdictions where anti-SLAPP protections are absent or weak").

100 Getting Sued, *supra* note 3, at 190.

101 *Id.*

102 Jesse J. O'Neill, Note, *The Citizen Participation Act Of 2009: Federal Legislation As An Effective Defense Against SLAPPs,* 38 B.C. Envtl. Aff. L. Rev. 477, 478 (2011) [hereinafter *Citizen Participation Act*] (citing H.R. 4264, 111th Cong. (2009)).

103 *Id.* at 495-96.

104 H.R. 2304, 114th Cong. (2015). The SPEAK FREE Act stands for "Securing Participation, Engagement, and Knowledge Freedom by Reducing Egregious Efforts Act of 2015." H.R. 2304 § 1.

105 *H.R. 2304: All Actions Except Amendments*, Congress.gov, https://www.congress.gov/bill/114th-congress/house-bill/2304/all-actions-without-amendments?q=%7B%22search%22%3A%5B%22HR+2304%22%5D%7D&resultIndex=1.

106 *Examining H.R. 2304, the "SPEAK FREE Act": Hearing on H.R. 2304 Before the House Subcommittee on the Constitution and Civil Justice of the House Committee on the Judiciary*, 114th Conf. (2016), https://judiciary.house.gov/wp-content/uploads/2016/06/114-82_20522.pdf [hereinafter SPEAK FREE Act Hearing].

107 H.R. 2304 § 2(a).

108 *Id.* (citations omitted).

109 *Id.* (citations omitted).

110 *Id.* (citations omitted).

broadly to effectuate the purpose and intent" of the SPEAK FREE Act.[111]

Additionally, much as is the case under California's anti-SLAPP statute, proposed § 4202(a) provides that, if the defendant can make a "prima facie showing that the claim at issue" arises from such activities, then the federal anti-SLAPP motion "shall be granted and the claim dismissed with prejudice, unless the responding party demonstrates that the claim is likely to succeed on the merits, in which case the motion shall be denied."[112] Moreover, much like California's law, another proposed provision—28 U.S.C. § 4203—provides that, when a federal anti-SLAPP motion is filed, "discovery proceedings in the action shall be stayed until a final and unappealable order is entered on such motion unless good cause is shown for specified discovery."[113]

Also, just as California's law allows litigants to immediately appeal from orders granting or denying anti-SLAPP motions, the federal anti-SLAPP bill would provide parties with the right to immediately appeal from an order granting or denying a federal anti-SLAPP motion. It would do so both by adding a new statutory provision—28 U.S.C. § 4204—codifying this right and by amending an existing statute—28 U.S.C. § 1292(a)—to permit such interlocutory appeals.[114] Furthermore, much like defendants are automatically entitled to their reasonable attorney's fees under California's law if they prevail on their state anti-SLAPP motions, the federal bill would add a provision—28 U.S.C. § 4207—requiring a court to award the party who prevails on a federal anti-SLAPP motion "litigation costs, expert witness fees, and reasonable attorneys fees."[115]

The current version of the SPEAK FREE Act is not limited to federal causes of action. Nor is it confined to only those state-law SLAPPs that are filed in federal court. Instead, the federal bill currently proposes the addition of a new removal provision—28 U.S.C. § 4206—that would allow a defendant to remove to federal court a "civil action in a State court that raises a claim" defined as a SLAPP by the federal statute.[116] Ordinarily, a claim can be removed to federal court only if the grounds for removal appear on the face of a well-pleaded complaint.[117] But, in proposed § 4206, the federal anti-SLAPP bill would override this rule by stating that the "ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal."[118]

This removal provision is among the SPEAK FREE Act's greatest benefits because, by permitting the targets of state SLAPP suits to remove to federal court where they can secure the protections of the federal anti-SLAPP statute, the SPEAK FREE Act would ensure that these defendants are no longer at the mercy of SLAPP plaintiffs' ability to choose to file their lawsuits in states where anti-SLAPP laws are either absent or weak.[119] In effect, the defendants would have the power to decide for themselves whether they are better off removing the SLAPP to federal court to take advantage of the federal anti-SLAPP law, or whether they instead "prefer the options available in state court" and choose "to remain there as a strategic choice."[120]

The SPEAK FREE Act also includes a clause that would expressly save state anti-SLAPP laws from federal preemption.[121] This "non-preemption provision" would "permit states to continue to play their role as the laboratories of American democracy, allowing Congress to learn from both the successes and pitfalls of various state anti-SLAPP regimes—with an eye toward not just the initial drafting of federal anti-SLAPP legislation, but improving it going forward."[122]

Today, the SPEAK FREE Act has 32 cosponsors—including Republicans and Democrats who hail from a wide range of states including Arizona, California, Colorado, Massachusetts, Michigan, Minnesota, New York, Pennsylvania, Utah, Virginia, Wisconsin, and Texas.[123] In other words, this federal bill reportedly enjoys "broad bipartisan support."[124] Such bipartisan support "makes sense" because "[f]ree speech isn't a partisan issue; it affects

111 H.R. 2304 § 2(d).

112 H.R. 2304 § 2(a) (citations omitted).

113 *Id*. (citations omitted).

114 *Id.*; H.R. 2304 § 2(b)(2).

115 H.R. 2304 § 2(a). The "Federal Government and the government of a State, or political subdivision thereof," are not permitted to recover fees under costs or fees under this provision. *Id.*

116 *Id.*

117 *E.g.*, Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63 (1987) (preemption defense "does not appear on the face of a well-pleaded complaint" and therefore does "not authorize removal to federal court").

118 *Id.*; *see also* Vaden v. Discover Bank, 556 U.S. 49, 59, n. 9 (2009) (a statute "overrides the well-pleaded complaint rule" where it provides that "'the ground for removal . . . need not appear on the face of the complaint but may be shown in the petition for removal'" (internal citation omitted)). This provision is not unprecedented as Congress has occasionally overridden the well-pleaded complaint rule in other removal provisions. *See, e.g.*, *id.* (recognizing that 9 U.S.C. § 205's removal procedure "overrides the well-pleaded complaint rule"); Mesa v. California, 489 U.S. 121, 136-37 (1989) (recognizing that 28 U.S.C. § 1442(a)(1)'s removal provision "serves to overcome the 'well-pleaded complaint' rule").

119 *See Citizen Participation Act*, *supra* note 102, at 505-06 (describing the benefits of the similar removal provision that had been included in the Citizen Participation Act of 2009).

120 *Id.*

121 H.R. 2304 § 2(c).

122 Colin Quinlan, Note, Erie *And The First Amendment: State Anti-SLAPP Laws In Federal Court After* Shady Grove, 114 Colum. L. Rev. 367, 405 (2014).

123 H.R. 2304: *Cosponsors*, Congress.gov, https://www.congress.gov/bill/114th-congress/house-bill/2304/cosponsors?q=%7B%22search%22%3A%5B%22HR+2304%22%5D%7D&resultIndex=1.

124 SPEAK FREE Act Hearing, *supra* note 106, at 2 (statement of Representative Trent Franks, Chairman, House Subcommittee on the Constitution and Civil Justice of the House Committee on the Judiciary).

everyone."[125] Indeed, conservatives have a history of joining with liberals to favor anti-SLAPP legislation—"again showing this is not a red or a blue state issue," but rather "a speech issue that transcends both parties and strikes at the heart of patriotism."[126]

In the words of Representative Trent Franks of Arizona (Chairman of the House Subcommittee on the Constitution and Civil Justice—the subcommittee that held a hearing on the SPEAK FREE Act), without sufficient protections for vital First Amendment rights, "all other rights are at grave risk."[127] Consequently, as pointed out by professors Pring and Canan, whose landmark research did so much to bring the insidious nature of SLAPP lawsuits to the public's attention, although state anti-SLAPP legislation has taken significant strides towards protecting the rights to petition and free speech from harassment by litigation, the safeguards afforded by these state laws is "very uneven" and therefore "it is time for congressional action as well."[128]

III. Conclusion

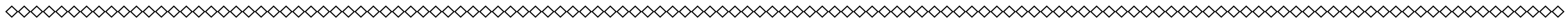
Each year, more and more people across the country are sued for speaking out, but these targets of SLAPP lawsuits often find themselves with little recourse—either because they are at the mercy of a patchwork of state anti-SLAPP laws that offer highly uneven protection or, worse yet, because they find themselves in a jurisdiction with no anti-SLAPP statute. Congress should step in to enact a robust federal anti-SLAPP law to protect citizens' fundamental rights to free speech and petition for redress of grievances.

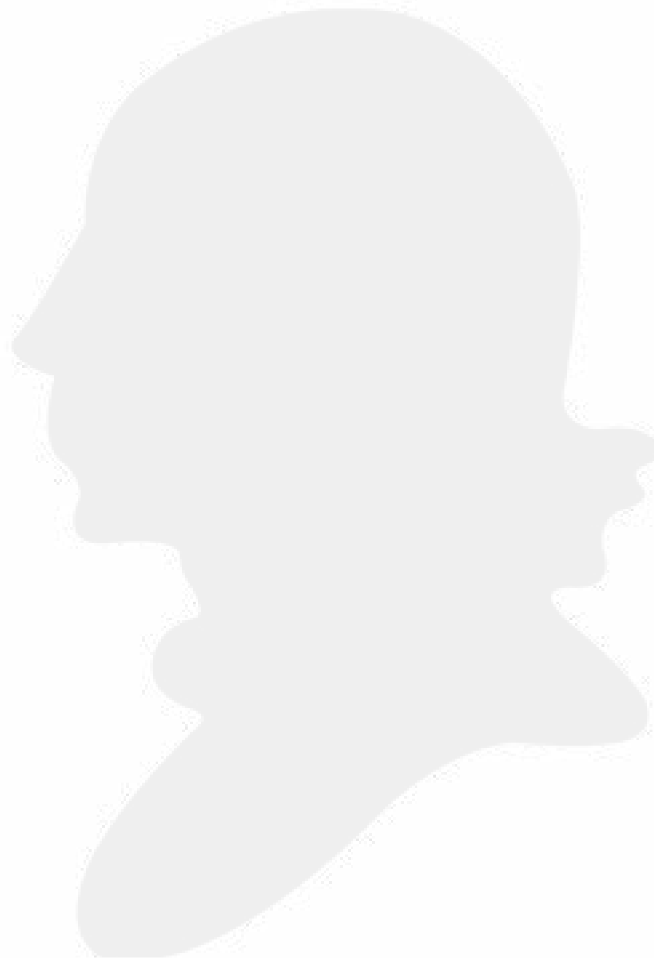
125 Eric Goldman, *59 Legal Scholars Sign Letter Supporting SPEAK FREE Act To Create Federal Anti-SLAPP Law* Forbes (Sept. 16, 2015), http://www.forbes.com/sites/ericgoldman/2015/09/16/59-legal-scholars-sign-letter-supporting-speak-free-act-to-create-federal-anti-slapp-law/#6e3819641aff.

126 *Texas Citizens Participation Act*, *supra* note 15.

127 SPEAK FREE Act Hearing, *supra* note 106, at 1-2.

128 Getting Sued, *supra* note 3, at 190.





New Applications of Section 2 of the Voting Rights Act to Vote Denial Cases

By Maya Noronha

Note from the Editor:

This article discusses recent federal appellate court decisions with respect to Section 2 of the Voting Rights Act, criticizing new applications of that law.

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 links to other perspectives on the issue, including ones opposed to the position taken in the article. We also invite responses from our readers. To join the debate, please email us at info@fedsoc.org.

• Janai S. Nelson, *The Causal Context of Disparate Vote Denial*, 54 B.C. L. Rev. 579 (2013), http://www.naacpldf.org/files/case_issue/The%20Causal%20Context%20of%20Disparate%20Vote%20Denial.pdf.

• Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 Harv. C.R.-C.L. L. Rev. 439 (2015), http://harvardcrcl.org/wp-content/uploads/2015/11/Applying-Section-2-to-the-New-Vote-Denial.pdf.

• Note, Kathleen M. Stoughton, *A New Approach to Voter ID Challenges: Section 2 of the Voting Rights Act*, 81 Geo. Wash. L. Rev. 293 (2013), http://www.gwlr.org/wp-content/uploads/2013/01/Stoughton_81_1.pdf.

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Introduction

Challengers to voting laws in North Carolina, Ohio, Virginia, and Wisconsin recently raised claims under Section 2 of the Voting Rights Act.[1] In the past, plaintiffs had argued that a Section 2 violation had occurred when a new election law (such as redistricting legislation) *diluted* the votes of minorities, but the complaints in this recent batch of cases allege under Section 2 that members of minority groups had their right to vote *denied*,[2] rarely claimed prior to 2013.[3] While vote dilution involves a reduction in the impact of votes already cast, vote denial occurs when an eligible voter does not even have the opportunity to cast that vote.

Plaintiffs in *Ohio Democratic Party v. Husted* challenged Ohio's elimination of "Golden Week," which had allowed voters to register and conduct early voting within the same seven days.[4] In *NAACP v. McCrory*[5] and *League of Women Voters v. North Carolina*[6] (later consolidated with *McCrory*), plaintiffs sought to invalidate several changes to North Carolina election procedures, such as new voter ID requirements, reduced early voting, and the end of out-of-precinct voting, pre-registration, and same day registration. In *Lee v. Virginia State Board of Elections*, Virginia's voter ID requirement was challenged.[7] Similarly, Wisconsin's voter ID law was challenged in *Frank v. Walker*.[8] Upon appeal, the Fourth, Sixth, and Seventh Circuits addressed how to analyze these Section 2 vote denial claims.

The Sixth and Seventh Circuits, along with the Fourth Circuit in *Lee*, upheld voting law reforms in Ohio, Wisconsin, and Virginia against challenges under Section 2. However, another Fourth Circuit panel preliminarily enjoined North Carolina's laws[9] and ultimately invalidated them.[10] These differing results among different panels of the Fourth Circuit (Judges Paul V. Niemeyer, Dennis W. Shedd, and G. Steven Agee were on the *Lee* panel, and Judges James A. Wynn, Diana Gribbon Motz, and Henry F. Floyd were on the *League of Women Voters* panel) can be explained not just by the differences among the provisions of the state voting laws, but also by the different ways the panels applied Section 2. While the *Lee* court's analysis resembled that of the other circuits,

1 42 U.S.C. § 1973 (current version at 52 U.S.C. § 10301) (as amended by Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (1982)).

2 *See* Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. Rev. 688 (2006).

3 997 F. Supp. 2d 322, 346 (M.D.N.C. 2014).

4 No. 15-01802 (6th Cir. Aug. 23, 2016).

5 No. 14-1845 (4th Cir. July 29, 2016).

6 No. 14-1845 (4th Cir. Oct. 1, 2014). Because the ultimate holding in *McCrory* rested on discriminatory intent, the prior ruling in *League of Women Voters* on the preliminary injunction better demonstrates how the panel applied Section 2.

7 No. 16-1605 (4th Cir. Dec. 13, 2016).

8 No. 11-01128 (7th Cir. Oct. 6, 2014).

9 *League of Women Voters*, No. 14-1845 at 56.

10 *McCrory*, No. 14-1845 at 77-78.

the *League of Women Voters* court took a similar tack to the district courts in Wisconsin and Ohio.

A recent trend in vote denial cases involves plaintiffs challenging voting law reforms using Section 2 as a substitute for Section 5.[11] Characteristics of recent Section 2 analysis include: (1) requiring plaintiffs to prove less of a burden on voting rights; (2) relying only on disparate impact evidence, as opposed to a showing of causation; (3) using retrogression to determine the impact of reforms on voters; (4) ignoring the state actor requirement; and (5) calling for more involvement of the judiciary in reviewing state voting laws.

I. Section 2 v. Section 5

In the Civil Rights era, the federal government and individual plaintiffs used the Voting Rights Act to address racially discriminatory voting laws passed in certain states. The Section 5 preclearance provision was enacted to prevent Southern states from quickly passing new voting laws before they could be fully addressed in lawsuits. While Section 2 only permits challenges to voting laws that have already been enacted, Section 5 requires that a voting law be precleared by the D.C. Circuit or the Justice Department Voting Rights Section before taking effect. Section 2 places the burden on the plaintiff to demonstrate that the voting law is discriminatory, but Section 5 puts the onus on the state to defend its legislation. Section 5 applies to certain jurisdictions with a history of voting tests and with low voter registration and turnout in the 1960s. The U.S. Supreme Court's 2013 decision in *Shelby County v. Holder* invalidated the Section 4 formula used to determine which jurisdictions are covered under Section 5, rendering the Section 5 preclearance requirement inoperable.[12]

Section 2 is an inappropriate substitute for Section 5 for a number of reasons. First, Section 5 was initially set to expire after five years. It was intended as a temporary stopgap to address "first generation barriers" to voting.[13] Consequently, the formula identifying covered jurisdictions was tied to states which had voting tests or lower minority turnout and voter registration in the 1960s and 1970s. The requisite elements of a Section 5 violation were easier to prove than those of a Section 2 violation. When the Voting Rights Act was passed, Section 5 was needed because Section 2 was insufficient to combat the series of discriminatory Southern laws faced by minorities in the 1960s and 1970s. Additionally, Section 5 preclearance has been recognized as a procedure that "imposes substantial federalism costs."[14] The federal government's intrusion on state sovereignty was justified by deep-seated discrimination in states where minority voter registration and turnout was exceedingly limited in the 1960s. The nexus of preclearance coverage and low minority political participation and success no longer exists.[15]

II. Burden v. Inconvenience

For a court to find a vote denial under Section 2 of the Voting Rights Act, the plaintiff must prove that the challenged voting law imposes a burden. There is a burden when members of a minority group have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.[16]

In four of the five recent voting rights cases described above, the appellate courts found that a state's failure to accommodate voter preferences or simply inconveniencing voters falls short of the vote denial prohibited by Section 2. The Fourth Circuit in *Lee* noted that the Supreme Court has held that a "minor inconvenience of going to the registrar's office to obtain an ID does not impose a substantial burden,"[17] and also affirmed the district court's opinion that, "while the law added 'a layer of inconvenience to the voting process, it appear[ed] to affect all voters equally.'"[18]

The Sixth and Seventh Circuits distinguished between states failing to accommodate voters' preferences and erecting barriers to voting. The Sixth Circuit found that "some African-American voters *may prefer* voting on Sundays, or avoiding the mail, or saving on postage, or voting after a nine-to-five work day," but held that the lower court inappropriately characterized those preferences as sufficient to establish a burden under Section 2.[19] The Seventh Circuit found that a "matter of choice" does not rise to a Section 2 violation.[20] Unless the state "makes it needlessly hard to" vote, some level of inconvenience that still permits voters to cast ballots is permissible.[21] The Seventh Circuit found that Section 2 would be violated if the government gave blacks or Latinos less opportunity than whites to vote, but that the fact that "these groups are less likely to *use* that opportunity" because of lower incomes is not a violation of Section 2.[22] Like the Sixth Circuit, the Seventh Circuit took a pragmatic approach. Because any change to election laws is likely to affect some portion of the electorate, these courts would limit Section 2 violations to significant burdens.

The Fourth Circuit panel in *League of Women Voters* took a sharply different approach. That court reversed the finding of the court below that the burden of eliminating same-day registration

11 J. Christian Adams, *Transformation: Turning Section 2 of the Voting Rights Act into Something It Is Not*, 31 Touro L. Rev. 297 (2015) (criticizing the conversion of Section 2 into Section 5); Roger Clegg and Hans A. von Spakovsky, *"Disparate Impact" and Section 2 of the Voting Rights Act*, Heritage Legal Memorandum #119 (2014), http://www.heritage.org/research/reports/2014/03/disparate-impact-and-section-2-of-the-voting-rights-act. *But see* Tokaji, *supra* note 2 (advocating for a Section 2 disparate-impact test). *See also* Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After* Shelby County, 115 Colum. L. Rev. 2143 (2015).

12 133 S.Ct. 2612 (2013).

13 *Id*. at 2625.

14 *Id.* at 2621 (quoting Northwest Austin Municipal Util. Dist. No. One v. Holder, 557 U.S. 193, 202 (2009)).

15 *See Shelby County*, 133 S. Ct. at 2619.

16 52 U.S.C. § 10301(b).

17 *Lee*, No. 16-1605 at 19 (referencing Crawford v. Marion County Election Bd., 553 U.S. 181, 198 (2008)).

18 *Id.* at 12.

19 *Husted*, No. 15-01802 at 13.

20 *Frank*, No. 11-01128 at 23.

21 *Id.*

22 *Id.*

was minimal because voters could still register and vote by mail.[23] The Fourth Circuit relieved the plaintiffs of the requirement of actually showing a denial of the right to vote, finding instead that "nothing in Section 2 requires a showing that voters cannot register or vote under any circumstance."[24]

III. Causation v. Correlation

Section 2 prohibits states from imposing a voting qualification "which results in" the denial of the vote.[25] After a court determines that a burden is present, it proceeds to the second step of analysis which deals with causation. In this step, the court asks whether the burden was caused by social or historical conditions that produce discrimination.[26] The Sixth Circuit explained that the analysis is "not just whether social and historical conditions 'result in' a disparate impact, but whether the challenged voting standard or practice *causes* the discriminatory impact as *it* interacts with social and historical conditions."[27] The "results" test is, thus, "a requirement of causal contribution by the challenged standard or practice itself."[28]

In order to find a Section 2 violation, the court must find a causative nexus between the change in law and the burden on minority voting. In their review of North Carolina's voting laws, the Fourth Circuit granted an injunction because "the disproportionate impacts of eliminating same-day registration and out-of-precinct voting are clearly *linked* to relevant social and historical conditions."[29] The Sixth Circuit, on the other hand, held that Section 2's causation requirement "cannot be construed as suggesting that the existence of a disparate impact, in and of itself, is sufficient to establish the sort of injury that is cognizable and remediable under Section 2."[30] The Fourth Circuit's *League of Women Voters* panel seems to reduce Section 2's requirement of causation to just a link or correlation between voting statistics and voting laws, while the Sixth Circuit requires the full-fledged causation that Section 2 calls for.

IV. The State Actor v. Other Factors

Section 2 only prohibits voting restrictions improperly "imposed or applied by any State or political subdivision."[31] The Seventh Circuit emphasized that "a state-created obstacle" is mandatory for a finding that a Section 2 violation occurred.[32] The district court in Wisconsin struck down the state voting law based on its findings that minorities are disproportionately likely to live in poverty, and that that fact can be traced to racial discrimination in education, employment, and housing.[33] However, the Seventh Circuit reversed because "[t]he judge did not conclude that the state of Wisconsin has discriminated in any of these respects . . . [and] units of government are responsible for their own discrimination but not for rectifying the effects of other persons' discrimination."[34]

V. Present v. Past

The tension between the traditional understanding of Section 2 and the new post-*Shelby* approach of voting rights plaintiffs can be seen most clearly in a comparison of two opinions in the North Carolina cases. The Middle District of North Carolina upheld North Carolina's voting changes, but the Fourth Circuit granted a preliminary injunction to the challengers. The lower court framed the inquiry as whether minorities had less of an opportunity to vote than whites under the new election law scheme, as courts have long done in their Section 2 analyses.[35] It held that "Section 2 does not incorporate a 'retrogression' standard," and that the court therefore was "not concerned with whether the elimination of [same-day registration and other features] will worsen the position of minority voters in comparison to the preexisting voting standard, practice or procedure—a Section 5 inquiry."[36]

But the appellate court compared whether minorities had less of an opportunity to vote than they had prior to the change in voting laws. North Carolina had eliminated early voting, pre-registration, out-of-precinct voting, and same-day registration, and the Fourth Circuit compared minorities' access to voting under the new procedures with the access they had enjoyed under the preexisting voting procedures in its Section 2 analysis.[37] The Fourth Circuit even criticized the district court for committing "grave errors of law" by failing to apply what would ordinarily be considered Section 5 inquiries when conducting a Section 2 analysis.[38] Notably, the Fourth Circuit cited *Reno v. Bossier Parish School Board*, a Section 5 case, to conclude that Section 2 analysis "necessarily entails a comparison" and requires "some baseline with which to compare the practice."[39]

VI. Deference v. Entanglement

The Sixth Circuit expressed grave concerns that courts using Section 2 to strike down laws reducing voting hours and making other voting changes would result in a "federal floor" or "one-way ratchet" imposed by federal courts on state governments.[40] If that were to happen, once any increase in voting periods or expanded

23 No. 14-1845 at 41.

24 *Id.* at 42.

25 52 U.S.C. § 10301(a).

26 *See Thornburg v. Gingles*, 478 U.S. 30 (1986)(applying a multi-factored test to a Section 2 inquiry into the requisite "social and cultural conditions").

27 *Husted*, No. 15-01802 at 7 (emphasis added).

28 *Id.* at 24.

29 *League of Women Voters*, No. 14-1845 at 41 (emphasis added).

30 *Husted*, No. 15-01802 at 23.

31 52 U.S.C. § 10301(a).

32 *Frank*, No. 11-01128 at 23.

33 Frank v. Walker, 17 F. Supp. 3d 837, 877 (E.D.Wisc. 2014).

34 *Frank*, No. 11-01128 at 23.

35 NAACP v. McCrory, 997 F.Supp.2d 322, 324 (M.D.N.C. 2014).

36 *Id.* at 351-52.

37 *McCrory*, No. 14-1845 at 38.

38 *Id.* at 36.

39 *Id.* at 37.

40 *Husted*, No. 15-01802 at 2.

procedures is passed, states would only be allowed to "add to but never subtract from" that baseline.[41] Any reforms reining in expansive laws would be struck down by the courts.

Plaintiffs in Ohio's *Husted* case and North Carolina's *McCrory* and *League of Women Voters* cases challenged the reduction of early voting days: Ohio had reduced 35 days of early voting to 29, and North Carolina had reduced 17 days of early voting to 10.[42] According to the district court's logic in its *Husted* decision, because Ohio once allowed 35 early voting days, the legislature should be barred from reducing the number of early voting days even if it had legitimate policy reasons for the reform, such as reduced election administration burdens or counteracting same day registration and early voting fraud.[43] Future, differently composed legislatures could never reduce early voting, even if only by one week (as North Carolina did). The judiciary would have the power to cement certain election rules on the books forever. The Sixth Circuit's ultimate concern was that "states would have little incentive to pass bills expanding voting access if, once in place, they could never be modified in a way that might arguably burden some segment of the voting population's right to vote."[44] Notably, many states—including New York and Connecticut—do not allow for *any* early voting, so allowing a period of 29 or even 10 early voting days is actually a generous provision comparatively.[45] Determining whether an early voting period is sufficient involves courts intimately in crafting voting laws. For this reason, the Sixth Circuit was concerned with judges becoming "entangled, as overseers and micromanagers, in the minutiae of state election processes."[46] Instead, the court recommended "[p]roper deference to state legislative authority."[47]

VII. Conclusion

Since the Supreme Court's decision in *Shelby County* suspended the Voting Rights Act's Section 5 preclearance in 2013, plaintiffs have taken a new approach to voting rights challenges by filing vote denial claims under Section 2. Some courts have been persuaded to find Section 2 violations in cases involving mere voter inconvenience, disparate impact, and comparisons of minority voting before and after the voting law changes rather than comparisons of minority and white voting under the new laws. What results from such analyses is, according to one Sixth Circuit judge, "astonishing" precedent[48] and an open door for more judicial involvement in voting law.

41 *Id.*

42 *Id.*

43 *Husted*, No. 15-01802 at 6. State legislatures might also reasonably conclude that early voting has a negligible impact on increasing voter access and turnout since early voters tend to vote anyway, as several studies have shown. Barry C. Burden, David T. Canon, Kenneth R. Mayer, and Donald P. Moynihan, *Election Laws, Mobilization, and Turnout: The Unanticipated Consequences of Election Reform*, 58 American Journal of Political Science 95 (2013); Joseph D. Giammo, and Brian J. Brox, *Reducing the Costs of Participation*, 63 Political Research Quarterly 295 (2010); Paul Gronke, Eva Galanes-Rosenbaum, and Peter A. Miller, *Early Voting and Turnout*, 40(4) Political Science and Politics 639 (2007); Jeffrey A. Karp and Susan A. Banducci, *Absentee Voting, Mobilization, and Participation*, 29 American Politics Research 183 (2001). *See also* Reid J. Epstein, *Early Voting Didn't Boost Overall Election Turnout, Studies Show*, Wall Street Journal (Dec. 30, 2016), http://www.wsj.com/articles/early-voting-didnt-boost-overall-election-turnout-studies-show-1483117610 (analysis of 2016 election).

44 *Husted*, No. 15-01802 at 20.

45 *Absentee and Early Voting,* National Conference of State Legislatures (Mar. 20, 2017), http://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx.

46 *Husted,* No. 15-01802 at 2.

47 *Id.* at 3.

48 *Id.* at 2.

Presidential Nominees and Foreign Influence: Mitigating National Security Risks

By Sean M. Bigley

Note from the Editor:

This article describes the procedures involved in determining whether to grant security clearances to presidential appointees, and argues that the Senate confirmation process is not the proper venue for security vetting.

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• Jason Rathod, *Not Peace, But a Sword: Navy v. Egan and the Case Against Judicial Abdication in Foreign Affairs*, 59 Duke L.J. 595 (2009), http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1447&context=dlj.

• Jeff Stein, *Despite Potential Conflicts of Interest in Asia, Commerce Appointee Wilbur Ross Will Get Confirmed First, Cleared Later*, Newsweek (Jan. 9, 2017), http://www.newsweek.com/donald-trump-appointees-security-clearances-540767.

• Susan Hennessey, *Ethics Rules Are National Security Rules*, Lawfare (Jan. 10, 2017), https://www.lawfareblog.com/ethics-rules-are-national-security-rules.

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Should a businessman with overseas interests and connections be barred from serving in the federal government? Should a policy expert with relatives in other countries be excluded from presidential appointment shortlists? What legal standards apply to such determinations, how are they applied, and by whom? Do current laws and investigative norms protect the American public from appointees whose overseas entanglements risk subjecting them to coercion or manipulation by foreign adversaries?

Questions like these raise what the national security community calls "foreign influence" concerns. Although it is worthy of careful consideration, the risk of foreign influence is often entirely mitigatable using standards promulgated under President Bill Clinton and in use government-wide since that time. The process of applying those standards is overseen by career government officials whose tenure transcends both Republican and Democratic administrations, and who have proven in the past their willingness to defend their prerogatives, even against the White House.[1] Their security determinations about a nominee can ultimately be overridden by the President, yet history provides no known precedent for such an action, and likely for good reason. The political fallout for any President would be catastrophic after the inevitable media leak.

Foreign entanglements are uniquely matters of national security, as opposed to matters of nominee suitability, a distinction discussed below. These national security matters are best resolved by the nation's security apparatus—which functions within the Executive Branch—and the extensive background investigation to which all presidential nominees submit before being granted security clearances.[2] The Supreme Court weighed in on this issue in a little-known 1988 case—*Department of the Navy v. Egan*. In *Egan*, the Court held that security clearance decisions were exclusively the purview of the Executive Branch[3] and reaffirmed "the generally accepted view that foreign policy was the province and responsibility of the Executive."[4] Although the case arose as one of statutory construction, the Court apparently

1 *See, e.g.*, Aaron Boyd, *White House Tech Advisor Denied Security Clearance*, Federal Times (Feb. 1, 2016), http://www.federaltimes.com/story/government/management/hr/2016/02/01/soltani-denied-clearance/79645394/. *See also* Email from Cassandra Butts to John Podesta, "Re: Security Clearance Issue," (Oct. 29, 2008), https://wikileaks.org/podesta-emails/emailid/11883 (published by Wikileaks; noting that the FBI denied an interim security clearance for unspecified reasons to Ben Rhodes, who later became President Obama's Deputy National Security Advisor, presumably after mitigating the FBI's concerns).

2 *See* Dept. of the Navy v. Egan, 484 U.S. 518, 529 (1988) (noting that personnel security determinations "must be made by those with the necessary expertise in protecting classified information").

3 *Egan*, 484 U.S. at 527.

4 *Id.* at 529 (quoting Haig v. Agee, 453 U.S. 280, 293-294 (1981)).

recognized that it had serious constitutional implications and, in an extraordinarily broad opinion, raised those matters sua sponte.

Over the past three decades, neither Republican nor Democratic Congresses have seen fit to legislatively neutralize *Egan*; it remains unclear whether such an effort would be an unconstitutional infringement on the President's Commander-in-Chief or appointment powers. Notwithstanding the absence of legislative action, however, some Senators are now attempting to override the spirit of *Egan* by purporting to condition their approval of key presidential nominees on issues like foreign influence that are fundamentally personnel security determinations.[5] The result is a blurring of the line between the Senate's constitutional "advice and consent" authority and the deference granted to the Executive Branch on matters of national security.

Below, I explore the framework of the security clearance process; why, despite certain flaws, it generally works; and how presidential nominees with overseas entanglements can obtain security clearances using the legal standards established by President Clinton. I also argue that the Senate's constitutional "advice and consent" authority with respect to nominees is appropriately limited by *Egan* to questions of nominee suitability instead of national security.

I. The Federal Government's Background Investigation System

A. Investigation

Processing for any prospective security clearance holder begins with the completion of Standard Form (SF) 86, the Questionnaire for National Security Positions.[6] The 127-page document, and the in-person questioning by federal agents that accompanies it, covers almost every conceivable issue pertaining to applicant judgment, reliability, and honesty. This includes some areas—such as substance abuse, dishonesty, and criminal history—covered in the general pre-employment suitability screenings that federal employers undertake by law apart from any security clearance investigations.[7] But it also includes numerous other areas like finances, blackmail potential, and misuse of information technology systems that are uniquely security concerns. Notably, security clearance investigations are designed to assess in great depth applicants' overseas connections: friends, family, property, bank accounts, investments or other personal assets, and business entanglements of any kind.

White House staff members and presidential appointees or nominees typically complete additional, more invasive screening questionnaires and, in some cases, a polygraph examination. The FBI's Special Inquiries Squad handles these cases and prepares comprehensive reports of investigation to present their findings to career adjudicators within the FBI and the Executive Office of the President's (EOP) Office of Security.

To prepare their reports of investigation, investigators review intelligence and law enforcement databases; assess any suspicious financial transactions;[8] compare the current SF-86 to past submissions for discrepancies; query the applicant's employers, colleagues, neighbors, associates, and friends; and interview the applicant at great length to further elucidate admitted issues or confront him or her with any areas of concern. Best practice is for investigators to develop their own sources of information, preventing the applicant from "guiding" the investigation by only providing references who will report positively about his or her attributes.

One of the most serious criticisms of the federal background investigation system is that it relies too much on applicant self-reporting.[9] In other words, government investigators only learn about certain issues if applicants choose to disclose them on the SF-86 form or during investigative interviews. There is merit in this argument, yet to-date little action has been taken to implement the recommendations of a 2014 presidential task force designed to examine the issue.[10] Fundamentally, the government has both a sword and a shield to combat falsified security clearance applications: prosecution under the federal false statements statute,[11] and cross-checking of information with human references and databases. The latter is only as effective as those performing the investigations, and many have raised concerns

5 *See, e.g.*, Lesley Wroughton and Patricia Zengerle, *Tillerson to Face Questions on Russian Ties at Confirmation Hearing*, Reuters (Jan. 11, 2017) http://www.reuters.com/article/usa-congress-tillerson-idUSL1N1F01XW (last accessed January 11, 2017).

6 Questionnaire for National Security Positions (Standard Form 86), https://www.opm.gov/forms/pdf_fill/sf86-non508.pdf (last accessed January 4, 2017).

7 5 CFR § 731 et seq. (noting that suitability assessments are designed to determine whether the hiring of a particular applicant would be detrimental to the integrity or efficiency of the federal service).

8 This is accomplished with the assistance of the "FINCEN"—the U.S. Treasury Department's Financial Crimes Enforcement Network, which keeps records of large cash deposits or withdrawals from U.S. financial institutions, as well as those which may be designed with the intent of "structuring" (i.e. avoiding tax reporting requirements by making multiple deposits of funds just under the $10,000 reportable limit).

9 *See* Suitability and Security Processes Review: Report to the President (Feb. 2014), https://www.whitehouse.gov/sites/default/files/omb/reports/suitability-and-security-process-review-report.pdf (last accessed January 10, 2017) (noting that an over-reliance on applicant self-reporting is caused primarily by local law enforcement agency non-cooperation in the federal background investigation process, combined with the inadequacy of counter-measures for detecting applicant falsifications).

10 *Id.*

11 18 U.S.C. § 1001. In recent years, the government has stepped up prosecutions for falsifying the security clearance application. *See, e.g.*, Press Release, Department of Justice, Maryland Resident Charged with Making False Statements and Submitting False Documents in Applications for Federal Jobs (March 16, 2011), https://www.justice.gov/opa/pr/maryland-resident-charged-making-false-statements-and-submitting-false-documents-applications (Maryland woman allegedly falsified her criminal and employment history); Press Release, U.S. Attorney's Office, Middle District of Florida, Government Employee Convicted Of Making False Statements (Sept. 30, 2015), https://www.justice.gov/usao-mdfl/pr/government-employee-convicted-making-false-statements (Florida man convicted of making false statements about his relationship with a foreign national); Press Release, U.S. Attorney's Office, Eastern District of Virginia, Former Fox News Commentator Pleads Guilty to Fraud (April 29, 2016), https://www.justice.gov/usao-edva/pr/former-fox-news-commentator-pleads-guilty-fraud (Maryland man convicted of falsifying a past career with the CIA in order to obtain new positions).

about the thoroughness and completeness of investigations undertaken by the nation's primary background investigations service provider, the Office of Personnel Management's National Background Investigations Bureau (OPM).[12] Once again, the criticisms do have merit; I have written previously about clear shortcomings in the federal background investigation process.[13] However, the general opinion within the personnel security community is that the FBI operates in a different league from the OPM. One of the chief reasons for this disparity in investigative quality likely stems from the difference in the two agency missions. The OPM is, at heart, a human resources functionary, while the FBI is primarily charged with building criminal cases.

Yet regardless of the shortcomings that plague the OPM and, to a much lesser extent, the FBI, it is doubtful that a Senate Committee hearing would achieve different results in borderline cases. After all, a nominee who lies to federal agents during a background investigation will have an added incentive—the specter of prosecution—to cover-up that lie during subsequent inquiries. The question is thus fundamentally which government body is best situated to ferret out and assess the relevancy of potential security issues: a panel of senators who may or may not have any familiarity with national security background investigations, or the federal law enforcement agency charged with detecting and apprehending foreign spies.

B. Adjudication

Once the investigative service provider (here, the FBI) has completed its investigation, a report of the investigation is compiled and forwarded to career adjudicators within that agency (and, in the case of presidential personnel, to the EOP Office of Security). The separation of investigative and adjudicative functions is an important feature that ensures quality control and helps defend against outside influences and other improprieties.

Adjudicators are required to review any concerns raised within the report under a regime of thirteen adjudicative guidelines titled "A" through "M." These "National Adjudicative Guidelines for Security Clearances" were originally promulgated in 1995 at the direction of President Bill Clinton pursuant to Executive Order 12968. Each Guideline provides a series of facts and circumstances that, if present, raise security concerns. These are followed by a complementary set of facts and circumstances that could mitigate the concerns.

For example, under the Adjudicative Guidelines:

> Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in U.S. interests, or is vulnerable to pressure or coercion by any foreign interest. Adjudication under this Guideline can and should consider the identity of the foreign country in which the foreign contact or financial interest is located, including, but not limited to, such considerations as whether the foreign country is known to target United States citizens to obtain protected information and/or is associated with a risk of terrorism.[14]

The government raises a prima facie case against granting a security clearance simply by alleging facts or circumstances that implicate one or more of the nine potentially disqualifying factors:

> (a) contact with a foreign family member, business or professional associate, friend, or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion;
>
> (b) connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual's obligation to protect sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information;
>
> (c) counterintelligence information, that may be classified, indicates that the individual's access to protected information may involve unacceptable risk to national security;
>
> (d) sharing living quarters with a person or persons, regardless of citizenship status, if that relationship creates a heightened risk of foreign inducement, manipulation, pressure, or coercion;
>
> (e) a substantial business, financial, or property interest in a foreign country, or in any foreign-owned or foreign-operated business, which could subject the individual to heightened risk of foreign influence or exploitation;
>
> (f) failure to report, when required, association with a foreign national;
>
> (g) unauthorized association with a suspected or known agent, associate, or employee of a foreign intelligence service;
>
> (h) indications that representatives or nationals from a foreign country are acting to increase the vulnerability of the individual to possible future exploitation, inducement, manipulation, pressure, or coercion;
>
> (i) conduct, especially while traveling outside the U.S., which may make the individual vulnerable to exploitation, pressure, or coercion by a foreign person, group, government, or country.[15]

Once a prima facie case has been established, the burden of proof then shifts to the security clearance applicant to provide sufficient evidence of mitigation via one or more of the six mitigating factors:

> (a) the nature of the relationships with foreign persons, the country in which these persons are located, or the positions

12 Two of the most high-profile examples are investigators' failure to uncover the security risks posed by the Washington Navy Yard or Fort Hood shooters, both of whom held security clearances.

13 Sean M. Bigley, *Opinion: Security Clearance Reform Misses the Mark*, ClearanceJobs.com (Nov. 3, 2016), https://news.clearancejobs.com/2016/11/03/opinion-security-clearance-reform-misses-mark/.

14 32 CFR § 147. *See also* Dept. of Defense Dir. 5220.6; Dept. of Defense Dir. 5220.2-R; Intel. Comm. Policy Guidance 704.2; 10 CFR § 710, Subpart A, Appx. B (Dept. of Energy).

15 *Id.*

or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the U.S.;

(b) there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest;

(c) contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation;

(d) the foreign contacts and activities are on U.S. Government business or are approved by the cognizant security authority;

(e) the individual has promptly complied with existing agency requirements regarding the reporting of contacts, requests, or threats from persons, groups, or organizations from a foreign country;

(f) the value or routine nature of the foreign business, financial, or property interests is such that they are unlikely to result in a conflict and could not be used effectively to influence, manipulate, or pressure the individual.[16]

Over the past 20 years, foreign influence concerns have become commonly referred to as "B" issues, as a result of their placement in the Guidelines under that subsection. No particular country is currently "blacklisted" as a matter of policy, but, in practice, security clearance applicants with ties to certain countries—most commonly Russia, China, Iran, South Korea,[17] Israel,[18] and Cuba[19]—do receive additional scrutiny. Nonetheless, even ties to the most problematic countries can be fully mitigated given the right applicant and the right set of circumstances.

A security clearance applicant provides such mitigation first by responding in writing to a "Statement of Reasons" (SOR), the administrative equivalent of an indictment that informs an applicant of the government's concerns. Pursuant to Executive Order 12968, security concerns, unless classified, must be pleaded by the government in the SOR with sufficient specificity as to adequately put the applicant on notice of the charges.[20] Much like discovery in an Article III court case, the government is required upon demand to provide an initially denied applicant with a complete copy of the government's unclassified files for use in rebutting the charges. Depending upon the strength of the applicant's rebuttal, initial unfavorable decisions can often be overturned simply by providing the government with appropriate mitigating context via written reply.

Subsequent procedures vary slightly among clearance-granting agencies, but all applicants are guaranteed a trial-type challenge before a federal Administrative Law Judge or Senior Security Adjudicator, followed, if necessary, by an appeal to a panel of senior agency officials commonly known as a Personnel Security Appeals Board.[21] Every applicant is entitled to appear personally and present his or her case at some point in the process, but agencies differ as to whether that right is granted at the hearing or appeal stage. Pursuant to *Egan*, an adverse agency determination is final and cannot be appealed to an Article III court.[22]

In foreign influence cases, there are a variety of ways in which initially denied applicants can address the government's concerns and obtain a favorable final adjudication. For example, in cases involving foreign relatives or associates, applicants often highlight, where feasible, the lack of significant bonds of affection, obligation, or influence, then compare those relationships to those that the applicant maintains with his or her relatives or associates in the United States. For cases involving foreign business investments, property, or other financial entanglements, applicants work toward divestment or present detailed accountings of their broader financial picture in order to put the value of the overseas assets in perspective. In cases of unsavory prior conduct while traveling abroad, applicants can offer an assessment—often with the assistance of an expert witness psychologist—of the likelihood that the conduct is known to a hostile foreign intelligence service and the extent to which it could realistically be used against the applicant for blackmail purposes.

No matter the type of foreign influence concerns, the goal in a successful defense is to provide strong evidence that whatever ties the applicant has abroad could not be leveraged against him or her by foreign actors in a way that would be inimical to the interests of national security. That can be challenging when close relatives live in a hostile foreign country or a substantial portion of the applicant's finances are tied up in a particular country and thus subject to the dominion of that government.

But for prominent titans of industry, law, and policy—the very types of people so often nominated for service in a presidential

16 *Id.*

17 The strong U.S.-Korean relationship notwithstanding, the South Korean government is known to operate an active industrial espionage program in the United States, seemingly rendering security clearance applicants in the defense contracting world particularly suspect.

18 Likewise, the Israeli government is known to operate a vibrant espionage program in the United States, but one that is targeted less at industry than it is at diplomacy and military operations. Given the Obama Administration's tense relationship with the Netanyahu government, many commentators have argued that the Israelis had no other choice in protecting their interests. Whether the intensity of Israeli intelligence collection efforts slows during the Trump era remains to be seen.

19 Despite a diplomatic upgrade in U.S.-Cuba relations under President Obama, security clearance holders are still effectively barred from traveling there and security clearance applicants with Cuban ties face steep barriers to favorable adjudication.

20 Exec. Order 12968 § 5.2.

21 *Id.*

22 Similarly, the U.S. Merit Systems Protection Board is barred from hearing the merits of security clearance cases (the fundamental issue in *Egan*), although the Board does have limited review authority to determine if an applicant was properly granted his procedural appeal rights under the Executive Order. As of October 2012, denied security clearance applicants do have one other, albeit rare, avenue of redress: filing a whistle-blower retaliation complaint with their agency's Inspector General under Presidential Policy Directive 19.

administration—there are a variety of ways in which foreign influence concerns can be effectively and ethically neutralized. The wealthier the individual, the less likely overseas business interests are considered a coercion concern insofar as they are small pieces of a very large financial picture. The deeper the individual's roots are in the United States, the more zealously he or she will likely resist espionage efforts by foreign associates. And an individual with holdings and contacts spread across multiple countries is less of a security risk than someone with investments or relationships concentrated in a single nation.

These are not mere hypotheticals; countless high profile individuals from the private sector successfully navigate the security clearance process every year. Those in the American defense and aerospace sectors are the most obvious examples because they need security clearances to perform their jobs. Yet the fact remains that, ultimately, "[n]o one has a 'right' to a security clearance. The grant of a clearance requires an affirmative act of discretion on the part of the granting official. The general standard is that a clearance may be granted only when 'clearly consistent with the interests of the national security.'"[23] Given the subject matter expertise of federal personnel security officials, their proven willingness to protect their prerogatives even against the White House,[24] the intensity of the scrutiny directed at presidential nominees, and the substantial ties most presidential nominees have in the United States, there is little risk that a favorably cleared nominee poses any risk of foreign influence, much less a national security risk in general.

II. *Egan* and the Original Understanding of "Advice and Consent"

The framework of the national security landscape described above is significantly reinforced by the *Egan* precedent. To understand the importance of *Egan*, it is important to understand the historical context of the Senate's "advice and consent" function, which forms the outer bounds of the Senate's authority to reject nominees. A plain reading of the Appointments Clause text finds nothing to limit what the Senate may consider in assessing a nominee.[25] Some Senators, including then-Senator Joseph Biden, have used the Constitution's silence to claim limitless authority to reject presidential nominees for any reason, including broad concerns about national security or ideology.[26] The Senate's procedural rules are silent on the matter.[27] However, the responsible exercise of power requires a fundamental understanding of its basis in law, as determined by the fairly understood meaning of words at the time the law was promulgated.[28] Therefore, a review of the Framers' original understanding of the advice and consent power is crucial to understanding how the Senate should exercise that power in considering nominees today.

Alexander Hamilton addresses this issue in Federalist No. 76; there, he describes the understanding of the Senate's advice and consent role as "an excellent check upon a spirit of favoritism in the President, [which] would tend greatly to preventing the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity."[29] Hamilton goes on to explain that:

> Out of a concern for both reputation and re-election, the president would be "ashamed and afraid" to bring forward unmeritorious candidates, whose only qualifications would be [hailing] from particular states, or being personally allied to the president, or "possessing the necessary insignificance and pliancy to render them the obsequious instruments of his pleasure."[30]

According to one scholar, "[t]he thrust of Hamilton's discussion is [thus] to suggest that the great desideratum regarding the appointment power is to secure 'merit' by resisting temptations to geographic partiality (especially state) and personal partiality."[31]

To be fair, not all contemporaneous interpretations of "advice and consent" agreed with Hamilton's. Another Framer,

23 *Egan*, 484 U.S. at 528 (referencing Exec. Order No. 10450, §§ 2 and 7, 3 CFR § 936, 938 (1949-1953 Comp.); 10 CFR § 710.10(a) (1987) (Department of Energy); 32 CFR § 156.3(a) (1987) (Department of Defense)).

24 Boyd, *supra* note 1; Email from Butts to Podesta, *supra* note 1.

25 The Constitution simply states, in pertinent part, that "The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . . ." U.S. Const. art. II, § 2, cl. 2.

26 One oft-cited example of the exercise of such unbounded authority is the contentious, and ultimately unsuccessful, nomination of Judge Robert H. Bork to the United States Supreme Court in 1987. Although various presidential nominees have been rejected *in part* based upon ideology as far back as Supreme Court nominee John Rutledge in 1795, the Bork affair is widely viewed as one of the first rejections of a presidential nominee on *solely* ideological grounds.

27 Interestingly, however, Rule 10(c) of the Senate Foreign Relations Committee requires that any nominee being reported by the Committee to the full Senate for consideration be "accorded a security clearance on the basis of a thorough investigation by executive branch agencies." The rule seemingly acknowledges a degree of acceptance by the Senate of the Executive Branch's authority and competency in personnel security matters.

28 The late Justice Scalia articulated the nuanced difference between original intent and original understanding in this way: "I don't care if the framers of the Constitution had some secret meaning in mind when they adopted its words. I take the words as they were promulgated to the people of the United States, and what is the fairly understood meaning of those words." Associate Justice Antonin Scalia, Address at the Catholic University of America (Oct. 18, 1996), *available at* http://www.proconservative.net/PCVol5Is225ScaliaTheoryConstlInterpretation.shtml.

29 The Federalist No. 76, at 385 (Alexander Hamilton) (Garry Wills ed., 1982).

30 Christopher Wolfe, *The Senate's Power to Give "Advice and Consent" In Judicial Appointments*, 82 Marq. L. Rev. 355, 358 (1999), http://scholarship.law.marquette.edu/mulr/vol82/iss2/2/.

31 *Id.*

George Mason, described his understanding of the advice and consent power more broadly:

> I am decidedly of opinion, that the Words of the Constitution . . . give the Senate the Power of interfering in every part of the Subject, except the Right of nominating . . . . The Word 'Advice' here clearly relates in the Judgment of the Senate on the Expediency, or the Inexpediency of the Measure, or Appointment; and the Word 'Consent' to their Approbation or Disapprobation of the Person nominated; otherwise the word Advice has no Meaning at all—and it is a well-known Rule of Construction, that no Clause or Expression shall be deemed superfluous or nugatory, which is capable of a fair and rational Meaning. The Nomination, of Course, brings the Subject fully under the Consideration of the Senate; who have then a Right to decide upon its Propriety or Impropriety. The peculiar Character or Predicament of the Senate in the Constitution of the General Government, is a strong Confirmation of this Construction.[32]

Nonetheless, juxtaposed against *Egan*, the absence of any reference to national security considerations is stark; like Hamilton, Mason understood "advice and consent" to deal with issues of merit, competency, and character—factors most aptly described as suitability concerns.

The term "suitability" is defined at 5 C.F.R. § 731 for the purpose of federal civil service hiring.[33] The provisions of § 731 set forth a number of discrete factors a federal agency should consider in making hiring judgments—including criminal or dishonest conduct, material, intentional false statements in the appointment process, and any recent substance abuse—ultimately leading to the determination of whether a particular appointment would adversely impact the efficiency or integrity of the federal service. These considerations are independent of, albeit sometimes overlapping with, security investigations. Certainly, the discretion of the Senate is broader is evaluating presidential nominees, but § 731, combined with the Constitution's Article I, Section 6, Clause 2 (commonly referred to as the "Incompatibility Clause"), is a useful guidepost for the Senate in wielding its advice and consent authority in the manner intended by the Framers.

Such guideposts are particularly important in tempering senatorial overreach given that the President's national security authority is granted by the Constitution, not Congress. The Supreme Court articulated this in *Egan*, finding that the President's:

> [A]uthority to classify and control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch that will give that person access to such information flows primarily from [the] constitutional investment of power in the President [as Commander in Chief of the Armed Forces], and exists quite apart from any explicit congressional grant.[34]

Because the Framers did not understand the advice and consent function to encompass a determination of whether nominees were security-worthy, and because the Constitution counsels deference to the President in national security matters, the Senate's nominee inquiries should be limited to matters of merit, competency, character, and, arguably, ideology. This is the most rational and efficient outcome: "[t]he attempt to define not only the [appointee's] future actions but those of outside and unknown influences renders the 'grant or denial of security clearances . . . an inexact science at best.'"[35] It is not reasonably possible for an outside nonexpert body to review the substance of such judgments and second-guess the decisions of career personnel security experts.[36]

III. Conclusion

All presidential nominees deserve scrutiny, and the Senate is constitutionally mandated to apply it. But both the separation of powers and the efficient administration of government require that nominee security-worthiness be vetted and adjudicated by national security experts within the executive branch. Moreover, in the case of foreign influence concerns, potential national security risks can be mitigated in a variety of ways, including reasonable divestment or diversification of assets, responsible compliance with reporting obligations, and a showing of overwhelming U.S. obligations and allegiance. The relative wealth, education, and sophistication that most presidential nominees possess renders them quite well-positioned to mitigate national security risk.

32 David A. Strauss and Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 Yale L.J. 1491, 1495 (1992).

33 *See supra* note 7.

34 *See* Cafeteria Workers v. McElroy, 367 U.S. 886, 890 (1961).

35 *Egan*, 484 U.S. at 529 ((quoting Adams v. Laird, 136 U.S.App.D.C. 388, 397, 420 F.2d 230, 239 (1969), *cert. denied*, 397 U.S. 1039 (1970)).

36 *Id.*

Beyond the Red-Blue Divide: An Overview of Current Trends in State Non-Compete Law

By J. Gregory Grisham

Note from the Editor:

This article discusses trends in non-compete law in various states, pointing out that the trends do not break down along the traditional red-blue divide.

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.

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Introduction

Covenants not to compete ("non-competes")[1] have a long history dating back to the medieval era.[2] In recent years, employers have increasingly used non-competes to try to protect their customer relationships and intellectual property, requiring even low-skill employees to sign them as a condition of employment.[3] Non-competes are common in the U.S.; a recent study showed "that roughly 18 percent of the U.S. workforce is bound by a non-compete currently."[4] Notwithstanding the prevalence of non-competes, a tension has always existed between non-competes and federal and state public policy favoring free competition.[5] The vast majority of state supreme courts and appellate courts have come down on the side of upholding non-competes, provided that 1) the employer has a "protectable interest"[6] to justify the restriction and 2) the restriction is reasonable as to time and geographic

1 This article will examine current state law trends in the enforcement of non-competes. The article will not address the closely related issues of confidentiality agreements and trade secrets, although these issues are often litigated along with non-competes.

2 Non-competes "date back to the medieval era where a master craftsman would make untrained apprentices sign contracts that said they couldn't set up shop in the town after they finished being apprentices." *Study Finds Many Companies Require Non-Compete Clauses for Low-Wage Workers*, NPR- All Things Considered (Nov. 7, 2016), http://www.npr.org/2016/11/07/501053238/study-finds-many-companies-require-non-compete-clauses-for-low-wage-workers. *See also* Schuyler Velasco, *States move to keep noncompete agreements from shackling workers to jobs*, Christian Science Monitor (July 27, 2016), http://www.csmonitor.com/Business/2016/0727/States-move-to-keep-noncompete-agreements-from-shackling-workers-to-jobs.

3 Mark Muro, *Why Noncompete Pacts Are Bad for Workers—and the Economy*, Wall Street Journal (May 23, 2016), http://blogs.wsj.com/experts/2016/05/23/why-states-should-stop-the-spread-of-noncompete-pacts/.

4 *Id.* Some commentators have argued that the overuse of non-competes can be harmful to employees and employers. *See, e.g.,* Dan Broderick, *Over-Using Non-Competes Harms Logistics Employees and Employers*, Global Trade Daily (March 20, 2017), http://www.globaltrademag.com/global-logistics/using-non-competes-harms-logistics-employees-employers?gtd=3850&scn=using-non-competes-harms-logistics-employees-employers.

5 *See, e.g.*, Central Adjustment Bureau, Inc. v. Ingram, 678 S.W.2d 28 (Tenn. 1984); Tenn. Code Ann. § 47-25-101. *See also* The Sherman Antitrust Act, 15 U.S.C. §§ 1–7; The Clayton Antitrust Act, 15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53; The Federal Trade Commission Act, 15 U.S.C §§ 41-58, as amended. The Texas experience with non-competes provides an excellent example of how the law of non-competes has evolved. *See* Patrick J. Maher, *The Noncompetition Agreement Has a Renaissance*, Daily Report (April 1, 2017), http://www.dailyreportonline.com/id=1202782768002/The-Noncompetition-Agreement-Has-a-Renaissance?mcode=1202629936552&curindex=1.

6 Protectable interests have been found to include, among other things, customer relationships, confidential information, and specialized training.

reach.[7] Further, most states that have enacted general statutes that authorize non-competes take a similar view permitting reasonable post-employment restrictions to protect the legitimate business interests of the former employer.[8]

I. State Statutes and State Attorney General Action

A. Statutory Changes

Twenty states have enacted "general" statutes that govern the enforcement of non-competes.[9] In recent years, three states—Arkansas, Alabama, and Georgia—enacted new statutes that permit or favor greater enforcement of non-competes.[10] Under the Arkansas statute, a two-year time restriction on a non-compete is presumptively reasonable unless the particular facts show otherwise.[11] The Arkansas statute also provides a long list of protectable business interests.[12] Moreover, contrary to prior Arkansas case law, the statute directs courts to reform an unenforceable non-compete in order to make it reasonable and enforceable.[13]

A new Alabama statute (effective January 1, 2016) replaced a more restrictive law and authorizes non-competes in the employment and sale-of-business contexts as well as in non-solicitation agreements.[14] The statute also sets presumptively reasonable time limits for agreements in each context: 1) two years for an employment non-compete, 2) one year for a non-compete or non-solicitation agreement growing out of the sale of a business, and 3) eighteen months for a non-solicitation agreement.[15] Notably, the statute codifies the judicial practice of "blue penciling" non-competes, authorizing courts to excise terms they find unreasonable to render the non-competes enforceable.[16]

The Georgia statute, reenacted in 2011, makes clear that non-competes are enforceable in Georgia where the "restrictions are reasonable in time, geographic area, and scope of prohibited activities."[17] The statute marked a dramatic departure from the jurisprudence of the Georgia Supreme Court and Court of Appeals that had been hostile to the enforcement of non-competes.[18] Like the Alabama and Arkansas statutes, the Georgia statute creates a presumptively reasonable time limit for non-competes—two years or less.[19] However, the Georgia statute limits application of non-competes to employees who "customarily and regularly" solicit "customers or prospective customers," "mak[e] sales or obtain orders or contracts," perform management duties (with language similar to the executive exemption in the FLSA), or are "key" or "professional" employees.[20] The Georgia statute also permits courts to "blue pencil" non-competes provided that the changes do not make the non-compete more burdensome for the employee.[21]

In Idaho, the legislature recently amended Idaho Code §44-2704 to add that a rebuttable presumption of irreparable harm is established where "a court finds that a key employee or key independent contractor is in breach" of a non-compete.[22] In order to rebut the presumption, "the key employee or key independent contractor must show that the key employee or key independent contractor has no ability to adversely affect the employer's legitimate business interests."[23]

In contrast with the actions of Arkansas, Alabama, and Georgia to generally enhance the enforceability of non-competes and Idaho's new presumption of irreparable harm for breach of a non-compete, Utah recently passed a statute limiting non-competes to one year from the date of the employee's termination. Non-competes in Utah entered into on or after May 10, 2016 with terms greater than one year are void and may not be saved via judicial "blue penciling."[24] The Utah statute also creates a remedy for employees who are subject to a lawsuit or arbitration in the event the non-compete is determined to be unenforceable, including "(1) costs associated with arbitration; (2) attorney fees and court costs; and (3) actual damages."[25]

Illinois just enacted legislation (effective January 1, 2017) that prohibits employers from entering into non-competes with "low wage" employees.[26] The term "low-wage employee" is defined as "an employee who earns the greater of 1) the hourly rate equal to the minimum wage required by the applicable federal, state, or local minimum wage law or 2) $13.00 per

7 *See, e.g.*, Allright Auto Parks, Inc. v. Berry, 409 S.W.2d 361 (Tenn. 1966).

8 *See, e.g.*, Fla. Stat. Ann. §542.335.

9 Alabama, Arkansas, California, Colorado, Florida, Georgia, Hawaii, Idaho, Louisiana, Michigan, Missouri, Montana, Nevada, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, and Wisconsin. Some other states have enacted statutes that govern non-competes in specific occupational groups. *See, e.g.*, Tenn. Code Ann. § 63-1-148 (healthcare professionals).

10 *See generally* Ala. Code §8-1-190; Ga. Code Ann. §13-8-50; and A.C.A. §4-75-101.

11 A.C.A. § 4-75-101(d).

12 A.C.A. § 4-75-101(b).

13 A.C.A. § 4-75-101(f)(1).

14 Ala. Code §8-1-190(b).

15 Ala. Code §8-1-190(b)(3)-(5).

16 Ala. Code §8-1-193.

17 Ga. Code Ann. §13-8-50 *et seq.*

18 Eric Smith & Jerry Newsome, *Georgia's Reenacted Restrictive Covenants Statute—A New Era in Georgia Noncompete Law Has Finally Arrived*, Littler- Insight (May 16, 2011), https://www.littler.com/georgias-reenacted-restrictive-covenants-statute-%e2%80%93-new-era-georgia-noncompete-law-has-finally.

19 Ga. Code Ann. § 13-8-57.

20 Ga. Code Ann. § 13-8-53(a).

21 Ga. Code Ann. §13-8-54; Ga. Code Ann. §13-8-53(d).

22 Idaho Code Ann. § 44-2704(6).

23 *Id.*

24 U.C.A. 1953 § 34-51-201.

25 U.C.A. 1953 § 34-51-301. There is a pending bill in Nevada that would, among other things, limit the duration of non-competes to three months following the termination of employment. *See* Assembly Bill No. 149 (introduced February 14, 2017).

26 Public Act 099-0860.

hour."[27] Oregon recently amended its existing statute governing restrictive covenants to limit non-competes to eighteen months from the date of termination.[28] A non-compete lasting longer than eighteen months "is voidable and may not be enforced" by an Oregon court.[29]

Two other states have also recently enacted legislation to clarify existing statutes addressing the enforcement of non-competes in their respective states. Hawaii prohibited the use of a non-compete (and non-solicitation) provision "in any employment contract relating to an employee of a technology business," making such provisions void.[30] New Hampshire recently amended its existing statute to require an employer to provide a prospective employee, prior to the acceptance of an offer of employment, with a copy of the non-compete the individual will be asked to sign. The failure to do so renders the non-compete unenforceable.[31]

Finally, California recently enacted a new statute that will affect employers (including those attempting to enforce non-competes) who try to avoid the application of California's strict, employee-friendly laws governing non-competes and venue in California.[32] The statute limits the ability of employers to require employees to litigate or arbitrate employment disputes 1) outside of California or 2) under the laws of another state, unless the employee was individually represented by a lawyer in negotiating the employment contract.[33]

B. Attorney General Actions

Two state attorneys general have recently taken an aggressive approach to restricting the use of non-competes in employment through litigation and settlement. The Attorney General of New York, Eric Schneiderman, recently insisted on a ban on non-competes for most company employees as part of a settlement with a major media employer.[34] In December 2016, Illinois Attorney General Lisa Madigan announced the settlement of a lawsuit against Jimmy John's—a national sandwich chain—which severely restricted the company's ability to use non-competes.[35]

While non-compete law is unique to each state, the trend as reflected in recent legislation is toward general enforcement of non-competes where protectable interests are found and the restrictions are reasonable, albeit with strict time limits and procedural hurdles in some jurisdictions. This pattern seems to hold in both red and blue states, indicating that political categorization is not necessarily helpful in predicting trends in non-compete law. Moreover, at least two state attorneys general have used settlements in specific cases to restrict the use of non-compete agreements. Both represent populous blue states, so that may indicate the start of a trend in the use of this particular method of restricting the use of non-competes.

II. Illustrative State Case Law

Non-compete cases are rising and cover a multitude of legal issues.[36] This section will look at select recent state supreme court and intermediate appellate court decisions that address three issues—1) judicial modification, 2) consideration, and 3) protectable interests—to ascertain current trends in the development of the common law of non-competes.

A. Judicial Modification

A number of recent cases have addressed the issue of whether overbroad non-competes can be saved through judicial modification. Some state courts have adopted the aforementioned blue pencil rule, which allows the trial court to excise overbroad terms that would otherwise render the non-compete unenforceable; others have adopted the more employer-friendly "reformation" approach that permits the court to "reform" the non-compete to make it enforceable. However, state courts in some jurisdictions have declined to adopt either approach and instead interpret non-compete agreements only as written.

In *Golden Road Motor Inn, Inc. v. Islam*, the Nevada Supreme Court considered whether an unambiguously overbroad non-compete could be judicially modified. The defendant-employee

27 *Id.*

28 O.R.S. § 653.295(2).

29 *Id.*

30 HRS § 480-4(d).

31 N.H. Rev. Stat. Ann. §275:70.

32 Labor Code § 925. *See* June D. Bell, *New Labor Code Section Helps Ensure California Workers Are Governed By California Law*, Society for Human Resource Management (Oct. 27, 2016), https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/disputes-in-california.aspx. *See generally* California Business Code §16600 *et seq.*

33 Michael C. Schmidt, *Noncompete Agreements: New Considerations Under Both Employment and Antitrust Law*, Lexology (Jan. 2, 2017), http://www.lexology.com/library/detail.aspx?g=83e92aa5-0fdc-4419-9c6d-3f8eba37de98. Several other states, including Oklahoma, North Dakota, and Montana have general statutes that prohibit the use of non-competes in the employment context. *See* Okla. Stat. tit. 15, §219A; N.D. Cent. Code §9-08-06; M.C.A. 28-2-703-705. In addition to Nevada, *see supra* note 25, a number of other states, including Maryland and Massachusetts, have pending bills to limit the reach of non-competes. *See* Jonathan L. Shapiro, *Which States Are Likely to Enact Laws Restricting Non-Compete Agreements in 2017?*, National Law Review (March 23, 2017), http://www.natlawreview.com/article/which-states-are-likely-to-enact-laws-restricting-non-compete-agreements-2017.

34 J. Jennings Moss, *Non-compete clauses come under fire by N.Y. attorney general*, New York Business Journal (June 15, 2016), http://www.bizjournals.com/newyork/news/2016/06/15/non-compete-clauses-come-under-fire-by-n-y.html; Vin Gurrieri, *Law360 Reaches Noncompete Settlement With NY AG*, Law360 (June 15, 2015), https://www.law360.com/articles/807290/law360-reaches-noncompete-settlement-with-ny-ag. *See also* Chris Tomlinson, *Non compete agreements create modern-day servitude*, Houston Chronicle (July 26, 2016), http://www.houstonchronicle.com/business/columnists/tomlinson/article/Non-compete-agreements-create-modern-day-servitude-8425406.php.

35 Press Release, Illinois Attorney General, *Madigan Announces Settlement with Jimmy John's For Imposing Unlawful Non-Compete Agreements* (Dec. 7, 2016), http://www.illinoisattorneygeneral.gov/pressroom/2016_12/20161207.html; Jonathan Israel, *State Attorneys General on the Attack Against Noncompete Overuse*, JDSupra Business Advisor (Aug. 16, 2016), http://www.jdsupra.com/legalnews/state-attorneys-general-on-the-attack-51847/.

36 Ruth Simon & Angus Loten, *Litigation Over Noncompete Clauses Is Rising*, Wall Street Journal (Aug. 14, 2013), https://www.wsj.com/articles/SB10001424127887323446404579011501388418552.

Islam worked as a casino host at Atlantis and signed a number of agreements related to her employment, including "a non-compete agreement [that] prohibited Islam from employment, affiliation, or service with any gaming operation within 150 miles of Atlantis for one year following the end of her employment."[37] The court affirmed the lower court's decision that the non-compete was unenforceable because it was overly broad and unreasonable "as it extend[ed] beyond what is necessary to protect Atlantis' interests."[38] The court also rejected Atlantis' argument that the non-compete should be judicially modified to render it enforceable. The court stated that, under Nevada law, an unreasonable provision "renders the non-compete agreement wholly unenforceable," noting that "we have not overturned or abrogated our case law establishing our refusal to reform parties' contracts where they are unambiguous."[39]

The North Carolina Supreme Court in *Beverage Systems of the Carolinas v. Associated Beverage Repair* reversed the Court of Appeals' finding that the trial court had the power to rewrite unreasonable geographic limitations in a non-compete where the parties had agreed that the agreement could be judicially modified.[40] The court held that the "blue pencil doctrine" could not be employed to salvage the overbroad geographic term:

> The Agreement's territorial limits cannot be blue-penciled unless the Agreement can be interpreted so that it sets out both reasonable and unreasonable restricted territories. [Citations omitted]. We found above that the restrictions to all of North Carolina and South Carolina, the only territorial restrictions in the Agreement, are unreasonable. Striking the unreasonable portions leaves no territory left within which to enforce the covenant not to compete. As a result, blue-penciling cannot save the Agreement.[41]

The court also discussed the policy reasons a court should not be permitted to rewrite an unreasonable and unenforceable non-compete agreement:

> Allowing litigants to assign to the court their drafting duties as parties to a contract would put the court in the role of scrivener, making judges postulate new terms that the court hopes the parties would have agreed to be reasonable at the time the covenant was executed or would find reasonable after the court rewrote the limitation. We see nothing but mischief in allowing such a procedure. Accordingly, the parties' Agreement is unenforceable at law and cannot be saved.[42]

Other courts have recently embraced the doctrine of judicial reformation of overbroad non-competes. The New Mexico Court of Appeals in *KidsKare, P.C. v. Mann,* while it did not directly address New Mexico law pertaining to judicial modification, ruled that judicial modification of an overbroad non-compete was available where the parties had agreed to a contract provision that authorized judicial amendment of the agreement in the event it was determined to be unreasonable.[43] The court reasoned that "[r]eformation of unreasonable clauses was an aspect of the bargain of the parties and consistent with their mutual intent as expressed by the employment agreement."[44]

B. Consideration

An issue that frequently arises in non-compete litigation is the adequacy of consideration to support the employee's agreement not to compete with the employer post-employment. State courts in some jurisdictions, while recognizing that continued employment of an at-will employee *can* serve as consideration to support a non-compete, require that the termination of the at-will employee be done in good faith as a condition of enforcing the non-compete.

In *Preston v. Marathon Oil Co.*, the Supreme Court of Wyoming discussed the issue of sufficiency of consideration for a non-compete signed after employment had commenced.[45] The court reaffirmed its rule that continued at-will employment *alone* is not sufficient consideration to support enforcement of a non-compete signed after commencement of employment, but that any termination must be done in good faith.[46] Likewise, in *Buchanan Capital Markets LLC* v. *DeLucca*, the New York Appellate Division affirmed the denial of a motion for preliminary

37 376 P. 3d 151, 153 (Nev. 2016).

38 *Id.* at 155.

39 *Id.* at 156. The Nevada Supreme Court stated that judicial restraint is a sound public policy for not modifying unreasonable unambiguous contract terms since it "avoids the possibility of trampling the parties' contractual intent." *Id.* at 157.

40 784 S.E.2d 457 (N.C. 2016).

41 *Id.* at 461-62.

42 *Id.* at 462. *See also* Clark's Sales & Service, Inc. v. Smith, 4 N.E.3d 772, 783-84 (Ind. Ct. App. 2014) ("[I]f the noncompetition agreement is divisible into parts, and some parts are reasonable while others are unreasonable, a court may enforce the reasonable portions only. When blue-penciling, a court must not add terms that were not originally part of the agreement but may only strike unreasonable restraints or offensive clauses to give effect to the parties' intentions.").

43 350 P.3d 1228, 1231-32 (N.M. Ct. App. 2015). For another illustrative recent decision approving of judicial modification, see *Emerick v. Cardiac Study Ctr., Inc.*, 357 P.3d 696, 703 (Wash. Ct. App. 2015) (affirming the lower court's reformation of an overbroad non-compete, which was consistent with Washington precedent, where the former employee contractually agreed to judicial modification in the event a provision of the agreement was unreasonable).

44 *Mann,* 350 P.3d at 1232.

45 277 P.3d 81 (Wyo. 2012). The court in *Preston* was answering a certified question from the United States Court of Appeals for the Federal Circuit "regarding the validity of an assignment of intellectual property rights given by Yale Preston to Marathon Oil Company without any additional consideration other than continued at-will employment." *Id.* at 82. Thus, the discussion of non-competes was in the context of deciding whether continued at-will employment was sufficient consideration to support an employment agreement provision regarding the assignment of intellectual property rights, and the court distinguished the two situations for purposes of sufficiency of consideration. *Id.* at 87-88.

46 *Id.*

injunction for an alleged violation of the plaintiff's predecessor's non-competes, holding that "such covenants are not enforceable if the employer (plaintiff) does not demonstrate 'continued willingness to employ the party covenanting not to compete.'"[47] The predecessor to the plaintiff in *DeLucca* terminated employees (including the defendants) as part of a merger and required them to reapply with the plaintiff (the new employer) if they wished to continue in their previous positions, which was viewed by the court as a termination "without cause."[48]

However, in *Runzheimer Int'l, Ltd. v. Friedlen*, the Wisconsin Supreme Court took a contrary approach, holding, in the context of a non-compete signed after employment began, that "an employer's forbearance in exercising its right to terminate an at-will employee constitutes lawful consideration for a restrictive covenant."[49] The court discussed the various checks that protect an at-will employee from being terminated shortly after signing a non-compete, including contract defenses of misrepresentation and breach of covenant of good faith and fair dealing.[50]

The Pennsylvania Supreme Court in *Socko v. Mid-Atlantic Systems of CPA, Inc.* rejected the position that continued employment is lawful consideration for the execution of a mid-employment non-compete.[51] The *Socko* court held that, "[i]n the context of requiring an employee to agree to a restrictive covenant mid-employment . . . such a restraint on trade will be enforceable only if new and valuable consideration, beyond mere continued employment, is provided and is sufficient to support the restrictive clause."[52] The court noted that "new and valuable" consideration could include "a promotion, a change from part-time to full-time employment, or even a change to a compensation package of bonuses, insurance benefits, and severance benefits."[53]

The Kentucky Supreme Court reached a similar result in *Charles T. Creech, Inc. v. Brown*.[54] The court ruled that a non-compete agreement signed by an employee mid-employment was unenforceable for lack of consideration when it was not part of an employment agreement that altered the terms and conditions of his employment. On this point, the court noted:

> Creech did not, by way of the Agreement, hire or rehire Brown because the Agreement, unlike the non-compete provision in *Higdon,* was not part of an employment contract. Furthermore, the Agreement cannot be construed as Creech "hiring" or "rehiring" Brown because the Agreement does not contain any of the indicia of an employment contract, *i.e.* it does not state what job Brown would be doing or what salary or wages Brown would be paid. In other words, the Agreement did not alter the terms of the employment relationship between Creech and Brown and was not "the same as new employment." Thus, Creech did not provide consideration to Brown by hiring or rehiring him based on his acceptance of the Agreement.[55]

The Illinois Court of Appeals in several recent decisions took an intermediate approach and held that continued employment for a "substantial period" could be sufficient consideration to support a non-compete executed after the at-will employment commenced.[56]

C. Protectable Employer Interests

State courts continue to carefully examine employer-asserted protectable interests. For example, a Massachusetts Superior Court judge recently denied the plaintiff-employer's motion for a preliminary injunction, finding that the employees' "conventional job knowledge and skill," without more, was insufficient to constitute a protectable interest to support an enforceable non-compete.[57]

In *Davis v. Johnstone Group, Inc.*, the Tennessee Court of Appeals affirmed the trial court's decision to deny enforcement of a non-compete due to lack of any protectable interest since the defendant, a real estate appraiser, had not received specialized training, knew no confidential information, and had no special relationship with the plaintiff's clients.[58] The Court of Appeals found that the defendant had simply acquired "general skills and knowledge of the trade" during his employment which inured to the defendant's exclusive benefit.[59]

Similarly, the Arkansas Court of Appeals in *Burleigh v. Center Point Contractors, Inc.* reversed the trial court's grant of

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47 144 A.D.3d 508 (N.Y. App. Div. 2016) (quoting Post v. Merrill Lynch, Pierce, Fenner & Smith, 48 N.Y.2d 84, 89 (1979)). *See also* Marsh USA, Inc. v. Alliant Ins. Servs., Inc., 49 Misc. 3d 1210(A) (N.Y. Sup. Ct. 2015). Some courts have refused to enforce non-competes based on a material change in the terms and conditions of employment after the agreement is signed. *See, e.g.*, *Patriot Energy Grp., Inc. v. Kiley,* 2014 WL 880880, at *8 (Mass. Super. Ct. 2014).

48 Paula Lopez, *New York Appellate Court Refuses to Enforce Non-Compete Against Terminated Employees*, Allyn & Fortuna, LLP (March 10, 2017), http://www.allynfortuna.com/new-york-appellate-court-refuses-to-enforce-non-compete-against-terminated-employees/.

49 862 N.W.2d 879, 892 (Wis. 2015).

50 *Id.* at 891-92.

51 126 A.3d 1266 (Pa. 2015).

52 *Id.* at 1275-76. *See also* AmeriGas Propane, L.P. v. Coffey, 2015 WL 6093207, at *6 (N.C. Super. Ct. 2015) (Under North Carolina law the "mere eligibility for discretionary raises does not constitute consideration to support a restrictive covenant.").

53 *Socko,* 126 A.3d at 1275.

54 433 S.W.3d 345, 354 (Ky. 2014).

55 *Id.* at 353.

56 *See* Prairie Rheumatology Assocs. v. Francis, 24 N.E.3d 58 (3d Dist. 2014); Fifield v. Premier Dealer Servs., 993 N.E.2d 938 (Ill. App. Ct. 2013).

57 Elizabeth Grady Face First, Inc. v. Garabedian, 2016 WL 1588816, at *4 (Mass. Super. Ct. March 25, 2016). The Court in *Garabedian,* in concluding that the former employees did not possess trade secrets or confidential/proprietary information belonging to the plaintiff, noted that most of the former employees' training occurred at a school run by the plaintiff that was also attended by non-employees. *Id.* at *3.

58 2016 WL 908902, at *6 (Tenn. Ct. App. 2016).

59 *Id.* quoting Selox, Inc. v. Ford, 675 S.W.2d 474, 476 (Tenn. Ct. App. 1984). *See, e.g.*, Hasty v. Rent–A–Driver, Inc., 671 S.W.2d 471, 473 (Tenn. 1984) ("There is authority for the proposition that general knowledge and skill appertain exclusively to the employee, even if acquired with expensive training, and thus does not constitute a

a preliminary injunction, finding that no protectable interest existed.[60] Specifically, the court found that the plaintiff had not provided the defendant with specialized training or confidential information.[61] Moreover, the court noted the testimony of one of the plaintiff-employer's witnesses that the plaintiff's "customer list" "was generated by a subscription service, Datafax, and that anyone who had the ability to qualify for a particular job would be able to find the jobs that were available for bidding using that service."[62]

As with state legislation, state appellate court decisions with respect to non-compete law do not indicate any red-blue divide. The common law in some states is more employer-friendly, while it is more employee-friendly in others, but there is no neat political breakdown.

III. A New Federal Interest in Non-Competes

In May 2016, President Obama signed into law the Defend Trade Secrets Act of 2016 ("DTSA"), which established a federal cause of action for trade secret misappropriation that closely tracks the Uniform Trade Secrets Act.[63] Later in the year, the White House and Treasury Department each issued reports critical of non-competes.[64] "[T]he White House issued a 'Call to Action' and a report entitled *Non-Compete Reform: A Policy Maker's Guide to State Policies*, expressing concern about overuse of non-compete agreements," particularly with respect to low-wage, low-skill workers.[65] The report also summarized recent "reform efforts" which included:

- Limiting the scope of such clauses—either based on time (current restrictions are usually one to two years) or geography;
- Carving out specific professions (lawyers are almost always carved out, but doctors could be too);
- Prohibiting the use of non-competes except for individuals with salaries at or above a specified threshold (currently used by Oregon and effective in Illinois starting January 1, 2017, for new non-competes);
- Assessing enforcement options (commonly either the ability to reform as needed, ability to strike the offending portion, or requirement to strike entire agreement if overbroad);
- Enhancing transparency for employees, such as by requiring prior notice that a job offer or promotion includes a non-compete requirement (intended to help individuals maximize their own bargaining power in negotiating over terms of employment, and avoiding the choice of signing or losing their job);
- Other reform options include the potential use of "garden leave"—where employers pay employees during a period in which they are not working—to ensure that continued employment is adequate consideration for a non-compete.[66]

The DTSA was passed and the Treasury and White House reports were issued under President Obama, and it is still too early to assess if the Trump Administration will show a similar interest in non-compete agreements. The new Congress has not yet introduced legislation that would create a federal law governing non-competes.

IV. Conclusion

The last several years have witnessed a flurry of activity in the states in the non-compete area. While each state has fashioned its own unique body of law in this area, there appears to be a clear trend toward enforcing non-competes where appropriate. There is also a countervailing trend toward limiting the duration of non-competes as well as their application to low-wage, low-skill workers. While there is a general recognition of protectable employer interests, these interests are scrutinized by the courts to ensure that non-competes are enforced only where the resulting competition would be unfair. The assessment of non-compete validity continues to be a fact-intensive inquiry. State appellate courts remain divided on whether a non-compete can be judicially modified to promote enforceability, although the trend of the law seems to be toward permitting modification (to varying degrees). None of the discernible trends in either legislation or common law seem to break down along what is often thought of the red-blue divide among states. Finally, the jury is out on whether the Trump Administration will follow in the footsteps of its predecessor to use the bully pulpit to encourage reform in the non-compete area.

protectible interest of the employer.") (citations omitted). *See also* Hinson v. O'Rourke, 2015 WL 5033908 (Tenn. Ct. App. 2015) (affirming, among other things, dismissal of a non-compete claim where employee received mostly on-the-job training, the employee had no special relationship with customers, and alleged "trade secrets" had been publicly disclosed and were available from other sources).

60 474 S.W.3d 887 (2015).

61 *Id.* at 891.

62 *Id.* at 889-90.

63 J.M. Durnovich, *The Defense of Trade Secrets Act of 2016 - A new federal cause of action for trade secret misappropriation*, JDSupra Business Advisor (June 24, 2016), http://www.jdsupra.com/legalnews/the-defense-of-trade-secrets-act-of-26627/.

64 *White House Releases Noncompete Call to Action*, Fair Competition Law (Oct. 25, 2016), https://faircompetitionlaw.com/2016/10/25/white-house-releases-noncompete-call-to-action/.

65 Dabney D. Ware, *Use of Non-Compete Agreements – Too Much of a Good Thing?*, National Law Review (Nov. 7, 2016), http://www.natlawreview.com/article/use-non-compete-agreements-too-much-good-thing.

66 *Id.*

Religious Liberties

Blaine Amendments and the Unconstitutionality of Excluding Religious Options From School Choice Programs

By Erica Smith

Note from the Editor:

This article discusses the school choice movement and how Blaine Amendments have hampered some school choice programs. It advocates strongly, based primarily on the Religion Clauses of the First Amendment, against the use of Blaine Amendments to undermine school choice.

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 links to other perspectives on the issue, including ones opposed to the position taken in the article. Because this article takes a particularly strong position against Blaine Amendments and for school choice, we have provided links here to articles arguing equally strongly in the other direction. As always, we also invite responses from our readers. To join the debate, please email us at info@fedsoc.org.

• Brief for Amici Curiae, Legal and Religious Historians, in Support of Respondent, 8-9, 16, Trinity Lutheran Church of Columbia, Inc. v. Pauley, No. 15-577 (U.S. cert. granted Jan. 15, 2016), http://www.scotusblog.com/wp-content/uploads/2016/07/15-577_amicus_resp_legal_and_religious_historians.authcheckdam.pdf.

• Rob Boston, *The Blaine Game*, Church & State (Sept. 2002), https://www.au.org/church-state/september-2002-church-state/featured/the-blaine-game.

• Jill I. Goldenziel, *Blaine's Name in Vain?: State Constitutions, School Choice, and Charitable Choice*, 83 Denver Univ. L. Rev. 1 (2005), http://scholar.harvard.edu/files/jill/files/jgoldenziel_denver_2005_vol83_no1.pdf.

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Erica Smith is an attorney for the national nonprofit law firm, the Institute for Justice, where she litigates school choice cases. The Institute for Justice has litigated or is currently litigating several of the cases discussed in this article, including the pending cases, Doyle v. Taxpayers for Public Education *and* Espinoza v. Montana Department of Revenue.

Introduction

The U.S. Supreme Court has long held that the Establishment Clause permits the government to include religious options in neutral and generally available public benefit programs. In this term's *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, the Court may finally resolve the open question of whether the government may *exclude* religious options from such public benefit programs. This issue has become crucial to the national school choice movement.

School choice programs are on the rise and now exist in 28 states and the District of Columbia. These programs give families financial assistance to choose private schooling[1] that best fits their children's individual needs, usually regardless of whether that schooling is nonreligious or religious. Religious private schools are the most popular choice for parents for a variety of reasons, including their traditional teaching methods, convenient locations, and, of course, their religious instruction.

The biggest obstacles to school choice programs are state constitutional provisions called "Blaine Amendments."[2] Predominantly passed in the late 1800s, Blaine Amendments prevent the state from appropriating public funds "in aid of . . . sectarian schools."[3] These amendments are present in 37 state constitutions[4] and have been interpreted in some states to restrict school choice programs that include religious options—or to prohibit such programs altogether. Most recently, Blaine Amendments have been used in New Hampshire, Colorado, and Montana to justify excluding religious schools from school choice programs, instead allowing families to only choose secular options.

While Blaine Amendments may seem benign on their face, they are marred by controversy. It is widely acknowledged among scholars and even Supreme Court justices that they were largely enacted to discriminate against the wave of Catholic immigrants that came to this country in the nineteenth century. These immigrants were frustrated with the generic Protestantism that was taught in the public schools at the time and fought for public funding for Catholic schools. Protestant lawmakers responded by passing Blaine Amendments to protect their monopoly on public funding for schools. Although the public schools are now secular,

1 School choice programs sometimes also offer families financial assistance to choose other private educational options, such as homeschooling, tutoring, therapies, and college classes.

2 These provisions are referred to as "Blaine Amendments" because they were modeled after a failed federal constitutional amendment proposed by Congressman James G. Blaine in 1875. *See* discussion at *infra* Part III.A.1.

3 *See, e.g.*, Ariz. Const. art. IX, § 10 ("No tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation.").

4 *See* Richard D. Komer & Olivia Grady, School Choice and State Constitutions: A Guide to Designing School Choice Programs (2d ed. 2016), http://ij.org/wp-content/uploads/2016/09/50-state-SC-report-2016-web.pdf (listing the Blaine Amendments in each state).

these Amendments continue to be used to discriminate against Catholic schools and religious schools of all denominations, as well as the families who wish to send their children to them.

Supreme Court precedent strongly suggests that the use of Blaine Amendments to exclude religious options in school choice programs violates the neutrality principle of the Free Exercise and Establishment Clauses. Blaine Amendments have both the purpose and the effect of discriminating against religion, and this discrimination cannot be justified by a compelling government rationale. The Supreme Court has never squarely addressed this issue, however, and the lower courts are currently split.

Now, the Supreme Court finally has an opportunity to resolve this issue in *Trinity Lutheran*. *Trinity Lutheran* involves a constitutional challenge to the use of Missouri's Blaine Amendment to exclude a church-run daycare from an otherwise neutral government program. If *Trinity Lutheran* holds that religious entities cannot be excluded from a public benefit program, it would have a monumental effect on the school choice movement. The Court may also provide guidance on whether, and to what extent, the Blaine Amendments' bigoted history impedes their validity today.

This article has five parts. Part I provides a brief overview of the school choice movement. Part II explains how opponents of school choice have used Blaine Amendments to block school choice programs and, more recently, to exclude religious schools from these programs. Part III argues that this exclusion violates the Free Exercise and Establishment Clauses of the U.S. Constitution. Part IV describes the circuit split on this issue, which deepened after the Supreme Court's 2004 decision regarding a college scholarship program, *Locke v. Davey*. Finally, Part V discusses the U.S. Supreme Court's cert grant in *Trinity Lutheran* and how the Court could use this case to finally resolve the Blaine Amendment controversy.

I. The School Choice Movement

The school choice movement has gained impressive momentum over the last 25 years. The first modern school choice program was enacted in 1990 in Milwaukee, Wisconsin. There are now 58 programs in 28 states and the District of Columbia,[5] serving 1.3 million students.[6]

School choice programs are very popular with parents. Parents choose to leave the public schools in order to participate in school choice programs for a variety of reasons, including better academic quality, safety, less bullying, and, more generally, an environment where their children will feel happy and supported.[7] School choice programs largely meet parental expectations. Studies of parents participating in several different school choice programs show consistent parental satisfaction rates of over 95 percent.[8]

Religious schools are a particularly attractive option for many parents. Parents often prefer religious private schools to secular private schools for several reasons, including religious schools' tendency to offer more traditional schooling,[9] and because religious schools are often in more convenient locations than secular schools, since there are more religious schools available.[10] Many parents also choose religious schools so that they can reinforce the religious beliefs and moral values that they teach at home.

Despite their popularity, however, school choice programs still face fierce opposition. Their primary opponents are public school districts, teachers' unions, and advocates for strict separation of church and state, all of which have brought numerous lawsuits against these programs across the country.[11] These groups argue that the government cannot constitutionally fund school choice for families who choose religious schools. After the Supreme Court rejected this argument under the federal

5 These states are Alabama, Arkansas, Arizona, Florida, Georgia, Iowa, Illinois, Indiana, Kansas, Louisiana, Maryland, Maine, Minnesota, Mississippi, Montana, New Hampshire, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Virginia, Vermont, and Wisconsin. *See School Choice in America*, ED Choice, http://www.edchoice.org/school-choice/school-choice-in-america/ (last visited Dec. 11, 2016).

6 *Id.*

7 *See, e.g.*, Dick Carpenter II & Marcus Winters, *Who Chooses and Why in a Universal Choice Scholarship Program: Evidence from Douglas County, Colorado*, Journal of School Leadership 923-924 (Sept. 2015), http://www.uccs.edu/Documents/coe/newsandevents/who%20chooses%20and%20why-DCSD.pdf.

8 Jason Bedrick, *Surprise: In Indiana, Parental Choice Increases Parental Satisfaction*, National Review (Feb. 11, 2014), http://www.nationalreview.com/corner/370833/surprise-indiana-parental-choice-increases-parental-satisfaction-jason-bedrick.

9 In contrast, some secular private schools are focused around alternative teaching methods, like in the Waldorf and Montessori schools (although some Montessori schools are themselves religiously affiliated).

10 *See, e.g.*, *Facts and Studies*, Council for Am. Private Educ., http://www.capenet.org/facts.html (last visited Dec. 11, 2016) (stating that there are 33,613 private schools in the United States, and that 79 percent of private school students attend religiously-affiliated schools).

11 *See, e.g.*, Bush v. Holmes, 767 So. 2d 668, 670, 672 (Fla. Dist. Ct. App. 2000), *decision disapproved of by* 919 So. 2d 392 (Fla. 2006) (noting that plaintiffs, including the Florida Education Association (a teachers' union), challenged Florida's Opportunity Scholarship Program under the Establishment Clause and state constitutional provisions); McCall v. Scott, 199 So. 3d 359, 361, 363 (Fla. Dist. Ct. App. 2016) (noting the Florida Education Association (a teachers' union) was one of the plaintiffs in this suit challenging Florida's Tax Credit Scholarship Program under Florida's Blaine Amendment, Fla. Const. Art. I, § 3, and that Americans United for Separation of Church and State was one of the legal groups representing the plaintiffs); Schwartz v. Lopez, 382 P.3d 886, 890 (Nev. 2016) (en banc) (noting that the ACLU of Nevada and Americans United for Separation of Church and State represented the plaintiffs in this suit challenging Nevada's Education Savings Account program under its Blaine Amendment); Duncan v. New Hampshire, 102 A.3d 913, 916-17 (N.H. 2014) (noting that the ACLU Foundation Program on Freedom of Religion and Belief and the Americans United for Separation of Church and State represented the plaintiffs in this suit challenging New Hampshire's Education Tax Credit program under its Blaine Amendment); Simmons-Harris v. Goff, No. 96APE08-982, 1997 WL 217583, at *1–2 (Ohio Ct. App. 1997), *aff'd in part, rev'd in part*, 711 N.E.2d 203 (Ohio 1999) (noting that the Ohio Education Association (a teachers' union) and the ACLU of Ohio Foundation were two of the groups representing plaintiffs in their Establishment Clause challenge to Ohio's voucher program, which was later rejected by the U.S. Supreme Court in *Zelman v. Simmons-Harris*).

Establishment Clause in 2002,[12] these groups now rely on state constitutions to support their legal claims.[13]

II. Blaine Amendments

Today, the most common means used to challenge school choice programs are state constitutional provisions called "Blaine Amendments." Blaine Amendments bar the use of "public funds" to "aid" sectarian institutions. Thirty-seven states have Blaine Amendments,[14] which were predominantly enacted between 1875 and 1900. School choice opponents argue that Blaine Amendments prohibit giving public funds to individuals when those individuals may choose to spend those funds at religious schools, as these funds could arguably aid sectarian institutions—however incidentally.

Just in the past ten years, Blaine Amendments have been used to challenge school choice programs eleven times.[15] There are still more instances of opponents pointing to Blaine Amendments to try to convince state legislatures and governors to reject school choice bills.[16]

School choice proponents, however, have become increasingly successful in defending against these challenges. They primarily argue that school choice scholarships do not result in giving public aid to religious schools. This is because schools never receive "aid" under any common understanding of that word; instead, they simply receive payment in exchange for services rendered—specifically, parents pay them for the service of educating their children. Families, not religious schools, are receiving the public "aid."[17] This and other arguments have convinced multiple courts that Blaine Amendments do not apply to school choice programs.[18] They have also given more state governments the confidence to enact such programs.

But not everyone is convinced. Although more school choice programs are being passed, Blaine Amendments have recently been used against school choice programs in a new way: to restrict the programs to students who wish to attend secular schools, excluding students who wish to attend religious schools.

In the past three years, such restrictions have been implemented in three different states, all under different circumstances. In 2013, a New Hampshire state trial court limited a scholarship program after finding that the state's Blaine Amendment did not allow families to use the scholarships at religious schools. The program existed in this severed state for a year before the New Hampshire Supreme Court restored the program, finding that the plaintiffs lacked standing to challenge it.[19] The next year, the Montana Department of Revenue relied on the state's Blaine Amendment to unilaterally adopt a rule limiting that state's new scholarship program to just students attending secular schools, directly contravening the will of the legislature. A Montana trial court issued a preliminary injunction against the rule in March 2016, and that case continues to be litigated.[20] Most recently, Douglas County, Colorado, chose to limit its scholarship program to students attending secular schools after a plurality on the Colorado Supreme Court interpreted Colorado's Blaine Amendment to prohibit scholarships for students attending religious schools.[21] The limitation on the program resulted in additional legal challenges, and the County rescinded the limitation on November 15, 2016.[22] The fate of the original program, which included both religious and secular schools, has yet to be determined, as cert petitions seeking review

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12 Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

13 *See, e.g.,* cases cited *infra* note 17.

14 *See* Komer & Grady, *supra* note 4, at 11.

15 Magee v. Boyd, 175 So. 3d 79 (Ala. 2015); Cain v. Horne, 202 P.3d 1178 (Ariz. 2009) (en banc); Niehaus v. Huppenthal, 310 P.3d 983 (Ariz. App. 2013); Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist., 351 P.3d 461 (Colo. 2015), *petition for cert. docketed*, Colo. State Bd. of Educ. v. Taxpayers for Pub. Educ. (U.S. Nov. 2, 2015) (No. 15-558); *McCall*, 199 So. 3d 359; *Bush*, 919 So. 2d 392; Gaddy v. Ga. Dep't of Revenue, No. 2014 CV 244538 (Fulton Cty. Super. Ct., Feb. 5, 2016), *appeal docketed* (Ga. Mar. 7, 2016) (No. S16D0982); Meredith v. Pence, 984 N.E.2d 1213 (Ind. 2013); *Duncan*, 102 A.3d 913; Schwartz, 382 P.3d 886; Oliver v. Hofmeister, 368 P.3d 1270 (Okla. 2016).

16 For instance, in the past year, this has occurred in Minnesota, Montana, New Hampshire, Virginia, South Dakota, and Texas. *See, e.g.*, Dana Ferguson, *Governor Seeks Legal Advice on Scholarships Bills*, Argus Leader (Mar. 14, 2016), http://www.argusleader.com/story/news/politics/2016/03/14/daugaard-asks-supreme-court-input-bills/81760312/ (describing how critics urged the Governor of South Dakota to veto a school choice bill pursuant to the state's two Blaine Amendments). Similar advocacy has occurred in multiple other states over the years.

17 *See, e.g.*, *Magee*, 175 So. 3d at 135 ("[T]he Section 8 tax-credit provision was designed for the benefit of parents and students, and not for the benefit of religious schools."); Kotterman v. Killian, 972 P.2d 606, 620, ¶ 46 (Ariz. 1999) (en banc) ("The way in which a[] [school tuition organization] is limited, the range of choices reserved to taxpayers, parents, and children, the neutrality built into the system—all lead us to conclude that benefits to religious schools are sufficiently attenuated to foreclose a constitutional breach."); *Niehaus*, 310 P.3d at 987, ¶ 15 ("The specified object of the [Empowerment Scholarship Accounts program] is the beneficiary families, not private or sectarian schools."); Toney v. Bower, 744 N.E.2d 351, 360–63 (Ill. App. 2001) (finding persuasive the reasoning in *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 12 (1993), that "[t]he direct beneficiaries of the aid were disabled children; to the extent that sectarian schools benefitted at all from the aid, they were only incidental beneficiaries"); *Meredith*, 984 N.E.2d at 1228–29 ("The direct beneficiaries under the voucher program are the families of eligible students and not the schools selected by the parents for their children to attend."); Goff v. Simmons-Harris, 711 N.E.2d 203, 211 (Ohio 1999) ("The primary beneficiaries of the School Voucher Program are children, not sectarian schools."); Jackson v. Benson, 578 N.W.2d 602, 626–27, ¶¶ 81–82 (Wis. 1998) (describing the vouchers as "life preservers" that have "been thrown" to students participating in the program).

18 *Id.*

19 *Duncan*, 102 A.3d at 926–27.

20 Espinoza v. Mont. Dep't of Revenue, No. DV-15-1152(D) (Mont. Dist. Ct. Mar. 31, 2016).

21 *Taxpayers for Pub. Educ.*, 351 P.3d at 469–71.

22 Mike DiFerdinando, *Douglas County School Board Rescinds Latest Voucher Program*, Highlands Ranch Herald (Nov. 15, 2016), http://highlandsranchherald.net/stories/Douglas-County-School-Board-rescinds-latest-voucher-program,239051.

of the Colorado Supreme Court's judgment striking down the original program are currently pending at the Supreme Court.[23]

Excluding students who wish to attend religious schools from school choice programs raises profound constitutional issues under the U.S. Constitution. Even if Blaine Amendments are correctly interpreted to require such exclusion, this exclusion would still have to comply with the First Amendment. It likely does not. Applying Blaine Amendments to discriminate between students who wish to attend religious schools and students who wish to attend secular schools likely violates the Free Exercise and Establishment Clauses.

III. Exclusion of Religious Options From School Choice Programs Is Likely Unconstitutional

The application of a Blaine Amendment to bar school choice programs that include religious options—or to exclude religious options from these programs—is likely unconstitutional under both the Free Exercise and Establishment Clauses. Such exclusion discriminates against the religious families who wish to choose religious schools. Further exacerbating this discrimination is the bigotry against Catholics that motivated the enactment of the Blaine Amendments in the first place.

One of the central tenets of the Religion Clauses is government neutrality toward religion. Just as the government may not advance religion, it also may not inhibit religion.[24] This neutrality principle prohibits discrimination among different religions, as well as discrimination against all religion.[25] The Supreme Court typically applies this neutrality requirement by analyzing a law's purpose and effect. Although the Court's Religion Clause jurisprudence has been fickle, it has consistently held that either a primary discriminatory purpose or a primary discriminatory effect is sufficient to fail both the Free Exercise Clause's neutrality test[26] and the Establishment Clause's *Lemon* test.[27] Failing either test means the law is subject to strict scrutiny and very likely unconstitutional.[28]

Here, excluding religious options from school choice programs has both the purpose and the effect of discriminating against religion. It is thus subject to strict scrutiny and unlikely to survive review.

A. Many Blaine Amendments Have a Discriminatory Purpose

It is widely acknowledged, including by the Supreme Court, that Blaine Amendments were predominantly enacted between the 1870s and 1890s to protect the Protestant monopoly over the public schools from the influence of new Catholic immigrants.[29] A law with the purpose of discriminating against religion is presumptively unconstitutional under both the Free Exercise Clause and the Establishment Clause, and is thus subject to strict scrutiny.[30] Therefore, in a challenge to the application of a Blaine Amendment to exclude students attending religious schools from participating in a school choice program, a court should review that Blaine Amendment's history in order to determine if it was passed with a discriminatory motive. If so, the religious exclusion must be reviewed with strict scrutiny.

1. Many Blaine Amendments Have a History of Anti-Catholicism

In the 1800s, the country was predominantly Protestant, and public schools taught a generic Protestantism. Teachers led students in daily prayer, sang religious hymns, extolled Protestant ideals, read from the King James Bible, and taught from anti-Catholic textbooks.[31] This status quo, however, was challenged

23 *Doyle*, 351 P.3d 461, *petition for cert. filed* (No. 15-556). The Court has not yet made a decision on the cert petition, perhaps because it is waiting to first render a decision in *Trinity Lutheran*. *See infra* Part V for discussion of *Trinity Lutheran*.

24 Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 523 (1993) ("The principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our opinions.").

25 *Id.* at 532 ("[T]he First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general."); McCreary Cty. v. ACLU of Ky., 545 U.S. 844, 860 (2005) ("The touchstone for our [Establishment Clause] analysis is the principle that the 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.'").

26 The best example of the Court's Free Exercise analysis of an allegedly discriminatory law is in *Church of the Lukumi Babalu Aye*, where the Court asked whether (1) "the object or purpose of a law is the suppression of religion or religious conduct," or (2) whether it "impose[d] burdens only on conduct motivated by religious belief." 508 U.S. at 533, 543. Essentially, *Lukumi* boils down to a purpose and effect analysis, which has substantial overlap with the Court's *Lemon* test.

27 The modern *Lemon* test has two prongs, under which a law fails the test unless (1) it has a "secular purpose" that is not simply secondary to a "religious objective," and (2) it has a "principal or primary effect . . . that neither advances nor inhibits religion. *McCreary Cty.*, 545 U.S. at 864; Agostini v. Felton, 521 U.S. 203, 218 (1997) (citing Lemon v. Kurtzman, 403 U.S. 602, 612 (1971)).

28 *E.g.*, Colo. Christian Univ. v. Weaver, 534 F.3d 1245, 1266 (10th Cir. 2008) ("[S]tatutes involving discrimination on the basis of religion, including interdenominational discrimination, are subject to heightened scrutiny whether they arise under the Free Exercise Clause, the Establishment Clause, or the Equal Protection Clause." (internal citations omitted)); *see also Church of the Lukumi Babalu Aye*, 508 U.S. at 546 ("A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases.").

29 *See, e.g.*, Mitchell v. Helms, 530 U.S. 793, 828 (2000) (plurality) ("Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that 'sectarian' was code for 'Catholic.'"); *Zelman*, 536 U.S. at 721 (Breyer, J., dissenting) ("Catholics sought equal government support for the education of their children in the form of aid for private Catholic schools," but Protestants insisted "that public schools must be 'nonsectarian' (which was usually understood to allow Bible reading and other Protestant observances) and public money must not support 'sectarian' schools (which in practical terms meant Catholic).").

30 *See* discussion and cited cases *supra* notes 26-28.

31 Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 Harv. J.L. & Pub. Pol'y 551, 559 (2003) ("The common schools . . . were used to assimilate immigrants and their children into American society by enculturating them with American values and attitudes. Central

by the increase in Catholic immigration, starting with the Irish potato famine in the 1840s. The new Catholic immigrants urged the government to either remove Protestantism from the public schools or provide public funding for Catholic schools.[32]

Some Protestants felt that their way of life was threatened by these immigrants, leading to decades of conflict. In the 1840s and 50s, the conflict led to protests, riots, vandalism, and even violence against Catholics.[33] Also in the 1850s, the Know-Nothing Party gained substantial influence as a third-party, with hundreds of Know-Nothings winning congressional seats, state legislature seats, and governorships.[34] The Know-Nothing Party chose the supposed Catholic threat to the public schools as one of its signature issues.[35]

Although the issue died down during the Civil War,[36] the public school controversy peaked in the 1870s. In September 1875, President Ulysses S. Grant, a former Know-Nothing who had become a Republican,[37] delivered a widely-publicized speech calling for the end of all public support for "sectarian schools."[38] It was widely understood that "sectarian" was code for Catholic, in contrast to the nondenominational Protestantism taught in public schools.[39] Three months later, President Grant delivered a congressional address calling for a constitutional amendment prohibiting such sectarian support.[40] The Republican Party also added the positon to its official party platform.[41]

Representative James Blaine, who hoped to succeed Grant as president, took up the cause. Within days of Grant's speech, he introduced a constitutional amendment to prohibit public school funding from being used for any "religious sect or denomination."[42] The proposed amendment passed in the House, and the Senate then amended it to allow "the reading of the Bible in any school"—a clear reference to the public school practice of reading the Protestant Bible.[43]

At the time, the anti-Catholic sentiments behind the proposed amendment were well understood. *The Nation*, which supported the proposal, characterized it as a "[c]onstitutional amendment directed against the Catholics" and declared it was designed to "catch anti-Catholic votes."[44] The *New York Tribune* labeled the amendment as part of a plan to "institute a general war against the Catholic Church."[45] And the *New York Times* referred to the proposal as addressing "the Catholic question."[46] The bill's anti-Catholic motives were also evident during the legislative debates, during which the supposed danger posed by the Catholic

to this enculturation was moral education grounded in Protestant religiosity. While professing to be free of sectarianism, the common schools were actually propagators of a generic Protestantism that, in the words of Professor Joseph Viteritti, 'was intolerant of those who were non-believers.'" (internal citations omitted)); Steven K. Green, *The Blaine Amendment Reconsidered,* 36 Am. J. Legal Hist. 38, 41 (1992) (noting "the obvious evangelical Protestant overtones to public education" and "the practice of hymn singing, praying, and reading from the King James Bible in the public schools").

32 Joseph P. Viteritti, Choosing Equality: School Choice, the Constitution, and Civil Society 85 (1999).

33 *See, e.g.*, *Zelman*, 536 U.S. at 720–21 (Breyer, J., dissenting) ("Dreading Catholic domination," native Protestants "terrorized Catholics." In some states, "Catholic students suffered beatings or expulsions for refusing to read from the Protestant Bible, and crowds . . . rioted over whether Catholic children could be released from the classroom during Bible reading." (internal citations omitted)); Commonwealth v. Cooke, 7 Am. L. Reg. 417 (Mass. Police Ct. 1859) (allowing teacher to beat Catholic student who refused to read from the Protestant Bible); Viteritti, *supra* note 32, at 79–83 (describing Philadelphia Bible riots in the 1840s); DeForrest, *supra* note 31, at 561 ("In one often-noted 1842 incident, the Catholic bishop of New York advocated public funding of the parochial school system in that state. In response a mob burned down his house and state troops had to be called out to defend the bishop's cathedral from attack.").

34 Tyler Anbinder, Nativism and Slavery: The Northern Know Nothings and the Politics of the 1850s 127 (1992).

35 *See, e.g.*, Viteritti, *supra* note 32, at 71 ("At a time when traditional American values seemed to be threatened by vast waves of immigration, the party promised to reinvigorate and preserve a homogeneous Protestant culture. The principal means proposed for achieving this were to restrict elective offices to native-born Americans and to establish a twenty-five year residency requirement for citizenship. But these goals proved to be unattainable, and, in practice, the Know-Nothings and their sympathizers focused their efforts primarily on the School Question.").

36 *Id*. at 111.

37 William S. McFeely, Grant: A Biography 69 (2002) (stating that Grant was "briefly" in the Know-Nothing party").

38 Speech available at Jim Allison, *President U.S. Grant's Speech*, The Constitutional Principle: Separation of Church and State, http://candst.tripod.com/granspch.htm (last visited Dec. 11, 2016).

39 *See* Green, *supra* note 31, at 57 n.117 (citing The Index, September 7, 1876, p. 426) ("For 'sectarian' (quoting from the [Republican] platform), read 'Catholic,' and you have the full meaning . . . ."); *Mitchell*, 530 U.S. at 828 (plurality) ("Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that 'sectarian' was code for 'Catholic.'"); *Zelman*, 536 U.S. at 721 (Breyer, J., dissenting) ("Catholics sought equal government support for the education of their children in the form of aid for private Catholic schools," but Protestants insisted "that public schools must be 'nonsectarian' (which was usually understood to allow Bible reading and other Protestant observances) and public money must not support 'sectarian' schools (which in practical terms meant Catholic).").

40 Speech available at Gerhard Peters & John T. Woolley, *Seventh Annual Message*, The American Presidency Project, http://www.presidency.ucsb.edu/ws/?pid=29516 (last visited Dec. 11, 2016) ("I suggest for your earnest consideration, and most earnestly recommend it, that a constitutional amendment be submitted . . . prohibiting the granting of any school funds or school taxes, or any part thereof, either by legislative, municipal, or other authority, for the benefit or in aid, directly or indirectly, of any religious sect or denomination, or in aid or for the benefit of any other object of any nature or kind whatever . . . . No sectarian tenets shall ever be taught in any school supported in whole or in part by the State, nation, or by the proceeds of any tax levied upon any community.").

41 *See* Green, *supra* note 31, at 56 (calling to ban public support for "any school or institution under sectarian control").

42 *See* 4 Cong. Rec. 5454 (1876).

43 4 Cong. Rec. 5453, 5456 (1876).

44 *See* Green, *supra* note 31, at 54 (quoting The Nation, Mar. 16, 1876, at 173).

45 *Id.* at 44 (quoting The New York Trib., July 8, 1875, at 4).

46 *Id.* at 58 (quoting N. Y. Times, Aug. 5, 1876, at 5) (stating that the Democratic nominee for President, New York Governor Samuel Tilden, "desired immediate action on the amendment so as to 'take the Catholic question out of politics.'").

Church and its schools was discussed at length.[47] One senator even insisted that Congress had a "duty . . . to resist" the teachings of the "aggressive" Catholic Church "by every constitutional amendment and by every law in our power."[48]

Although the federal constitutional amendment (narrowly) failed in the Senate, [49] similar amendments were enacted across the country into state constitutions. Just over the next year, 14 states added their own "Baby Blaine" Amendments.[50] Now, 37 states have Blaine Amendments in their state constitutions. While an individual assessment would be required before drawing conclusions about any particular Blaine Amendment, the legislative history of many of these amendments reveals that they were similarly motived by anti-Catholic bigotry.[51]

In fact, seven justices on the U.S. Supreme Court have already recognized the Blaine Amendments' sordid history. *In Mitchell v. Helms*, four conservative justices stated in dicta that the Blaine movement was "born of bigotry" and called for its legacy to be "buried now."[52] And three liberal justices discussed the Blaine movement's hateful pedigree at length in their dissent in *Zelman v. Simmons-Harris*.[53] The Supreme Court, however, has never squarely addressed the constitutionality of Blaine Amendments, and they continue to be enforced today.

2. Blaine Amendments Enacted with Discriminatory Motives Are Likely Unconstitutional Under the Religion Clauses As Applied to Limit School Choice Programs

Blaine Amendments enacted to discriminate against Catholics raise serious issues under the Free Exercise and Establishment Clauses. While most of these Amendments were passed over a century ago, the Supreme Court has made clear that the passage of time is insufficient to cleanse a law of its tainted history. The Court has also held that a law passed for discriminatory reasons is unconstitutional when it continues to disadvantage the group it was originally intended to discriminate against. That is exactly what occurs when Blaine Amendments are applied to exclude students attending religious schools from school choice programs. This application of the Blaine Amendments is therefore presumptively unconstitutional and subject to strict scrutiny.

In *Hunter v. Underwood*, for example, the Supreme Court unanimously struck down an Alabama constitutional provision under the Equal Protection Clause[54] because of its discriminatory intent when it was enacted over 80 years earlier.[55] The challenged provision disenfranchised citizens who had been convicted for certain crimes, including misdemeanors involving "moral turpitude."[56] Although the provision was neutral on its face, the record showed it was originally intended to target African Americans, who were believed to disproportionately commit such offenses.[57] In striking down the law, the Court emphasized that the delegates at Alabama's constitutional convention "were not secretive about their purpose" and that bigotry at the convention "ran rampant."[58] The Court also rejected the government's argument that "events occurring in the succeeding 80 years had legitimated the provision"; what mattered instead was that the provision was originally intended to disadvantage African

47 *See id.* at 67 (discussing statements of senators who opposed the amendment who stated the amendment was directed against Catholics); *id.* (citing 4 Cong. Rec. 5589 (1876)) ("Senator Lewis Bogy (D-Missouri) called the amendment 'a cloak for the most unworthy partisan motives' and charged that the Republicans were replacing the 'bloody shirt' with unfounded fears of an imperial papacy."); DeForrest, *supra* note 31, at 570–73 (discussing congressional record).

48 4 Cong. Rec. 5588 (1876) (Statement of Sen. Edmunds).

49 The amendment received a majority in the Senate but fell four votes short of the supermajority needed to proceed to the states for ratification. Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 Harv. J.L. & Pub. Pol'y 657, 672 (1998).

50 DeForrest, *supra* note 31, at 573.

51 New Hampshire, Colorado, and Missouri are examples. Professor Charles L. Glenn of Boston University testified on the "Discriminatory Origins" of New Hampshire's Blaine Amendment on behalf of defendant-intervenors in recent litigation involving that Amendment. Charles L. Glenn, *The Discriminatory Origins of New Hampshire's 'Blaine' Amendment* (Mar. 21, 2013), http://mirrorofjustice.blogs.com/files/glenn-on-nh-blaine.pdf. The New Hampshire Supreme Court ultimately did not address the issue, finding the plaintiffs in the suit lacked standing. *Duncan*, 102 A.3d at 926–27. Professor Glenn also testified regarding the tainted history behind Colorado's Blaine Amendment in the ongoing suit in that state. *See Taxpayers for Publ. Educ.*, 351 P.3d 461. And as discussed *infra* Part V, the history behind Missouri's Blaine Amendment is discussed in the briefing of *Trinity Lutheran v. Pauley*.

52 *Mitchell*, 530 U.S. at 802, 829 (plurality opinion by Justice Thomas, joined by Chief Justice Rehnquist and Justices Scalia and Kennedy) (upholding law that provided supplies to both secular and religious private schools).

53 536 U.S. at 719–21 (dissent by Justice Breyer, joined by Justices Stevens and Souter).

54 While *Hunter* involved a challenge under the Equal Protection Clause and not either Religion Clause, all three clauses similarly prohibit discriminatory intent or purpose. *See, e.g.*, *Colo. Christian Univ.*, 534 F.3d at 1266 ("[S]tatutes involving discrimination on the basis of religion, including interdenominational discrimination, are subject to heightened scrutiny whether they arise under the Free Exercise Clause, the Establishment Clause, or the Equal Protection Clause." (internal citations omitted)); Frederick Mark Gedicks, *The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in the United States*, 19 Emory Int'l L. Rev. 1187, 1189–1190 (2005) ("[A]t the least, the [Religion] Clauses render presumptively invalid laws that single out a particular religion or religion generally for special burdens . . . . Similarly, the Equal Protection Clause of the Fourteenth Amendment provides constitutional protection against religious discrimination.").

55 471 U.S. 222, 232-33 (1985). This is not the only time the Court has struck down a state constitutional provision under the Equal Protection Clause because it was discriminatory. *See* Romer v. Evans, 517 U.S. 620 (1996) (striking down Colorado's constitutional amendment that prevented the state or local governments from giving protected status based on sexual orientation).

56 *Id.* at 223–24.

57 *Id.* at 227.

58 *Id.* at 229.

Americans and that it continued to negatively affect African Americans.[59]

The same is true with the Blaine Amendments. First, just as in *Hunter*, the anti-Catholic sentiments behind the Blaine Amendments passed in the late 1800s are virtually undisputed. Even historians who argue that other motivations drove the Blaine Amendments—such as ensuring that adequate funds would exist for public schools—concede that "[a]nti-Catholicism" was "[o]ne [f]actor" at play.[60] This is likely sufficient to violate the Constitution. Indeed, in *Hunter*, the Court rejected the relevance of an additional, permissible purpose behind the challenged provision,[61] holding that a permissible purpose could "not render nugatory the purpose to discriminate."[62] The same should hold with Blaine Amendments.

Second, like in *Hunter*, the Blaine Amendments continue to adversely affect Catholics—the original targets of the discrimination—as well as adherents of other religions. As explained below, religious families are burdened whenever Blaine Amendments are used to exclude religious options from school choice programs.

Thus, the application of Blaine Amendments with a documented history of bigotry to prohibit religious participation in school choice programs is likely presumptively unconstitutional. Such an application would disadvantage Catholics and other religious groups, perpetuating the bigotry that originally motivated these Blaine Amendments. This application would thus be subject to strict scrutiny.

B. Blaine Amendments Have a Discriminatory Effect

Even if a particular Blaine Amendment lacked a discriminatory purpose when enacted, it would likely still be unconstitutional under the Religion Clauses as applied to school choice programs to exclude students who wish to attend religious schools. That is because this application has the primary effect of discriminating against religious families who wish to send their children to these schools. This discriminatory effect provides independent grounds to review this application of the Blaine Amendment with strict scrutiny.

The Supreme Court has long stated that a law with a neutral purpose is still discriminatory under the Free Exercise Clause if it only applies to "conduct motivated by religious beliefs."[63] Similarly, a law with the primary effect of inhibiting religion fails the Establishment Clause's *Lemon* test.[64] There are few examples in the case law of laws that fail these tests. As the Supreme Court stated in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, "[t]he principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our opinions."[65] In addition, Supreme Court cases finding a discriminatory effect have for the most part only involved discrimination against particular religions.[66]

The Court, however, has strongly implied that excluding all religious schools from a school choice program would be unconstitutional. In *Zelman*, for instance, the Court stated that a program that "differentiates based on the religious status of beneficiaries or providers of services" would violate the "touchstone of neutrality" under the Establishment Clause.[67] The Court reiterated this idea two years later in *Locke v. Davey*.[68] Although *Locke* actually rejected a discrimination claim involving a college scholarship program, the Court's rationale for why the program's exclusion was constitutional provides valuable guidance for thinking about exclusions in school choice programs. This guidance ultimately leads to a conclusion that excluding all religious options in school choice programs is unconstitutional.

Locke arose when a student wishing to become a church pastor challenged a Washington State program that awarded college scholarships to low-income, academically gifted students, but excluded students pursuing a "devotional theology" degree.[69] The Court found that strict scrutiny should not apply to the program because it showed no "hostility" toward religion.[70] Instead, the Court emphasized that "the entirety of the [program]

59 *Id.* at 232-33.

60 Brief for Amici Curiae, Legal and Religious Historians, in Support of Respondent, 8-9, 16, Trinity Lutheran Church of Columbia, Inc. v. Pauley, No. 15-577 (U.S. cert. granted Jan. 15, 2016), http://www.scotusblog.com/wp-content/uploads/2016/07/15-577_amicus_resp_legal_and_religious_historians.authcheckdam.pdf (conceding that anti-Catholicism was a factor behind the Blaine Amendments, despite an overall argument that it was not the predominant motivation, and conceding that "animus may have motivated some supporters" of the Blaine Amendments).

61 *Hunter*, 471 U.S. at 231–32. Evidence showed that another motivation behind the legislation was an intent to discriminate against poor people, regardless of their race. *Id*. Being poor is not a protected classification under the Equal Protection Clause, and the Court assumed, without deciding, that such a motive would be permissible. *Id*. at 232.

62 *Id.*

63 *See, e.g.*, *Church of the Lukumi Babalu Aye*, 508 U.S. at 524 ("[T]he principle of general applicability was violated because the secular ends asserted in defense of the laws were pursued only with respect to conduct motivated by religious beliefs.").

64 *See, e.g.*, *Agostini*, 521 U.S. at 218 (stating the *Lemon* test requires that a law's "principal or primary effect must be one that neither advances nor inhibits religion") (citing *Lemon*, 403 U.S. at 612).

65 508 U.S. at 523.

66 *See, e.g.*, *Church of Lukumi Babalu Aye*, 508 U.S. at 524 (striking down law prohibiting animal sacrifice, as it had both the purpose and effect of targeting the religion of Santeria); Larson v. Valente, 456 U.S. 228, 253 (1982) (striking down state charitable solicitations law under the Establishment Clause when it had the "principal effect" of treating some religious denominations more favorably than others); Fowler v. Rhode Island, 345 U.S. 67 (1953) (finding municipal ordinance unconstitutional as applied when its interpretation had the effect of letting some religious groups hold sermons in the park, but not others). *But see* McDaniel v Paty, 435 U.S. 618 (1978) (plurality opinion) (striking down state law barring ministers or priests from holding public office).

67 *Zelman*, 536 U.S. at 654, n.3.

68 540 U.S. 712 (2004).

69 *Id.* at 715–16.

70 *Id.* at 724 ("Far from evincing the hostility toward religion which was manifest in *Lukumi*, we believe that the entirety of the Promise Scholarship Program goes a long way toward including religion in its benefits."); *id.* at 721 (finding no "evidence of hostility toward religion");

goes a long way toward including religion in its benefits."[71] Specifically, it allowed scholarships for students attending religious schools and taking religious classes, including devotional theology courses, just as long as they were not pursuing a devotional theology degree.[72]

As the program was not hostile toward religion, the Court upheld it under what appeared to be intermediate scrutiny. The Court held that the program's exclusion was justified by the state's interest in not funding the clergy, an interest that the Court found to be "substantial" in that such funding was recognized to constitute a "hallmark[] of an 'established' religion" since the country's founding.[73]

After *Locke*, it seems likely that excluding *all* religious schools from a school choice program—or any other generally available student-aid program—would show "hostility" toward religion, triggering strict scrutiny under the Free Exercise Clause (which *Locke* narrowly avoided). Such total exclusion would not go "a long way toward including religion in its benefits"[74] and would instead prohibit "conduct motivated by religious belief" from having any place in the program.[75] Indeed, religious belief is the primary motivator of many parents who select religious schools for their children. While the student in *Locke* was obviously motivated by religion to pursue a devotional theology degree, the Court emphasized that the program still allowed him to attend the religious school of his choice and even to take devotional classes.[76] In contrast, a total religious exclusion would disallow any funding for a student who wishes to attend a religious school.

Excluding all religious schools from a school choice program would also run afoul of the Establishment Clause, as its primary effect would be to "inhibit religious practice" under *Lemon*'s second prong. The exclusion forces religious families to choose between receiving a scholarship and attending a school that accords with their religious beliefs. If parents choose a secular private school, they are rewarded with hundreds or even thousands of dollars. But if they want their child to attend a religious private school, they will receive nothing—and either have to pay tuition out of pocket or be unable to enroll their child in a private school at all.[77]

It is difficult to imagine how such a system would not inhibit religious practice. Religious schooling is integral to guiding children in the practice of religion and is even required by certain religions.[78] Yet some parents will inevitably feel pressure to forgo religious schooling for the opportunity to send their child to a private secular school with government funding. This is exactly the type of pressure that the Religion Clauses are meant to prevent.[79]

Any law that discriminates against religion in either its purpose or effect is presumptively unconstitutional under the First Amendment and must be examined under strict scrutiny. Using a Blaine Amendment to exclude religious schools from an otherwise generally available choice program is likely presumptively unconstitutional. Not only were many of the Blaine Amendments enacted with discriminatory motives, but such an exclusion has a discriminatory effect on religious practices. Thus, religious exclusions must undergo strict scrutiny and will likely not survive review.

C. Laws Excluding Religious Options from School Choice Programs Cannot Survive Strict Scrutiny

Under strict scrutiny, a government would have to prove that its exclusion of religious schools from a school choice program is narrowly tailored to achieve a compelling state interest. It is unlikely that a government could offer a compelling interest for its exclusion.

A state would likely argue that it wishes to exclude religious options from a school choice program in order to distance the state from religion and avoid entanglement between the two. But the Supreme Court has already held that an asserted state interest in "achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal

id. at 720 ("[T]he State's disfavor of religion (if it can be called that) is of a far milder kind.").

71 *Id.*

72 *Id.* at 724–25.

73 *Id.* at 722, 724 ("[W]e can think of few areas in which a State's antiestablishment interests come more into play.").

74 *Id.* at 724.

75 *Church of the Lukumi Babalu Aye*, 508 U.S. at 543.

76 *Locke*, 540 U.S. at 724–725 (describing how the plaintiff would still be allowed to take devotional theology classes with the scholarship money).

77 Some may argue that this choice is little different from the choice parents already face when their state lacks a school choice program: they can either pay to send their child to a religious private school or send their child to a public school for free. But this choice is legally distinguishable and does not pose the same constitutional concerns. The public schools exist entirely independent of the private schools and, while all states are required to provide public schooling, no state is required to subsidize private schooling. Once the government decides to subsidize private school tuition, however, it creates a new and separate benefit to families, and the Religion Clauses require that it do so on a neutral and nondiscriminatory basis. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263, 267–68 (1981) ("The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place."). Thus, the public/private distinction is different than a religious/non-religious distinction.

78 For example, Catholic doctrine requires parents to send their children to Catholic schools "wherever and whenever it is possible." Pope Paul VI, *Declaration on Christian Education: Gravissimum Educationis*, Vatican (Oct. 28, 1965), http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651028_gravissimum-educationis_en.html (reminding "Catholic parents of the duty of entrusting their children to Catholic schools wherever and whenever it is possible").

79 *Zelman* held that, under the Establishment Clause, the government could not "coerc[e] parents into sending their children to religious schools," as this would violate the *Lemon* test. *Zelman*, 536 U.S. at 655–56. It stands to reason that discouraging parents from sending their children to religious schools would also be problematic under the *Lemon* test. The government must be "neutral" as to the parents' choice and cannot coerce or influence this choice. *Id.* at 652–54, 654 n.3 (stating that, to satisfy the "touchstone of neutrality" under the Establishment Clause, a program cannot "differentiate[] based on the religious status of beneficiaries or providers of services").

Constitution [] is limited by the Free Exercise Clause" and does not qualify as a "compelling interest."[80]

Locke does not hold otherwise. The Court in *Locke* never found that the government had a compelling interest in not funding the training of ministers. In fact, the Court avoided strict scrutiny analysis altogether. Instead, *Locke*'s analysis was akin to intermediate scrutiny, and merely found that the restriction was justified by the state's "substantial" interest in not funding ministers.[81]

But even assuming that there is a compelling state interest in not providing scholarships to fund the training of ministers, this interest is narrow and distinguishable from any state interest in withholding scholarships from students attending religious schools. Unlike this country's long and established history of opposing public support for the clergy, there is not a comparable history of opposing aid for families choosing religious schools. In fact, many states have long provided such aid, even before the advent of school choice programs. This aid is often provided on neutral criteria to all families choosing private schooling and includes subsidies for transportation, textbooks, and supplies.[82] While some courts have stuck down such programs, they are in the minority, and these rulings do not rise to the level of the deeply rooted public opposition to funding the clergy discussed in *Locke*.[83] Perhaps this is because many understand such aid to be for families and their personal educational choices, and not for religious institutions themselves.[84]

It is thus unlikely that the state has a compelling interest in excluding religious options from an otherwise neutral and generally available school choice program, and it would be

80 *Widmar,* 454 U.S. at 276–77 (striking down university regulation that made its facilities available for use by student groups for secular reasons but excluded student groups who wished to use the facilities for religious worship or teaching, as this exclusion was a violation of free speech); *see also* Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144, 172–73 (3d Cir. 2002) (rejecting borough's asserted "interest in avoiding 'an Establishment Clause controversy'").

81 *Locke*, 540 U.S. at 725.

82 Approximately 15 courts, including the U.S. Supreme Court, have upheld such student-aid programs. *See* Mueller v. Allen, 463 U.S. 388 (1983) (holding that Minnesota's tax deduction for education expenses—including the cost of tuition, textbooks, and transportation—does not violate the *Lemon* test despite overwhelmingly benefiting parents with students in parochial schools); Cochran v. La. State Bd. of Educ., 281 U.S. 370 (1930) (holding that students and the state were the beneficiaries under a program providing textbooks to parochial school students, not the school or the religious denomination with which the school is affiliated); Bd. of Educ. of Stafford v. State Bd. of Educ., 709 A.2d 510 (Conn. 1998) (upholding law funding transportation of private school students); Neal v. Fiscal Court, Jefferson Cty., 986 S.W.2d 907 (Ky. 1999) (holding that the Jefferson County Fiscal Court's plan to allocate funds for the transportation of private elementary school students did not violate Kentucky's Blaine Amendment); Borden v. La. State Bd. of Educ., 123 So. 655 (La. 1929) (upholding the constitutionality of a program in which public funds were used to purchase, among other things, textbooks for parochial schools); Bd. of Educ. of Baltimore Cty. v. Wheat, 199 A. 628 (Md. 1938) (holding that using public money to provide transportation for children attending private schools does not violate Maryland's Constitution); Attorney Gen. v. Sch. Comm. of Essex, 439 N.E.2d 770 (Mass. 1982) (holding that a statute requiring transportation of private school students on public school buses was a community safety measure not unlike police or fire protection); Alexander v. Bartlett, 165 N.W.2d 445 (Mich. Ct. App. 1968) (holding that a statute permitting local school districts to furnish transportation without charge for students of state-approved private schools did not violate Michigan's first Blaine Amendment); Chance v. Miss. State Textbook Rating & Purchasing Bd., 200 So. 706 (Miss. 1941) (en banc) (holding that loaning public textbooks to private school pupils does not violate Mississippi's Blaine Amendment); Everson v. Bd. of Educ. of Ewing Twp., 44 A.2d 333 (N.J. 1945) (holding that the transportation of private school students at public expense was designed to help parents comply with mandatory attendance laws, which is a public purpose, and therefore does not violate the New Jersey Constitution); Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen, 228 N.E.2d 791 (N.Y. 1967), *aff'd*, 392 U.S. 236 (1968) (holding that New York's textbook loan program does not violate the state's Blaine Amendment); Cunningham v. Lutjeharms, 437 N.W.2d 806 (Neb. 1989) (holding that lending textbooks to private schools does not violate the First Amendment's Establishment Clause); Honohan v. Holt, 244 N.E.2d 537 (Ohio Ct. Com. Pl. 1968) (holding that the indirect benefits flowing to religious schools from the transportation of their pupils at public expense do not violate the Ohio Constitution); Rhoades v. Sch. Dist. of Abington Twp., 226 A.2d 53 (Pa. 1967) (upholding the constitutionality of a statute authorizing transportation of private school students); Bowerman v. O'Connor, 247 A.2d 82 (R.I. 1968) (upholding a textbook loan program that included students attending religious schools under the state's Compelled Support Clause); Janasiewicz v. Bd. of Educ. Of Kanawha, 299 S.E.2d 34 (W. Va. 1982) (holding that transportation program for private school students was constitutional).

83 Approximately 10 courts have struck down such student-aid programs. Matthews v. Quinton, 362 P.2d 932 (Alaska 1961) (holding that transportation of private school students at public expense violates the Alaska Constitution); California Teachers Ass'n v. Riles, 632 P.2d 953 (Cal. 1981) (holding that lending textbooks to private schools violated the state constitution's Blaine Amendments); Spears v. Honda, 449 P.2d 130 (Haw. 1968) (holding that a statute authorizing the transportation of private school students at public expense violated the state's Blaine Amendment); Epeldi v. Engelking, 488 P.2d 860 (Idaho 1971) (holding that the state could not subsidize the transportation of private school students without violating Idaho's Blaine Amendment); Fannin v. Williams, 655 S.W.2d 480 (Ky. 1983) (holding that a Kentucky statute that provided state-supplied textbooks to children in private schools violated the Kentucky Blaine Amendment); Bloom v. Sch. Comm. of Springfield, 379 N.E.2d 578 (Mass. 1978) (striking down textbook loan program); Paster v. Tussey, 512 S.W.2d 97 (Mo. 1974) (en banc) (striking down textbook program under the state Constitution's Compelled Support Clause and Blaine Amendment); Dickman v. Sch. Dist. No. 62C, 366 P.2d 533 (Or. 1961) (holding that a statute authorizing the state to provide textbooks to students at parochial schools violated the state's Blaine Amendment); Moses v. Skandera, 367 P.3d 838 (N.M. 2015), *petition for cert. filed*, N. M. Ass'n of Non-Pub. Sch. v. Moses (U.S. May 19, 2016) (No. 15-1409) (holding that lending instructional materials for free to students who attend private schools involved an appropriation of state funds and violated one of New Mexico's two Blaine Amendments); Mitchell v. Consol. Sch. Dist. No. 201, 135 P.2d 79 (Wash. 1943) (en banc) (striking down a transportation program for private school students under the state Blaine Amendment); *see also* Luetkemeyer v. Kaufmann, 364 F. Supp. 376 (D. Mo. 1973), *aff'd by mem. op.*, 419 U.S. 888 (1974) (holding that the state's refusal to provide school bus transportation to religious school pupils did not violate the students' equal protection rights because the decision was not irrational). For a discussion of *Luetkemeyer,* see *infra* note 103.

Notably, some of these courts have upheld other student aid programs. *See supra* note 82 for the Kentucky, Massachusetts, and Michigan decisions.

84 *See, e.g.*, *Cochran*, 281 U.S. at 374–75 (holding that students and the state were the beneficiaries under a program providing textbooks to parochial school students, not the school or the religious denomination with which the school is affiliated).

unnecessary for a court to reach the narrowly tailored part of the strict scrutiny analysis. The exclusion would likely fail strict scrutiny.

IV. Lower Courts Disagree About Whether the Government Can Exclude Religious Options from Student-Aid Programs

Although the Supreme Court has strongly implied that the exclusion of all religious options from an otherwise generally available school aid program would be unconstitutional, the Court has never squarely addressed such an exclusion. As a result, the lower courts have split on this issue. On one side, the Sixth, Eighth, and Tenth Circuits have all struck down restrictions in public programs that discriminated against students attending religious schools.[85] On the other side of the split, the First Circuit and the Vermont and Maine Supreme Courts have upheld such restrictions.[86] Justice Thomas acknowledged this split as early as 1999, urging the Court to "provide the lower courts . . . with much needed guidance."[87] But, 18 years later, the split has only deepened.

The Supreme Court's decision in *Locke v. Davey* is partly responsible for this deepening divide. Specifically, the Court caused confusion with its emphasis on the "room for play in the joints" between the Free Exercise and Establishment Clauses.[88] In other words, just because a state action is not *forbidden* by the Establishment Clause does not mean it is *required* by the Free Exercise Clause. In *Locke*, for instance, the Court recognized that the Establishment Clause would *allow* a state to offer scholarships for those majoring in devotional theology, as long as these scholarships were granted in the context of a neutral and generally available program. But the state was not *required* by the Free Exercise Clause to grant these scholarships. As *Locke* stated, "[i]f any room exists between the two Religion Clauses, it must be here."[89]

The problem is that the lower courts cannot agree on how much "room for play in the joints" exists between the two clauses. The leading opinions representing the two different perspectives are *Eulitt v. Maine Department of Education*[90] and *Colorado Christian University v. Weaver*.[91]

Eulitt represents the view that there is significant room between the Establishment and Free Exercise Clauses. In *Eulitt*, the First Circuit upheld the exclusion of all religious schools from Maine's "town tuition programs," in which a town can pay for children to attend the private school of their choice instead of maintaining a public school. The court claimed that *Locke* compelled this holding, finding there was "no authority that suggests that the 'room for play in the joints' identified by [*Locke*] is applicable to certain education funding decisions but not others."[92] Yet the court ignored *Locke*'s conclusion that the Washington program was not discriminatory only because it went "a long way toward including religion in its benefits," which the *Eulitt* exclusion certainly did not do.[93] *Eulitt* also skimmed over Maine's interest in the exclusion, merely noting that states may "act upon their legitimate concerns about excessive entanglement with religion, even though the Establishment Clause may not require them to do so."[94] The court never even identified what Maine's "legitimate concern" was, nor did it inquire into whether that concern was historically recognized and "substantial," as the *Locke* Court did. By upholding the religious exclusion without any inquiry into whether its purpose or effect was discriminatory, the court rubberstamped the exclusion under rational basis review—an approach that has no support in the Supreme Court's Religion Clause jurisprudence.

The Tenth Circuit later read *Locke* far more narrowly in *Colorado Christian University v. Weaver*. There, the court invalidated Colorado's exclusion of "pervasively sectarian" schools from state scholarship programs under the Free Exercise, Establishment, and Equal Protection Clauses.[95] The opinion, written by then-Judge Michael McConnell, states that *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],' and does not extend to the wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support."[96] *Colorado Christian* is thus consistent with *Locke*'s strong implication that the wholesale exclusion of

85 *Colo. Christian Univ.*, 534 F.3d at 1256 (striking down exclusion of "pervasively sectarian" schools from college scholarship program); Peter v. Wedl, 155 F.3d 992, 997 (8th Cir. 1998) (holding that a Minnesota regulation violated the Free Exercise Clause when it required school districts to provide special education services to private school children but prohibited children attending religious schools from receiving these services on school grounds); Hartmann v. Stone, 68 F.3d 973, 977, 985–86 (6th Cir. 1995) (striking down regulation under the Free Exercise Clause that barred providers who "teach or promote religious doctrine" from a federal child-care program); *see also* Badger Catholic, Inc. v. Walsh, 620 F.3d 775, 777, 779 (7th Cir. 2010) (striking down, under *Locke*, public university's ban on the use of extracurricular student funds for "worship, proselytizing, or religious instruction," as the ban completely barred religious support).

86 These courts have all upheld the exclusion of religious schools from town tuition programs, in which towns pay for parents to send their children to the school of their choice in lieu of the town maintaining a public school. Strout v. Albanese, 178 F.3d 57, 64–65 (1st Cir. 1999); Bagley v. Raymond Sch. Dep't, 728 A.2d 127, 147 (Me. 1999); Chittenden Town Sch. Dist. v. Vt. Dep't of Educ., 738 A.2d 539, 562–63 (Vt. 1999).

87 Columbia Union Coll. v. Clarke, 527 U.S. 1013, 1013 (1999) (Thomas, J., dissenting from denial of certiorari).

88 *Locke*, 540 U.S. at 718–19. The Court quoted this language from its case, *Walz v. Tax Commission of the City of New York*, 397 U.S. 664, 669 (1970).

89 *Locke*, 540 U.S. at 725.

90 386 F.3d 344 (1st Cir. 2004); *see also* Anderson v. Town of Durham, 895 A.2d 944, 961 (Me. 2006).

91 534 F.3d 1245.

92 *Eulitt*, 386 F.3d at 355.

93 *Locke*, 540 U.S. at 724.

94 *Eulitt*, 386 F.3d. at 355.

95 *Colo. Christian Univ.*, 534 F.3d at 1258, 1266, 1269.

96 *Id.* at 1255 (internal citations omitted).

religious options from a student-aid program would be hostile toward religion and therefore unconstitutional.[97]

Today, the courts continue to divide over whether school choice programs can constitutionally exclude religious schools from otherwise generally available scholarship programs. The most recent court to join the split is a Montana trial court, which issued a preliminary injunction against a religious exclusion in March 2016.[98] Without resolution by the U.S. Supreme Court, more courts will become divided.

V. The Supreme Court's upcoming decision in Trinity Lutheran may provide clarity on this controversy

The U.S. Supreme Court now has an opportunity to resolve this split—or at least provide much-needed clarity—when it decides *Trinity Lutheran Church of Columbia, Inc. v. Pauley*.[99] *Trinity Lutheran* concerns whether it is constitutional to rely on a state Blaine Amendment to exclude churches from a public benefit program.

In *Trinity Lutheran,* a church-run daycare center challenged Missouri's Blaine Amendment[100] under the Religion Clauses and the Equal Protection Clause after state officials used the Amendment to deny it a state grant to replace its playground surface with a safer material.[101] The daycare was originally intended to be one of 15 grant recipients because it had one of the best grant applications, but the state later denied the grant solely because of the daycare's religious affiliation. In a divided opinion, the Eighth Circuit rejected what is characterized as the daycare's facial challenge to the Blaine Amendment.[102]

In rejecting the challenge, the Eighth Circuit majority relied on *Locke.*[103] It reasoned that the daycare "seeks to compel the direct grant of public funds to churches, another of the 'hallmarks of an established religion'" and that, at the very least, the state's decision not to give a grant to the daycare fell into the "play in the joints" between the Religion Clauses.[104] The majority, however, acknowledged that "there is active academic and judicial debate about the breadth of the [*Locke*] decision."[105] The majority also conceded that the next "logical constitutional leap in the direction the [Supreme] Court recently seems to be going" is toward holding that a government may not bar the distribution of public aid based solely on religion.[106] Yet the Eighth Circuit refused to go in this direction itself, finding such a holding would still be "a leap of great magnitude" from the Court's previous decisions, and "only the Supreme Court can make that leap."[107]

The daycare is now urging the Supreme Court to make that "logical constitutional leap" and to rule that denying public aid based solely on religious status is unconstitutional. Even if the Supreme Court rejects the daycare's request, however, there are several other outcomes that could benefit the school choice movement.

For instance, the Court could reject the challenge because, as the Eighth Circuit noted, the grant program involves direct institutional aid. In contrast, school choice programs only involve *student* aid; government funds are given to students who choose where to spend them, rather than given to religious institutions. Indeed, the distinction between institutional aid and individual aid is well established in Religion Clause jurisprudence.[108] In the former, the state is choosing to support a religious institution, while in the latter, no money goes to a religious institution except through the private and voluntary decisions of individuals. The Court could make this institution/individual aid distinction implicit in its reasoning, or it could go further, explicitly noting that, under *Locke*, the total exclusion of religious schools from a student-aid program is unconstitutional.

In addition, it is possible that the Court will address the anti-Catholic history behind Missouri's Blaine Amendment. This history has been discussed in the daycare's opening brief and in at least one amicus brief.[109] The Court could hold that this history makes the Amendment's application to the daycare unconstitutional, or just note that the Amendment is constitutionally suspect. Even if the Court finds that there is not enough historical evidence to make any firm conclusions about Missouri's Amendment, the Court could leave the door open to future challenges of applications of other Blaine Amendments that are religiously discriminatory.

Of course, *Trinity Lutheran* could also fail to provide any meaningful guidance on student-aid programs or Blaine

97 *See Locke*, 540 U.S. at 724.

98 *Espinoza*, No. DV-15-1152(D).

99 788 F.3d 779 (8th Cir. 2015), *cert granted,* 136 S. Ct. 891 (U.S. Jan. 15, 2016) (No. 15-577).

100 Article I, Section 7 of the Missouri Constitution states that "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion."

101 788 F.3d at 782.

102 Oddly, the majority in *Trinity Lutheran* never addressed the plaintiff's as-applied challenge which, according to the dissent, was the only challenge it even brought. *Id.* at 790–91 (Gruender, J., concurring in part and dissenting in part).

103 *Id.* at 785. The majority also expressed that it felt bound to reject the facial challenge to the Blaine Amendment because of the Supreme Court's summary affirmance thirty years earlier in *Luetkemeyer v. Kaufmann*, which held that the state could constitutionally use Missouri's Blaine Amendment to deny funding for religious school busing while simultaneously providing busing to public school students. *Trinity Lutheran*, 788 F.3d at 785. *Luetkemeyer*, however, did not involve a program that provided aid to some private school students and not others, like in other student-aid cases, which presents a distinctly different Free Exercise claim.

104 *Id.* at 785 & n.3 (some internal quotation marks omitted).

105 *Id.* at 785.

106 *Id.*

107 *Id.*

108 *See, e.g.*, *Zelman*, 536 U.S. at 649 (collecting cases).

109 Brief of Petitioner 42–43, Trinity Lutheran, No. 15-557 (U.S. cert. granted Jan. 15, 2016), http://www.scotusblog.com/wp-content/uploads/2016/04/TrinityLutheranPetitionersBrief.pdf; Brief for Amicus Curiae Douglas County School District and Douglas County School Board in Support of Petitioner 27-36, Trinity Lutheran, No. 15-557, http://www.scotusblog.com/wp-content/uploads/2016/04/TrinityLutheranMeritsAmicusDCSD.pdf.

Amendments. If this occurs, the Court should seize the next opportunity to do so, whether that be in the Colorado case, the Montana case,[110] or another student-aid case. Until then, lower courts and state legislatures will continue to wrestle with this issue, with predictably inconsistent results.

VI. Conclusion

Excluding religious options from otherwise neutral and generally available student-aid programs is likely discriminatory under the Free Exercise and Establishment Clauses. Further exacerbating this discrimination is the bigotry against Catholics that motivated the enactment of the Blaine Amendments in the first place. Until the Supreme Court resolves this issue, however, both lower courts and legislators will continue to struggle with it, causing uncertainty for school choice programs nationwide.

110 *See* discussion of both the Colorado and Montana cases *supra* Part II.

When a Pastor's House Is a Church Home: Why the Parsonage Allowance Is Desirable Under the Establishment Clause

By Hannah C. Smith & Daniel Benson

Note from the Editor:

This article discusses the parsonage allowance, whereby the value of a minister's home is exempted from federal income tax. It argues that the allowance is constitutional under the Establishment Clause, and indeed desirable pursuant to important Establishment Clause values.

The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the authors. Whenever we publish an article that advocates for a particular position, as here, we offer links to other perspectives on the issue, including ones opposed to the position taken in the article. As always, we also invite responses from our readers. To join the debate, please email us at info@fedsoc.org.

• Erwin Chemerinsky, *The Parsonage Exemption Violates the Establishment Clause & Should Be Declared Unconstitutional*, 24 Whittier L. Rev. 707 (2003), *available at* http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1652&context=faculty_scholarship.

• Plaintiffs' Combined Brief Opposing Summary Judgment in Favor of the Government and Intervenor-Defendants, Gaylor v. Lew, No. 3:16-cv-215-bbc (W.D. Wis. Apr. 5, 2016), *available at* https://ffrf.org/images/FFRFSummaryJudgmentBrief.pdf.

• Lorelei Laird, *Courts are hearing new challenges to tax exemptions for religion*, ABA Journal (May 1, 2014), http://www.abajournal.com/magazine/article/courts_are_hearing_new_challenges_to_tax_exemptions_for_religion.

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For almost a century, Congress has excluded the value of a minister's home from federal income tax.[1] The Internal Revenue Code provides: "In the case of a minister of the gospel, gross income does not include (1) the rental value of a home furnished to him as part of his compensation; or (2) the rental allowance paid to him as part of his compensation," within certain limits.[2] Because many ministers have traditionally lived in church-owned housing, or "parsonages," this statute—§ 107 of the Internal Revenue Code—is often called the "parsonage allowance."[3]

Over the last several years, some academics and litigants have attacked this longstanding tax provision as a violation of the Establishment Clause.[4] But their arguments often fail to consider the parsonage allowance's historical and statutory contexts, both of which show that the government has regularly adapted tax principles to the unique circumstances of religious organizations in order to promote the important Establishment Clause values of church autonomy, non-entanglement, and non-discrimination. This article will explore those contexts in order to demonstrate why the parsonage allowance is not only permissible under the Establishment Clause, but desirable.

I. The Parsonage Allowance and the Establishment Clause

The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion."[5] To interpret this clause, the Supreme Court has employed various tests.

In some cases, the Court has applied the *Lemon* test, which asks whether the government's action 1) has a religious "purpose," 2) has the "primary effect" of "advancing" or "endorsing" religion, and 3) fosters "excessive [government] entanglement with religion."[6] This test has been heavily criticized by courts and commentators alike[7] and has not been applied by the Supreme Court in a merits decision in over 12 years.[8] At least eight current

1 Revenue Act of 1921, Pub. L. No. 67-98, § 213(b)(11), 42 Stat. 227, 239 (1921).

2 26 U.S.C. § 107.

3 It is also called the "parsonage exemption" or "parsonage exclusion."

4 *See, e.g.,* Freedom From Religion Foundation v. Geithner, 644 F.3d 836 (9th Cir. 2011); Freedom From Religion Foundation v. Lew, 773 F.3d 815 (7th Cir. 2014); Gaylor v. Lew, No. 3:16-cv-215-bbc (W.D. Wis. Apr. 5, 2016); Erwin Chemerinsky, *The Parsonage Exemption Violates the Establishment Clause & Should Be Declared Unconstitutional*, 24 Whittier L. Rev. 707 (2003).

5 U.S. Const. amend. I, cl. 1.

6 Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 395 (1993) (describing *Lemon* test); Lynch v. Donnelly, 465 U.S. 668, 688-89 (1984) (O'Connor, J. concurring) (first articulating "no endorsement" test).

7 *See, e.g.*, Doe v. Elmbrook Sch. Dist., 687 F.3d 840, 869-77 (7th Cir. 2012) (Easterbook & Posner, JJ., dissenting from en banc decision) (calling *Lemon* and "no endorsement" test "hopelessly open-ended"); Gerard V. Bradley, *Protecting Religious Liberty*, 42 DePaul L. Rev. 253, 261 (1992); Richard W. Garnett, *Religion, Division, & the First Amendment*, 94 Geo. L.J. 1667 (2006); Douglas Laycock, *Towards a General Theory of the Religion Clauses*, 81 Colum. L. Rev. 1373, 1380-88 (1981); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 118-20 (1992).

8 McCreary Cty. v. Am. Civil Liberties Union of Ky., 545 U.S. 844 (2005).

or recent Justices have called for its rejection.[9] And in recent cases, the Court has treated the *Lemon* factors as "no more than helpful signposts," if it has applied them at all.[10]

Instead, the Court has increasingly focused on the historical meaning of the Establishment Clause and the practices that have long been permitted under it.[11] It has also decided two prominent cases in the tax context—*Walz v. Tax Commission*[12] and *Texas Monthly, Inc. v. Bullock*.[13] In these cases, although the Court mentioned some of the *Lemon* factors, its analysis was not driven by a three-factor test. Rather, the Court focused on the history of the Establishment Clause, the nuances of the tax code, and principles unique to the tax context.[14]

In the case of the parsonage allowance, while lower courts may feel compelled to consider the *Lemon* factors, it is also crucial that they consider the historical meaning of the Establishment Clause, the practices that were permitted under it, and the Court's analyses in *Walz* and *Texas Monthly*. As explained below, the parsonage allowance is not only permissible under the Establishment Clause, but desirable, because it furthers the core Establishment Clause values of neutrality, non-discrimination, and non-entanglement. It is fully consistent with the historical meaning of the Establishment Clause. It is fully consistent with the controlling concurrence in *Texas Monthly*. And it is fully consistent with the plurality's more stringent test in the same case. Finally, striking down the parsonage allowance would threaten scores of other provisions in the federal and state tax codes.

II. The Parsonage Allowance Is Consistent With a Historical Understanding of the Establishment Clause

In its most recent Establishment Clause decision, the Supreme Court reaffirmed that "the Establishment Clause *must* be interpreted by reference to historical practices and understandings."[15] It engaged in a thorough review of legislative prayer practices "[f]rom the earliest days of the Nation" that have "long endured," and "become part of our heritage and tradition," concluding that the "prayer practice in the town of Greece fits within the tradition long followed in Congress and the state legislatures."[16]

But this is nothing new; history has always been highly relevant in the Supreme Court's Establishment Clause jurisprudence. In *Marsh v. Chambers*, the Court upheld a state's practice of paying a chaplain who led legislative prayer because similar practices were "deeply embedded in the history and tradition of this country."[17] The history "sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress."[18] Similarly, in *Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*—the Court's first decision involving the ministerial exception, which is rooted in the Establishment Clause—the Court examined the history of colonial "[c]ontroversies over the selection of ministers," as well as "two events involving James Madison," to determine that "[t]he Establishment Clause prevents the Government from appointing ministers."[19] And in *Van Orden v. Perry*, the Court upheld Texas' Ten Commandments display, with a plurality applying an analysis "driven both by the nature of the monument and by our Nation's history."[20]

It should come as no surprise, then, that the Court has similarly applied a historical analytical framework in tax cases. In *Walz*, the Court rejected an Establishment Clause challenge to New York's property tax exemption for church property.[21] The Court held that "[t]here is no genuine nexus between tax exemption and establishment of religion."[22] It reached this conclusion based on more than two centuries of "our history and uninterrupted practice" showing that "federal or state grants of tax exemption to churches were not a violation of the Religion Clauses of the First Amendment."[23] In his concurrence, Justice Brennan similarly looked to the "history" and "practices of the Nation," finding that "[t]he existence from the beginning of the Nation's life of a practice . . . is a fact of considerable import" in determining constitutionality under the Establishment Clause.[24] Given this "uninterrupted" and "historic practice," Justice

9 *See, e.g.,* Mount Soledad Mem'l Ass'n v. Trunk, 132 S. Ct. 2535, 2535-36 (2012) (Alito, J., dissenting from denial of certiorari) ("Establishment Clause jurisprudence is undoubtedly in need of clarity."); Utah Highway Patrol Ass'n v. Am. Atheists, Inc., 132 S. Ct. 12, 14-15, 17, 19, 21-22 & n.3 (2011) (Thomas, J., dissenting from denial of certiorari) ("Establishment Clause jurisprudence [is] in shambles," "nebulous," "erratic," "no principled basis," "purgatory," "impenetrable," "ad hoc patchwork," "limbo," "incapable of consistent application," "our mess," "little more than intuition and a tape measure.") (citations omitted); *Lamb's Chapel*, 508 U.S. at 398 (Scalia, J., concurring); Allegheny Cty. v. Am. Civil Liberties Union, 492 U.S. 573, 655-57 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part); Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327 (1987) (O'Connor, J., concurring in judgment); Wallace v. Jaffree, 472 U.S. 38, 107-13 (1985) (Rehnquist, J., dissenting); *id.* at 90-91 (White, J., dissenting); Comm. for Public Ed. & Religious Liberty v. Regan, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting).

10 Van Orden v. Perry, 545 U.S. 677, 686 (2005) (plurality); *see also* Town of Greece v. Galloway, 134 S. Ct. 1811 (2014) (not applying *Lemon*); Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (same); Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001) (same).

11 *Town of Greece*, 134 S. Ct. at 1819; Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 183 (2012); *Van Orden*, 545 U.S. at 686; Marsh v. Chambers, 463 U.S. 783, 786 (1983).

12 397 U.S. 664 (1970).

13 489 U.S. 1 (1989).

14 *Walz*, 397 U.S. at 675-680; *Texas Monthly*, 489 U.S. at 11-13.

15 *Town of Greece*, 134 S. Ct. at 1819 (emphasis added).

16 *Id.* at 1823, 1825, 1819.

17 463 U.S. 783, 786 (1983).

18 *Id.* at 790.

19 565 U.S. 171, 183-84 (2012).

20 545 U.S. 677, 686 (2004) (plurality opinion); *see also id.* at 699-700 (Breyer, J., concurring) (looking to "national traditions" and the monument's historical context).

21 397 U.S. at 680.

22 *Id.* at 675.

23 *Id.* at 680.

24 *Id.* at 681.

Brennan observed that religious tax "exemptions were not among the evils that the Framers and Ratifiers of the Establishment Clause sought to avoid."[25]

So what does history have to say about the tax treatment of churches and ministers? At the time of the Founding, an establishment of religion consisted of one or more of several key elements, all involving state coercion to participate in religious activity: 1) government control of the doctrine and personnel of the church, 2) government coercion of religious beliefs and practices, 3) government assignment of important civil functions to the church, and 4) government financial support of the church.[26] The "financial support" that amounted to an establishment took very specific forms: government land grants to the established church, direct grants from the public treasury, and compulsory taxes or "tithes" for the support of churches and ministers.[27]

By contrast, tax exemptions like the parsonage allowance were never considered to be establishments in the Founding era. As the Court said in *Walz*, a tax exemption "is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state."[28] Far from creating an impermissible unity of church and state, a tax exemption "restricts the fiscal relationship between church and state, and tends to complement and reinforce the desired separation insulating each from the other."[29]

Over 200 years of unbroken history confirm that religious tax exemptions are fully consistent with the historical meaning of the Establishment Clause. Religious tax exemptions permeate state and federal tax codes, and have done so since the Founding. For example, in 1799, Virginia took steps to disestablish the Anglican Church, repealing measures that had given property to the church, and condemning them as being "inconsistent with the principles of the constitution, and of religious freedom, and manifestly tend[ing] to the re-establishment of a national church."[30] Yet even after it formally disestablished the Anglican Church, Virginia consistently exempted the property of "any college, houses for divine worship, or seminary of learning" from taxation.[31] "It may reasonably be inferred that the Virginians did not view the exemption for 'houses of divine worship' as an establishment of religion."[32] The municipal government of the District of Columbia exempted "houses for public worship" from property taxes in 1802.[33] Significantly, "[a]ll of the 50 States provide for tax exemption of places of worship, most of them doing so by constitutional guarantees."[34] And "[f]or so long as federal income taxes have had any potential impact on churches—over 75 years [to the 1970 case]—religious organizations have been expressly exempt from the tax."[35]

While property tax exemptions for churches have often included other non-profit charitable organizations as well, many other religious tax exemptions have not. Early Congresses viewed religious tax exemptions as consistent with the Establishment Clause even when the exemptions did not also apply to secular groups. For example, Congress refunded import duties paid by religious organizations on religious articles like plates for printing Bibles,[36] church vestments, furniture, and paintings,[37] and church bells;[38] it also exempted all churches and appurtenant property in D.C. "from any and all taxes or assessments, national, municipal, or county."[39] Similarly, "[a]t least 45 States provide exemptions for religious groups without analogous exemptions for other types of nonprofit institutions."[40] These exemptions range from sales and beverage tax exemptions for sacramental wine[41] and meals served by churches[42] to sales tax exemptions for church vehicles used to transport people for religious purposes.[43] And, analogously to the federal tax code's § 107, numerous states exempt clergy housing from taxation and have done so for many decades.[44]

The distinction between these permissible religious tax exemptions and prohibited government sponsorship of religion is not mere formalism or historical accident. Exempting religious actors from taxation is qualitatively different from providing direct financial support because tax exemptions respect First Amendment values by protecting church autonomy and reducing government entanglement with religion. The Supreme Court "has long recognized that the government may (and sometimes must)

25 *Id.* at 682, 685, 687.

26 *See* Michael McConnell, *Establishment and Disestablishment at the Founding, Part 1: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2131 (2003); *see also* Felix v. City of Bloomfield, 847 F.3d 1214 (10th Cir. 2017) (Kelly, J., and Tymkovich, C.J., dissenting from denial of rehearing en banc) (relying on Professor McConnell's historical analysis).

27 McConnell, *supra* note 26 at 2146-59.

28 397 U.S. at 675.

29 *Id.* at 676.

30 2 Va. Stat. at Large of 1792-1806 (Shepherd) 149.

31 9 Va. Stat. at Large (1775-78, Hening) 351; 13 Va. Stat. at Large (1789-92, Hening) 112, 241, 336-37; 2 Va. Stat. at Large of 1792-1806 (Shepherd) 149.

32 *Walz*, 397 U.S. at 683 (Brennan, J., concurring).

33 Acts of the Corporation of the City of Washington, First Council, c. V, approved Oct. 6, 1802, at 13.

34 *Walz*, 397 U.S. at 676.

35 *Id.*

36 6 Stat. 116 (1813); 6 Stat. 600 (1834).

37 6 Stat. 162 (1816).

38 6 Stat. 675 (1836).

39 Act of June 17, 1870, 16 Stat. 153.

40 *Texas Monthly*, 489 U.S. at 31 (Scalia, J., dissenting).

41 Haw. Rev. Stat. § 244D-4(b)(4); S.D. Codified Laws § 35-5-6(2); Wash. Rev. Code § 66.20.020(3).

42 Cal. Rev. & Tax. Code Ann. § 6363.5; Idaho Code § 63-3622J; Md. Ann. Code, Tax-Gen. § 11-206(d)(1)(ii).

43 Mich. Comp. Laws § 205.54a(b)(ii); Mo. Rev. Stat. § 144.450(4); Va. Code § 58.1-3617.

44 *See Texas Monthly*, 489 U.S. at 31 n.3 (Scalia, J., dissenting) (collecting statutes).

accommodate religious practices and that it may do so without violating the Establishment Clause."[45] Thus, it is a "permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions."[46]

Imposing additional taxes on ministers' housing allowances would interfere with the ability of churches to carry out their religious missions by diverting scarce resources away from their core First Amendment activities. As Justice Brennan recognized in *Walz*: "[T]axation would surely influence the allocation of church resources," with "public service activities . . . bear[ing] the brunt of the reallocation."[47] And taxation "would bear unequally on different churches, having its most disruptive effect on those with the least ability to meet the annual levies assessed against them."[48]

The parsonage allowance not only alleviates a government-imposed burden on churches, but also reduces government entanglement in religion by avoiding the "direct confrontations and conflicts" between ministers and the government that would occur without it.[49] With increased taxation come more IRS deficiency actions, more "tax liens, [and] tax foreclosures."[50] Religious tax exemptions thus "constitute[] a reasonable and balanced attempt to guard against" the "latent dangers inherent in the imposition of . . . taxes."[51]

In short, while the Establishment Clause prohibits the types of direct financial support that prevailed in colonial establishments—land grants, direct grants from the treasury, and compulsory "tithes" to support churches and ministers—it does not bar the tax exemption for parsonages. Such exemptions were common at the time of the Founding and actually further the core Establishment Clause goals of alleviating government burdens on religion, avoiding discrimination among churches, and avoiding entanglement between church and state.

III. The Parsonage Allowance Is Consistent With the Controlling Opinion in *Texas Monthly*

The parsonage allowance is also consistent with the Supreme Court's decision in *Texas Monthly*. Nearly 20 years after a 7–1 majority in *Walz* upheld tax exemptions for churches as a practice "deeply embedded in the fabric of our national life,"[52] a fractured Court in *Texas Monthly* invalidated a sales tax exemption that applied exclusively to "periodicals . . . that consist wholly of writings promulgating the teaching of [a] faith" and "books that consist wholly of writings sacred to a religious faith."[53] No opinion received more than three votes.

Justice Brennan, in a plurality opinion joined by Justices Marshall and Stevens, concluded that the sales tax exemption violated the Establishment Clause because it constituted a "subsidy exclusively to religious organizations," "burden[ed] nonbeneficiaries markedly," and "c[ould] not reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion."[54] He argued that a religious tax exemption would be constitutional only if it were part of a broader scheme that provided benefits to "a large number of nonreligious groups as well."[55]

Justice White concurred in the result, but avoided the Establishment Clause altogether. He concluded that the sales tax exemption "discriminates on the basis of the content of publications," and therefore "is plainly forbidden by the Press Clause of the First Amendment."[56]

Justice Blackmun, joined by Justice O'Connor, concluded that the sales tax exemption violated the Establishment Clause, but offered a "narrow resolution of the case."[57] Specifically, they acknowledged that the exemption might be upheld if it were coupled with an exemption for "philosophical literature" covering similar topics, and that "the Free Exercise Clause [may even] require[] a tax exemption for the sale of religious literature by a religious organization."[58] But they reasoned that "by confining the tax exemption exclusively to the sale of religious publications, Texas engaged in preferential support for the communication of religious messages."[59] This sort of "statutory preference for the dissemination of religious ideas offends our most basic understanding of what the Establishment Clause is all about."[60] Thus, for the Blackmun/O'Connor concurrence, the critical issue was that the tax exemption applied "exclusively" to religious literature, and that this had the effect of giving preferential support to religious messages. This focus on a preference for religious messages was the "narrowest grounds" for decision, and is therefore the controlling opinion under *Marks v. United States*.[61]

The parsonage allowance is distinguishable from the tax exemption struck down in *Texas Monthly* in important ways. First, unlike *Texas Monthly*, where the tax exemption for religious literature stood alone, the parsonage allowance is one

45 Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 144-45 (1987).

46 *Corp. of the Presiding Bishop*, 483 U.S. at 335.

47 397 U.S. at 692 (Brennan, J., concurring).

48 *Id.*

49 *Id.* at 674.

50 *Id.*

51 *Id.* at 673.

52 *Id.* at 676.

53 489 U.S. at 5.

54 *Id.* at 15 (plurality).

55 *Id.* at 11.

56 *Id.* at 25-26 (White, J., concurring).

57 *Id.* at 28.

58 *Id.* at 27-28.

59 *Id.* at 28 (Blackmun, J., concurring).

60 *Id.*

61 430 U.S. 188, 193 (1977). *Accord* Freedom From Religion Foundation v. Lew, 983 F. Supp. 2d 1051, 1061-62 (W.D Wisc. 2013) (Blackmun/O'Connor concurrence is controlling); Catholic Health Initiatives Colorado v. City of Pueblo, Dep't of Fin., 207 P.3d 812, 828 (Colo. 2009) (Eid, J., dissenting) (same).

of *many* tax exemptions for housing allowances, most of which are nonreligious.[62] These include exemptions for any employee who receives lodging for the convenience of his employer,[63] any employee living in a foreign camp,[64] any employee of an educational institution,[65] any member of the uniformed services,[66] any government employee living overseas,[67] any citizen living abroad,[68] and any employee temporarily away from home on business.[69] It is as if, in *Texas Monthly*, the state had coupled the tax exemption for religious literature with a tax exemption for business literature, scientific literature, educational literature, travel literature, and government literature. That would not be a form of "preferential support" for religious messages; it would be a form of putting religious messages on the same footing as many other secular messages deemed socially beneficial. Indeed, in such circumstances, Justices Blackmun and O'Connor would likely have argued that "the Free Exercise Clause *requires* a tax exemption for the sale of religious literature."[70]

Second, the Blackmun/O'Connor concurrence did not address preferential support for "religion" generally; instead, it emphasized that the Court was dealing with "the taxation of books and journals," which implicates "three different Clauses of the First Amendment: the Free Exercise Clause, the Establishment Clause, and the Press Clause."[71] Accordingly, its Establishment Clause analysis placed great weight on the fact that the tax exemption applied specifically to religious "literature"—mentioning this point, or some variation of it, no less than eighteen times.[72] Of course, the parsonage allowance applies to housing, not religious literature. And it applies regardless of whether the minister who lives there is involved in spreading a religious message. In that sense, because it is tied to property, the parsonage allowance is much more like the property tax exemption upheld in *Walz*. Indeed, while some ministers certainly use their homes to teach and counsel their congregations, the connection between ministers' homes and religious messages is even weaker than the connection between actual church buildings and religious messages in *Walz*. And the Blackmun/O'Connor concurrence certainly did not disturb *Walz*'s ruling on exemptions for churches more generally.

IV. The Parsonage Allowance Satisfies Even the More Restrictive Test of the *Texas Monthly* Plurality

Even assuming the *Texas Monthly* plurality is controlling, the parsonage allowance still satisfies its more stringent test. Under the *Texas Monthly* plurality, "[w]hat is crucial is that any subsidy afforded religious organizations be warranted by some *overarching secular purpose* that justifies like benefits for nonreligious groups."[73] The fit between the overarching secular purpose and the benefit for religious organizations need not be perfect. Rather, it is enough if "it can be *fairly concluded* that religious institutions *could be thought* to fall within the natural perimeter [of the legislation]."[74] Because this test is even more stringent than the *Lemon* test, a statute that satisfies the *Texas Monthly* concurrence satisfies *Lemon* as well.[75]

Section 107(2) is part of a broad scheme of tax exemptions serving the same secular purpose: ensuring fair tax treatment of employee housing costs. Since its inception, the federal income tax system has recognized that some housing costs are incurred primarily for "the convenience of the employer"—not for the employee's personal consumption—and are therefore not income. Many tax provisions embody this doctrine. Some provisions demand case-by-case analysis of each situation, but others establish bright lines for certain classes of workers, reducing the disputes and non-uniformity that would result from an individualized, case-by-case approach. This reduction of disputes and non-uniformity is especially vital in the context of ministers, because it fulfills the Establishment Clause's core directives of limiting entanglement between church and state and avoiding discrimination among religious groups.

A. Non-Ministers Receive a Variety of Tax-Exempt Housing Benefits Under the "Convenience Of The Employer" Doctrine

The parsonage allowance codified in § 107(2) is part of a broad package of tax exemptions that all trace their origin to the "convenience of the employer" doctrine, which is as old as the federal income tax itself. One cannot understand § 107(2) without understanding the convenience of the employer doctrine—including its rationale, its history, and its codification throughout the tax code.

1. Rationale of the Doctrine

The convenience of the employer doctrine flows from a very basic principle about the nature of income: for something to qualify as income, there "must be an economic gain, and *this*

62 *See infra* Part III.

63 26 U.S.C. § 119(a).

64 § 119(c).

65 § 119(d).

66 § 134.

67 § 912.

68 § 911.

69 §§ 162, 132.

70 *Texas Monthly*, 489 U.S. at 28, 26 (emphasis added) (citing Follett v. McCormick, 321 U.S. 573 (1944) and Murdock v. Pennsylvania, 319 U.S. 105 (1943)).

71 *Id.* at 26, 28.

72 *See id.* at 26 ("spreading the gospel"); *id.* ("spread the gospel"); *id.* ("publications"); *id.* ("religious literature"); *id.* at 27 ("religious books"); *id.* ("religious books"); *id.* ("religious literature"); *id.* ("philosophical literature"); *id.* at 28 ("taxation of books and journals"); *id.* ("religious literature"); *id.* ("religious literature"); *id.* ("religious publications"); *id.* ("religious messages"); *id.* ("dissemination of religious ideas"); *id.* at 29 ("religious literature"); *id.* ("religious literature"); *id.* ("atheistic literature"); *id.* ("religious literature").

73 489 U.S. at 14 n.4 (emphasis added).

74 *Id.* at 17 (emphasis added) (quoting *Walz,* 397 U. S. at 696).

75 *See* Lemon v. Kurtzman*,* 403 U.S. 602, 612 (1971) (statute (1) "must have a secular legislative purpose," (2) "its principal or primary effect must be one that neither advances nor inhibits religion," and (3) it "must not foster an excessive government entanglement with religion.").

gain must primarily benefit the taxpayer personally."[76] For example, a worker might receive any number of things that simultaneously benefit her *and* her employer's business—such as meals, travel, entertainment, and office furnishings. But if these things are primarily intended to further the business of the employer, rather than compensate the employee, they are not treated as income.[77]

The same principle applies to lodging. In general, when an employee receives ordinary lodging or a housing allowance, it does not benefit the employer other than by compensating the employee, and so the value of the lodging is treated as income. But in some cases, the lodging is provided primarily "for the convenience of the employer." Common examples include hotel managers who must live at the hotel, military officers who must live in the barracks, or commercial fishermen who must live on a ship. For these workers, the lodging is an important component of their job. As one early court put it, it is "part of the maintenance of the [employer's] general enterprise," not "part of the individual income of the laborer."[78] In such cases, excluding the lodging from income does not confer a special benefit; rather, it avoids unjustly taxing workers on amounts they receive primarily on another's behalf.

2. History of the Doctrine

The convenience of the employer doctrine was first recognized by administrative rulings in 1914—immediately after imposition of the federal income tax in 1913—in cases involving government employees who received in-kind lodging.[79] But the doctrine quickly expanded to include private employees and cash housing allowances. In 1919, it was extended to in-kind lodging provided to private seamen.[80] In 1920, it was extended in principle to all private employees.[81] In 1921, it was extended by statute expressly to ministers.[82] And in 1925—in the first federal court case addressing the doctrine—it was extended to cash housing allowances.[83]

Early IRS rulings also extended the doctrine to cash allowances for volunteer charitable activities. In 1919, it was extended to a volunteer in the American Red Cross.[84] And in the same year, it was extended to a clergyman under a vow of poverty.[85] The non-economic motivation of these activities made it relatively easy to conclude that the allowances were primarily for the benefit of the general enterprise, not a private benefit to induce performance.

3. Codification in the Tax Code

In 1954, Congress codified some aspects the "convenience of the employer" doctrine in § 119(a)(2). Section 119(a)(2) now excludes the value of lodging from gross income for any employee—secular or religious—if five conditions are met. The lodging must be furnished 1) by an employer to an employee, 2) in kind, 3) on the business premises of the employer, 4) for the convenience of the employer, and 5) as a condition of employment.[86] A wide variety of employees have qualified for this exemption, including construction workers,[87] museum directors,[88] an oil executive living in Tokyo,[89] the president of the Junior Chamber of Commerce,[90] a state governor,[91] a rural school system superintendent,[92] a prison warden,[93] and many others.

But § 119(a)(2) is not the only provision codifying the convenience of the employer doctrine. Other provisions relax the requirements of § 119(a)(2) for certain types of employees. For example, § 119(c) governs "lodging in a camp located in a foreign country." It defines "camp" in a way that eliminates the "business premises" and "condition of employment" factors.[94] The rationale is that, when the camp is in a "remote area where satisfactory housing is not available on the open market,"[95] the lodging is per se for the convenience of the employer.

Another per se rule applies to employees of educational institutions—such as college presidents, university faculty, or even elementary-school teachers. Under § 119(d), such employees can exclude a portion of the fair rental value of "qualified campus lodging," even if they cannot satisfy *any* of the elements of the convenience of the employer doctrine. All they need to show is that the lodging is "(A) located on, or in the proximity of, a campus of the educational institution, and (B) furnished to the employee . . . by or on behalf of such institution for use as a residence."[96]

An even broader per se rule is § 134, which applies to members of the military. Under this provision, "any member or former member of the uniformed services" can receive tax-exempt housing benefits—including both in-kind lodging and cash

76 United States v. Gotcher, 401 F.2d 118, 121 (5th Cir. 1968) (emphasis added).

77 *See* Treas. Reg. § 1.132-5(a)(1)(v); Treas. Reg. § 1.162-2(a)–(b).

78 Jones v. United States, 60 Ct. Cl. 552, 575 (1925); *see generally* J. Patrick McDavitt, *Dissection of a Malignancy: The Convenience of the Employer Doctrine*, 44 Notre Dame L. Rev. 1104 (1969).

79 *Id.* at 1105 (citing T.D. 2079, 16 Treas. Dec. Int. Rev. 249 (1914)).

80 *Id.* at 1106 (citing O.D. 265, 1 C.B. 71 (1919)).

81 *Id.* (citing Treas. Reg. 45, art. 33 (1920 ed.); T.D. 2992, 2 C.B. 76 (1920)).

82 Revenue Act of 1921, Pub. L. No. 98, § 213(b)(11), 42 Stat. 227, 239 (overturning O.D. 862, 4 C.B. 85 (1921)).

83 *Jones*, 60 Ct. Cl. 552.

84 O.D. 11, 1919-1 C.B. 66.

85 O.D. 119, 1919-1 C.B. 82.

86 Treas. Reg. § 1.119-1(b).

87 Treas. Reg. § 1.119-1(f) Ex. (7); Stone v. Comm'r, 32 T.C. 1021 (1959).

88 Jane Zhao, *Nights on the Museum: Should Free Housing Provided to Museum Directors Also Be Tax-Free?*, 62 Syracuse L. Rev. 427, 447-49 (2012).

89 Adams v. United States, 218 Ct. Cl. 322 (1978).

90 U.S. Jr. Chamber of Commerce v. United States, 167 Ct. Cl. 392 (1964).

91 Rev. Rul. 75-540, 1975-2 C.B. 53; *See also* Rev. Rul. 90-64, 1990-2 C.B. 35 (principal representative of the U.S. to a foreign country).

92 Haack v. United States, 75-2 U.S.T.C. ¶ 9847 (S.D. Iowa 1975).

93 I.R.S. Priv. Ltr. Rul. 9126063 (March 29, 1991).

94 *Compare* 26 U.S.C. § 119(c) *with* § 119(a)(2).

95 § 119(c)(2)(A).

96 § 119(d)(2)–(3).

allowances—regardless of whether the requirements of § 119(a)(2) are satisfied.[97] This section codifies the reasoning in *Jones* that a service member's duties "require his physical presence at his post or station; his service is continuous day and night; [and] his movements are governed by orders and commands."[98] Every service member is presumed to face these burdens on housing, whether living at home or abroad, on base or off, active duty or retired.

Nor is this per se rule limited to the military. Section 912 extends the same treatment to enumerated housing allowances of *all* government employees living abroad—including Peace Corps volunteers, CIA operatives, diplomats and consular officials, school teachers, and others. This reversed previous law, which required case-by-case application of the convenience of the employer doctrine to such employees.[99]

Section 911 extends yet another per se rule to any "citizen or resident of the United States" residing in a foreign country. Such persons need not satisfy any of the requirements of § 119(a)(2); living abroad is enough. They can exclude housing costs above a certain level—whether housing is provided in-kind, through a cash allowance, or even purchased with their own funds. The basic rationale is that, if an individual is working abroad, she likely has significant extra housing costs that reduce her real income compared with a domestic worker. But a foreign worker need not prove that these considerations apply in her individual case.

Finally, under §§ 162 and 132, anyone posted away from her normal workplace for one year or less is not taxed on cash housing allowances or in-kind lodging provided by the employer. Again, there is no need to show that the lodging is used for work; the mere fact that she has moved away temporarily, while still maintaining her permanent home and primary business location, is enough to show that the temporary lodging is for the employer's benefit.

In short, Congress has enacted a broad package of tax benefits designed to relieve workers who face unique, job-related housing requirements. The default rule is § 119(a)(2), which establishes a demanding, case-by-case test requiring all employees to demonstrate that their lodging is provided for the convenience of their employer. But Congress has also relaxed this default rule in a variety of situations where the type of work, the burdens on housing, or a non-commercial working relationship make it likely that the lodging was intended to benefit the employer.

4. Value of the Allowances

Critics of the parsonage allowance have suggested that these other exemptions apply only to a small number of secular groups. But according to congressional estimates, the annual value of these other exemptions vastly exceeds those under § 107. The projected value of other exemptions for 2017 totals more than $12 billion (including, for example, $6.4 billion for allowances for the armed forces and $2.3 billion for allowances for federal employees abroad), while the parsonage allowance is only expected to be worth about $800 million this year.[100] The value of the parsonage allowance represents only a small fraction of the value of all exemptions for housing. All of these exemptions are reasonable reflections of the same overarching secular purpose of the convenience of the employer doctrine.

B. Ministers Fit Comfortably Within the "Convenience of the Employer" Doctrine

In light of this treatment of secular workers, the question under the plurality in *Texas Monthly* is simply whether it can be "fairly concluded that [ministers] could be thought to fall within the natural perimeter [of this legislation.]"[101] The answer is a resounding "yes."

A comparison to the strongest case—members of the military—is instructive. As *Jones* explained, a member of the military—whether living at home or abroad, on base or off, active duty or retired—is deemed to fall within the convenience of the employer doctrine on a per se basis because his duties "require his physical presence at his post or station; his service is continuous day and night; [and] his movements are governed by orders and commands."[102] Ministers face similar job-related demands on their housing.

1. Required Physical Presence

First, ministers are typically required to live at or near the church to be close to those they serve. This is most obvious in the case of Orthodox Jewish rabbis, who, due to Sabbath restrictions, must live within walking distance of the synagogue. It is also obvious in the case of religious orders, where leaders often live in the same convent or monastery as the members.

But it is also true in other settings. Many churches require their priests to live within the boundaries of the parish and near the church. Muslim imams usually must live near the mosque to lead prayer five times daily. Some churches are dedicated to serving a particular neighborhood, and the minister is expected to live in or near that neighborhood even when the location is undesirable. Still other churches assign ministers to serve in homeless shelters, hospitals, or nursing homes where they are expected to live in close proximity to those they serve. This sort of "voluntary displacement" has deep theological roots and, in the case of Christianity, is believed to mirror the incarnation of Christ.[103]

On a more practical level, ministers in many small churches are the primary caretaker of the church building. Like the caretakers of apartment buildings—who often receive tax-free housing under § 119(a)(2)—ministers must respond when the

97 § 134.

98 60 Ct. Cl. at 569.

99 McDavitt, *supra* note 78 at 1108 & n.40 (collecting decisions).

100 *See* Staff of the Joint Committee on Taxation, Estimates of Federal Tax Expenditures for Fiscal Years 2015-2019 (Comm. Print 2015) at Table 1. The value of temporary-location costs under §§ 162 and 132 is unknown; it appears to be reported within the larger category of "fringe benefits," totaling $7.5 billion. *Id.* Allowances for Armed Forces and federal employees include more than just housing.

101 489 U.S. at 17.

102 60 Ct. Cl. at 569.

103 Henri J.M. Nouwen et al., Compassion: A Reflection on the Christian Life 60-73 (2005).

fire alarm goes off, a pipe bursts, the furnace fails, the snow needs shovelling, or the building has other needs.

2. Service Day and Night

Ministers are also expected to be available to serve their congregations at any hour of the day or night. The Roman Catholic sacrament of anointing of the sick is administered only to those in danger of death.[104] The sacrament must be administered "at the appropriate time,"[105] and there are many "case[s] of necessity."[106] If the priest is not available at all hours, the sacrament cannot be administered. Ministers also respond at all hours to comfort grieving families, pray with congregants about emergencies, counsel spouses facing marital strife, hear confessions, and offer advice. The major life events of a congregation are not confined to regular business hours.

3. Use of Lodging for Their Duties

Ministers are also expected to use their homes to serve the church. In the Christian New Testament, there are two main lists of qualifications for ministers; both require them to be "hospitable."[107] In practice, this means hosting various church events, like Bible studies, women's meetings, meals for new members, and the like. It also means providing temporary lodging for church members in transition, guest speakers, missionaries, and other travelers with a connection to the church—a practice frequently commended in the Christian New Testament.[108] Many congregants also expect the minister's home to be accessible for unplanned social visits.

Ministers also use their homes for church-related duties. When congregants seek comfort, prayer, counsel, confession, and advice—often at irregular hours—they often meet in the minister's home. Counseling sessions, prayer meetings, and sensitive staff meetings are often held in the comfort of a home rather than a formal office. Meetings with lay leaders routinely occur in the home. Sermons are often prepared in the home. And in small churches that lack their own building, the only place to gather for worship is often the minister's home.

4. Frequent Movement and Limited Choice

Ministers also face frequent movement and limited choice in their housing. This is most obvious in hierarchical denominations, such as Roman Catholic or Eastern Orthodox, where the placement of ministers is dictated by higher church authorities. In such churches, the diocesan Bishop often has absolute authority to move priests from parish to parish. Bishops can also agree to move priests across diocesan lines, including to foreign countries. Nor is frequent movement limited to hierarchical denominations. The average tenure of Southern Baptist ministers is less than 3 years,[109] and for Mainline Protestant ministers it is only four years.[110]

In many religious communities, the minister's home is also expected to set an example of frugality. This is obviously true for members of religious orders who take a vow of poverty. But it also includes other religious groups, where a luxurious house may be viewed as a sin or a distraction from the minister's pastoral service.[111] In other cases, ministers may be obliged to live in an area with housing costs far higher than the minister would otherwise choose. Either way, the housing costs are driven by the needs of the church, not the personal consumption choices of the minister.

The point of describing ministers' activities is not to show that ministers are exactly like military service members in every respect. It is that they are in a unique, non-commercial employment relationship with unique, job-related demands on their housing. Given this reality, Congress could "fairly conclude[] that [ministers] could be thought to fall within the natural perimeter" of the convenience of the employer doctrine.[112] Accordingly, § 107(2) is constitutional even under the more stringent test of the *Texas Monthly* plurality.

In that sense, challenges to the parsonage allowance are analogous to *Rojas v. Fitch*.[113] There, the First Circuit considered an Establishment Clause challenge to religious exemptions from federal and state unemployment taxes. The plaintiff argued that these exemptions provided unique, unjustified benefits to religious employers in violation of *Texas Monthly*. The First Circuit, however, disagreed. Applying the *Texas Monthly* plurality, it held that a religious tax exemption is permissible as long as similar exemptions are "conferred upon a wide array of non-sectarian groups . . . in pursuit of some legitimate secular end."[114] Turning to the unemployment taxes at issue, the court noted that the federal and state insurance programs "exclud[e] from coverage a variety of workers whose employment patterns are irregular or whose wages are not easily accountable."[115] Although the plaintiff argued that these exemptions were underinclusive and thus effectively favored religion, the court rejected the argument that "a provision incidentally benefitting religion *must* grant a like benefit to every group that could also conceivably fall within the secular rationale for the exemption provision."[116] Rather, it was enough that the exemptions "serve the legitimate secular purpose of facilitating

104 1983 Code c.1004 § 5.

105 Code c.1001.

106 Code c.999, 1000 § 1, 1003 § 3.

107 Titus 1:8; 1 Timothy 3:2 (Revised Standard Version).

108 *See, e.g.*, Matthew 10:11 (lodging for apostles); Acts 16:15 (lodging for missionaries); Romans 16:2 (lodging for Phoebe); 3 John 1:5-8 (lodging for traveling Christians).

109 David Roach, *Finishing the Race: Inspiring Examples of Longevity in Ministry*, SBC Life (Feb. 2008), http://www.sbclife.net/Articles/2008/02/sla10.

110 The Barna Group, *Report Examines the State of Mainline Protestant Churches* (Dec. 7, 2009), https://www.barna.com/research/report-examines-the-state-of-mainline-protestant-churches/.

111 *See* Alison Smale, *Vatican Suspends German Bishop Accused of Lavish Spending on Himself*, N.Y. Times, Oct. 23, 2013.

112 *Texas Monthly*, 489 U.S. at 17 (plurality).

113 127 F.3d 184 (1st Cir. 1997), *abrogated on other grounds by* Hardemon v. City of Boston, No. 97-2010, 1998 WL 148382 (1st Cir. Apr. 6, 1998).

114 *Id.* at 188 (quoting *Texas Monthly*, 489 U.S. at 14-15).

115 *Id.* at 188.

116 *Id.* at 189.

the administration of the unemployment insurance system" and reduce "entanglement concerns."[117]

Here, the fit between § 107 and the "legitimate secular purpose" of the convenience of the employer doctrine is even stronger. The exemption has a far longer historical pedigree, and the value of the exemption is dwarfed by the value of a wide array of nonreligious exemptions. If the exemption considered in *Rojas* was legal under *Texas Monthly*—as it surely was—then the parsonage allowance has an even greater claim to legitimacy.

C. To the Extent that the Parsonage Allowance Provides Special Treatment to Ministers, It Is Justified by Important First Amendment Principles

Not only do ministers fit comfortably within the convenience of the employer doctrine, but there are powerful reasons for addressing the taxation of ministers separately in § 107, and not simply lumping them in with all other employees under § 119. Indeed, just as Congress adapted the convenience of the employer doctrine to employees in foreign camps (§ 119(c)), educational institutions (§ 119(d)), military service (§ 134), overseas government jobs (§ 912), overseas private jobs (§ 911), and jobs requiring temporary displacement (§§ 162 and 132), it has adapted the doctrine to ministers—and it has very good secular reasons for doing so. Specifically, § 107 serves two critical secular purposes: reducing entanglement between church and state, and avoiding discrimination among religious groups. Both purposes are not just constitutionally permissible but laudable.

1. The Tax Code Routinely Provides Special Treatment to Churches and Ministers To Reduce Entanglement and Discrimination Among Religions

Objections to the parsonage allowance implicitly assume that churches and ministers are in an ordinary employment relationship, and so any tax provision addressing them separately is automatically suspect. But that assumption is flawed. In many cases, the First Amendment not only permits "special solicitude" for churches, but requires it.[118] In particular, the First Amendment 1) restricts government interference in the relationship between churches and ministers,[119] 2) forbids government entanglement in religious questions,[120] and 3) prohibits government discrimination among denominations.[121] These three values—church autonomy, non-entanglement, and non-discrimination—are reflected throughout the tax code in specific protections for churches, none of which are available to secular non-profits.

For example, several provisions protect the relationship between churches and ministers by exempting churches from paying or withholding certain types of taxes:

- Churches are not required to withhold federal income taxes from ministers in the exercise of ministry.[122]
- Churches are exempt from Social Security and Medicare taxes for wages paid to ministers in the exercise of ministry; instead, ministers are uniformly treated as self-employed.[123]
- Churches are exempt from state unemployment insurance funds authorized by the Federal Unemployment Tax Act.[124]

Other provisions protect church autonomy by exempting churches from disclosing information:

- Churches and certain related entities are not required to file Form 990, which discloses sensitive financial information.[125]

Still others reduce entanglement by offering unique procedural protections:

- Churches receive special procedural protections when subjected to a tax audit.[126]
- Churches need not petition the IRS for recognition of their tax-exempt status under § 501(c)(3).[127]

Still others modify tax provisions so that they apply neutrally among various church polities:

- Churches can maintain a single church benefits plan exempt from ERISA for employees of multiple church affiliates, regardless of common control, and for ministers, regardless of their employment status.[128] This is designed

117 *Id.*

118 *Hosanna-Tabor*, 565 U.S. at 189.

119 *Id.*

120 *Walz*, 397 U.S. at 674.

121 Larson v. Valente, 456 U.S. 228, 244 (1982).

122 26 U.S.C. § 3401(a)(9).

123 26 U.S.C. §§ 1402(c)(4), 1402(e), 3121(b)(8).

124 26 U.S.C. § 3309(b)(1).

125 26 U.S.C. § 6033(a)(3).

126 26 U.S.C. § 7611.

127 26 U.S.C. § 508(a), (c)(1)(A).

128 26 U.S.C. § 414(e).

"[t]o accommodate the differences in beliefs, structures, and practices among our religious denominations."[129]

- Churches can include ministers in 403(b) contracts (a type of tax-deferred retirement benefit), even if ministers do not qualify as employees.[130]
- Churches can provide certain insurance to entities with common religious bonds, even if those entities are not structured to meet normal common control tests.[131]

Congress has been particularly careful to make sure that general tax rules do not discriminate among ministers based on the nature of their relationship with the church. For example, when Congress extended eligibility for social security to ministers in 1954, it stipulated that all ministers would be treated as self-employed, regardless of whether they were common-law employees—precisely to avoid discriminating between groups based on the status of their ministers as employees.[132]

In short, the tax code does not treat churches and ministers as ordinary employers and employees. Rather, Congress has crafted numerous tax provisions that apply *only to churches and ministers*. These provisions, like § 107(2), reduce entanglement and prevent discrimination among religions.

2. The Parsonage Allowance Reduces Entanglement

Some critics of the parsonage allowance claim that § 107 might increase entanglement because it requires the government to inquire into religious doctrine to determine who is a minister. But this is mistaken. Viewed in context of the entire tax code, the per se parsonage allowance of § 107 is far less entangling than the next best alternative—applying the notoriously difficult multi-factor standard of § 119 to ministers.

Whenever the government taxes churches and ministers, there is no completely disentangling alternative: "Either course, taxation of churches or exemption, occasions some degree of involvement with religion."[133] To figure out which alternative is best, it is essential to distinguish between two types of entanglement. One is called "enforcement entanglement."[134] It occurs when the government *taxes* churches, and is therefore required to value church property, place liens on church property, and (in some cases) foreclose on church property.[135] This creates direct confrontations between church and state and threatens church autonomy.[136]

The other type of entanglement is called "borderline" entanglement.[137] It occurs when the government *exempts* churches, and is therefore required to decide who qualifies for the exemption and who doesn't. For example, it may have to decide whether an entity is "religious" and whether a publication is "consistent with 'the teaching of the faith.'"[138] Policing the borders of a complicated exemption threatens to entangle courts in religious questions.[139]

These two types of entanglement are illustrated by *Walz* and *Texas Monthly*. *Walz* focused on "enforcement entanglement." There, the Court explained that taxing churches "would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes."[140] Exempting churches, by contrast, would "restrict[] the fiscal relationship between church and state," thus "tend[ing] to complement and reinforce the desired separation insulating each from the other."[141]

Texas Monthly focused on "borderline entanglement." There, all periodicals were subject to tax, except those that consisted "wholly of writings promulgating the teaching of [a] faith."[142] Because the government had to decide which messages were "consistent with 'the teaching of the faith,'" the exemption produced "greater state entanglement" than providing no exemption at all.[143]

Section 107 reduces *both* enforcement entanglement and borderline entanglement. It reduces enforcement entanglement because it avoids the "latent dangers inherent in the imposition of . . . taxes" on a core part of the relationship between churches and their ministers.[144] More importantly, it reduces borderline entanglement because it replaces the notoriously fact-intensive standard of § 119 with the bright-line rule of § 107.

Section 119 is extremely difficult, if not impossible, to apply to ministers. First, it requires the minister to qualify as an "employee" under IRS rules. This, in turn, requires the government to tax differentially depending on internal matters of church polity. If the minister belongs to a denomination that gives him broad autonomy or exposes him to significant economic risk, he may fail this test and be considered self-employed. Some decisions suggest that United Methodist Council ministers would qualify as employees, but Assemblies of God and various

129 *See* 26 U.S.C. § 414(e)(3)(B), (5)(A); Miscellaneous pension bills: Hearings before the Subcommittee on Private Pension Plans and Employee Fringe Benefits of the Committee on Finance, United States Senate, Ninety-Sixth Congress, First Session (Dec. 4, 1979), at 367 (Statement of Sen. Talmadge).

130 26 U.S.C. § 403(b)(1)(A)(iii).

131 26 U.S.C. § 501(m)(3)(C)-(D); G.C.M. 39874 (May 4, 1992); Treas. Reg. § 1.502-1(b).

132 Conf. Rep. No. 83-2679 (1954).

133 *Walz*, 397 U.S. at 674.

134 Edward A. Zelinsky, *Do Religious Tax Exemptions Entangle in Violation of the Establishment Clause?*, 33 Cardozo L. Rev. 1633 (2012).

135 *Id.*

136 *Id.* at 1640.

137 *Id.* at 1635.

138 *Texas Monthly*, 489 U.S at 20.

139 *Walz*, 397 U.S. at 698-99 (Harlan, J., concurring).

140 *Id.* at 674.

141 *Id.* at 676.

142 489 U.S. at 5.

143 *Id.* at 20 (plurality).

144 *See Walz*, 397 U.S. at 673.

Pentecostal ministers would not.[145] Even if a minister qualified as an employee, a § 119 exemption would be unavailable if one entity provided the housing (such as the congregation), but a different entity qualified as the "employer" (such as the diocese)—thus pressuring churches to make decisions about church structure based on definitions in the tax code.[146]

Once these threshold concerns are overcome, § 119 still requires the government to decide whether a minister's housing was "furnished for the convenience of the employer" as "a condition of his employment."[147] This, in turn, requires the government to decide whether the lodging is truly necessary "to enable him properly to perform the duties of his employment."[148] In other words, is it really necessary for a priest or imam "to be available for duty at all times"?[149] Is it really necessary for a rabbi to live in close proximity to the synagogue, to counsel synagogue members at home, to host meetings at home, and to prepare *derashot* at home? These sorts of inquiries are extremely difficult and fact-intensive for secular employees.[150] They raise grave constitutional concerns when applied by the government to evaluate the relationship between a church and its ministers.[151]

Section 107, by contrast, recognizes that the government cannot decide which uses of a minister's home are "necessary" to the mission of the church and which are not. It asks only whether the employee is functioning as a minister. This is an inquiry courts have been conducting for decades—not only in the tax context, but also under the First Amendment "ministerial exception."[152] Indeed, it is an inquiry that the Supreme Court itself said was constitutionally *required* just five years ago.[153]

This is why § 107 is easily distinguishable from the exemption in *Texas Monthly*. There, the alternative to the religious exemption for periodicals was no exemption at all—all periodicals would be taxed equally. Thus, striking down the religious exemption eliminated any possibility of borderline entanglement. By contrast, if § 107 were struck down, the alternative would be to apply § 119 to ministers. Far from eliminating borderline entanglement, that would exacerbate it.[154]

3. The Parsonage Allowance Reduces Discrimination

Section 107(2) also reduces discrimination among religions. The Supreme Court has repeatedly held that nondiscrimination is "[t]he clearest command of the Establishment Clause."[155] This applies not just to intentional discrimination among religions, but also to "indirect way[s] of preferring one religion over another."[156] Of course, a facially neutral law is not invalid merely because it has a greater "incidental effect" on one denomination than another.[157] But "when the state passes laws that facially regulate religious issues"—as § 107 clearly does—"it must treat individual religions and religious institutions without discrimination or preference."[158]

The leading case on religious nondiscrimination is *Larson*. There, a Minnesota law imposed reporting requirements on all charitable organizations, but it exempted "religious organizations that received more than half of their total contributions from members."[159] This had the effect of distinguishing between "well-established churches," which received ample "financial support from their members," and "churches which are new and lacking in a constituency" and had to rely on "public solicitation."[160] The state defended its rule on the ground that it was "based upon secular criteria" and merely "happen[ed] to have a disparate impact upon different religious organizations."[161] But the Supreme Court rejected this argument, concluding that the statute "focuses precisely and solely upon religious organizations" and makes "explicit and deliberate distinctions between [them]."[162]

Maintaining the parsonage allowance without applying it to cash allowances for clergy housing—§ 107(1) without § 107(2)—would have the same effect. "[W]ell-established churches" with "financial support" can afford to purchase a parsonage and provide tax-free housing to ministers.[163] But "churches which are new and lacking in a constituency" cannot.[164] This creates a serious disparity between wealthy and poor denominations.

But the disparity is not merely financial. The decision to have a parsonage is also influenced by theological considerations. In some denominations, like the Roman Catholic Church, the use of church-owned parsonages is fundamental to how the Church

145 *See* Weber v. Comm'r, 103 T.C. 378 (1994), *aff'd*, 60 F.3d 1104 (4th Cir. 1995); Shelley v. Comm'r, T.C.M. (RIA) 1994-432 (1994); Alford v. United States, 116 F.3d 334 (8th Cir. 1997).

146 *See* Fuhrmann v. Comm'r, T.C.M. 1977-416 (1977).

147 Treas. Reg. § 1.119-1(b).

148 *Id.*

149 *Id.*

150 McDavitt, *supra* note 78 at 1139-40.

151 *Hosanna-Tabor*, 565 U.S. at 190 (prohibiting "government interference with internal church decisions that affect[] the faith and mission of the church itself"); *id.* at 206 (Alito, J., concurring) (courts cannot asses "the importance and priority of the religious doctrine in question," what a "church really believes," or "how important that belief is to the church's overall mission"); *Corp. of Presiding Bishop*, 483 U.S. at 342 (Brennan, J., concurring) (courts cannot "determin[e] that certain activities are in furtherance of an organization's religious mission").

152 *See* McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972).

153 *Hosanna-Tabor*, 565 U.S. 171.

154 It is no answer to say that § 119 applies only to in-kind lodging. Cash allowances present the same entanglement problem under §§ 162 and 280A(c)(1).

155 *Larson*, 456 U.S. at 244, 246 (collecting cases).

156 Fowler v. Rhode Island, 345 U.S. 67, 70 (1953).

157 *See* Employment Div. v. Smith, 494 U.S. 872, 878 (1990).

158 Colo. Christian Univ. v. Weaver, 534 F.3d 1245, 1257 (10th Cir. 2008) (internal quotations marks omitted).

159 456 U.S. at 231.

160 *Id.* at 246 n.23.

161 *Id.* (internal quotations marks omitted).

162 *Id.*

163 *Id.*

164 *Id.*

deploys its clergy. In other denominations—typically newer and less hierarchical ones—there is no historical or theological emphasis on church-owned parsonages. Sometimes, this is because churches expect ministers to be bi-vocational; other times, it is because churches may take years before they establish a permanent place of worship; still other times, it is because the churches have a theological reluctance to amass large holdings of worldly property. And in some cases, ministers are expected to be itinerant, making a housing allowance the only feasible way of meeting their housing needs. Given these differences among denominations, limiting § 107 only to in-kind housing discriminates along theological, not just financial, lines.

Thus, it is no surprise that equal treatment of housing allowances was first imposed by courts to avoid religious discrimination, even before Congress enacted § 107(2). This occurred in the early 1950s, when three federal courts held that cash housing allowances must be excluded from the income of ministers.[165] Congress then codified these decisions in § 107(2). When it did so, it expressly stated that it was seeking to "remove[] the discrimination in existing law" among various denominations, as had been required in the federal court decision.[166]

Treating cash allowances and in-kind housing equally is also logical. Although cash payments *may* be compensatory, they need not be. "[J]ust as an employee is often furnished tangible property which cannot be regarded as compensation, an employee may be furnished cash which is not compensation."[167] The question is whether the lodging is furnished for the convenience of the employer, not whether it is cash or in-kind. Thus, it is no surprise that the first court decision involving the convenience of the employer doctrine rejected a distinction between cash allowances and in-kind housing.[168] So did the first court of appeals decision involving ministers.[169] So did early IRS rulings on charitable volunteers.[170] And so did early commentators.[171] Indeed, § 119 is the *only* housing allowance to distinguish between cash and in-kind housing benefits. There is no reason to import this distinction into § 107, especially when it causes discrimination among religions.

V. Striking Down the Parsonage Allowance Would Endanger Scores of Tax Provisions Throughout Federal and State Law

An interpretation of the Establishment Clause that invalidates the parsonage allowance also threatens numerous other provisions throughout federal and state tax codes. As discussed above, nearly every state in the nation provides some tax exemptions for religious groups without analogous exemptions for other nonprofit institutions.[172] Likewise, Congress has created a host of tax provisions that treat churches and ministers differently than other employers and employees in order to protect the First Amendment values of church autonomy, non-entanglement, and non-discrimination.[173]

To take just one example, the federal tax code includes a religious exemption from self-employment taxes for "a duly ordained, commissioned, or licensed minister of a church" who "is conscientiously opposed to, or because of religious principles . . . is opposed to, the acceptance . . . of any public insurance."[174] This statutory test—"duly ordained, commissioned, or licensed"—is identical to the Treasury Regulation definition of a "minister of the gospel" for purposes of § 107.[175] Thus, if § 107 impermissibly advances religion or entangles the government in religious questions, then so does the self-employment tax exemption for religious objectors to Social Security. But "[w]ithout this exemption in the Code, the IRS would be required to enforce the self-employment tax against individuals despite their religious opposition to 'public insurance' such as the Social Security system financed by the self-employment tax."[176]

Surely the First Amendment requires no such thing. Indeed, multiple courts have rejected this argument.[177] Yet this is the clear implication of the position that § 107 violates the Establishment Clause. Critics of the parsonage allowance are wrong. The Establishment Clause does not require such hostility to religion. These numerous state and federal tax provisions are constitutional, as is the parsonage allowance.

165 MacColl v. United States, 91 F. Supp. 721, 722 (N.D. Ill. 1950); Conning v. Busey, 127 F. Supp. 958 (S.D. Ohio 1954) (following *MacColl*); Williamson v. Comm'r, 224 F.2d 377 (8th Cir. 1955).

166 H.R. Rep. No. 83-1337, at 4040 (1954); S. Rep. No. 83-1622, at 4646 (1954). Congress did the same thing with housing allowances for government workers living overseas to eliminate discrimination among them. In the 1950s, many overseas employees received tax-exempt, in-kind housing, but some did not. Congress enacted the Overseas Differential and Allowances Act authorizing cash housing allowances, and § 912 excluding those cash housing allowances from income. Thus, § 912 does the same thing for overseas employees that § 107(2) does for ministers. *See* Anderson v. United States, 16 Cl. Ct. 530, 534 (1989), *aff'd,* 929 F.2d 648 (Fed. Cir. 1991). *See also id.* at 535 ("Congress intended that all federal overseas employees be treated uniformly.").

167 *Williamson*, 224 F.2d at 379 (quoting Saunders v. Comm'r, 215 F.2d 768, 771 (3d Cir. 1954)).

168 *Jones*, 60 Ct. Cl. 552.

169 *Williamson*, 224 F.2d at 379.

170 O.D. 11, 1919-1 C.B. 66; O.D. 119, 1919-1 C.B. 82.

171 *See* McDavitt, *supra* note 78 at 1132-33, 1138 (distinction is "artificial and formalistic" and has "no practical place in the convenience of the employer doctrine").

172 Parts I-III, *supra*.

173 *Id.*

174 26 U.S.C. § 1402(e).

175 *See* Treas. Reg. § 1.107-1(a) (citing Treas. Reg. § 1.1402(c) 5.

176 Zelinsky, *supra* note 134 at 1669.

177 *See, e.g.*, Droz v. Comm'r, 48 F.3d 1120, 1124-25 (9th Cir. 1995) (upholding § 1402(g) against an Establishment Clause challenge); Ballinger v. Comm'r, 728 F.2d 1287, 1292-93 (10th Cir. 1984) (rejecting Establishment Clause challenge to § 1402(e)).

The FCC: Death to the Set-Top Box! Long Live the Set-Top Box . . . or is it Apps?

By Alex Okuliar

Note from the Editor:

This article discusses and critiques the FCC's proposed set-top box rule.

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• Gigi Sohn, Counselor to FCC Chairman Wheeler, *The End of Big Cable's Control over Your TV Set-top Box is Nigh*, The Daily Dot (June 22, 2016), http://www.dailydot.com/layer8/unlock-the-box-fcc-gigi-sohn/.

• Tom Wheeler, *FCC Chairman: Here are the new proposed rules for set-top boxes*, L.A. Times (Sept. 8, 2016), http://www.latimes.com/opinion/op-ed/la-oe-wheeler-set-top-box-rules-20160908-snap-story.html.

• Troy Wolverton, *Review: Consumers lose as FCC retreats on set-top box proposal*, Phys.org (Sept. 14, 2016), http://phys.org/news/2016-09-consumers-fcc-retreats-set-top.html.

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Emboldened by its success with net neutrality, the Federal Communications Commission (FCC) may be looking to shake up the way you enjoy media at home. At the behest of FCC Chairman Tom Wheeler, on February 18, 2016, the agency issued a Notice of Proposed Rulemaking (NPRM) about television set-top boxes.[1] The proposal passed 3-2 on a party line vote, with the Democrats in favor and the Republicans opposed. The proposal—which would require cable companies to open access to set-top box technology to foster competition—has proved controversial, drawing commentary and debate from a wide spectrum of stakeholders. Very recently, it has met with criticism and opposition even among those who initially sponsored it, despite an eleventh hour compromise attempt by Chairman Wheeler. The agency has now taken the set-top box proposal off the agenda until next year, and many people think it will not move forward at all given the election of Republican Donald Trump as President.[2] Below, I explore the state of the set-top box, explain the nature of the proposed rule, and offer some perspective on why many feel the proposal is impractical and represents an inefficient government intrusion on a functioning free market. I close with a more detailed update on where the proposed rule stands today.

I. The Current State of Set-Top Box Technology

Most cable companies bundle their programming with a set-top box that you can rent only from the cable company. Most of us really don't care for these clunky black boxes that resemble set pieces from cutting edge 1980s sci-fi movies like *War Games* and *Back to the Future*. The FCC cites to estimates that these boxes cost consumers $20 billion a year in rental fees.[3] Agency personnel argue that consumers are not getting their money's worth because, while the cost of televisions, computers, and mobile phones all have declined by about 90% since 1994, the price of set-top boxes has gone up about 185 percent.[4] And about 99% of us rent a set-top box, so these fees are spread far and wide.[5]

Those are pretty compelling points in support of a proposal to shake up the current system. The NPRM from the FCC attempts to do that by requiring cable companies to open their video and related content to other companies to enable them to create navigation devices. So why all the controversy about

1 *In the Matter of Expanding Consumers' Video Navigation Choices Commercial Availability of Navigation Devices*, Notice of Proposed Rulemaking and Memorandum Opinion and Order (Feb. 18, 2016), https://apps.fcc.gov/edocs_public/attachmatch/FCC-16-18A1.pdf [hereinafter NPRM].

2 Giuseppe Macri, *Set-Top Boxes, Business Internet Regs Punted to Trump FCC*, Inside Source (Nov. 18, 2016), http://www.insidesources.com/set-top-boxes-business-internet-regs-punted-to-trump-fcc/.

3 NPRM, *supra* note 1 at 8 (citing to statistics compiled by Senators Markey and Blumenthal).

4 *Id.*

5 Gigi Sohn, Counselor to FCC Chairman Wheeler, *The End of Big Cable's Control over Your TV Set-top Box is Nigh*, The Daily Dot (June 22, 2016), http://www.dailydot.com/layer8/unlock-the-box-fcc-gigi-sohn/.

the NPRM? In part, because it appears to underestimate or overlook several key issues, including the robust competition today in media and media navigation devices (think AppleTV), the practical shortcomings of the proposal, the implications of the NPRM for important individual rights (including intellectual property), as well as the fact that much of today's debate is another round in a multi-decade dispute that earlier FCC regulations not only did not resolve but, according to some, may have made the situation worse.

A. The History of Attempts to Regulate Set-Top Boxes

Let's tackle the last issue first. The battle over set-top boxes began in the early 1990s and has been addressed by legislators and regulators many times over. First, in 1995, Congressman Ed Markey (D-MA) and House Commerce Committee Chairman Tom Bliley (R-VA) sponsored a bill to promote set-top box competition that became a part of the Telecommunications Act of 1996. The Act ordered the FCC to "adopt regulations to assure the commercial availability . . . of converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems, from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor."[6]

In 1998, the FCC passed an "integration ban" to separate the security and navigation functions in a set-top box. In response, the industry developed the "CableCARD" that could be inserted into any cable box to decrypt the cable signals and interface with a third-party set-top box available for purchase by the consumer and able to navigate channels. This was a perfect solution for all those consumers who wanted not just one, but *two* set-top boxes—one leased and one purchased—sitting elegantly on the top and side of their TVs. The system created no real incentive for cable companies or consumers to adopt the new "two-box" solution, so CableCARD has never really taken off; a recent mandatory filing by the National Cable & Telecommunications Association revealed that only 617,000 CableCARDS have been issued in purchased boxes, as compared to more than 53,000,000 in use in the standard leased boxes most of us have in our living rooms.[7] Other recent statistics point to similarly meager uptake of CableCARDS as a retail solution.[8] The lack of adoption for this regulatory solution strongly suggests that we should consider other alternatives—assuming a change is even needed.

B. Competition Today is Robust

The FCC sees a narrow relevant market for set-top boxes, explaining in its proposal that the market includes "access to the multichannel video programming to which consumers subscribe . . ."[9] This, in turn, means the FCC appears to view the market as beginning and ending with "set top boxes that can access the MVPD ["multichannel video programming distributor"] feed."[10] MVPDs are cable and satellite operators, including Comcast, Time Warner Cable, DirecTV, Charter Communications, and Dish.[11] The NPRM implies that MVPDs are the only competitors in the market, and it therefore tries to increase competition by unbundling the MVPD-owned equipment (set-top boxes) from their programming; this approach is similar to the moribund CableCARD proposal and the "integration ban" from the 1990s.[12] Some companies, such as Google, appear to agree with the NPRM's diagnosis and approach to reform.[13]

But the agency's approach underestimates the robust competition *already* present today in online over-the-top (OTT) content provision.[14] Anyone who has recently talked to a friend about the 2016 Emmy Awards or the best new TV shows is probably talking about at least some shows available (perhaps even exclusively) on Netflix, Hulu, Amazon, YouTube, or iTunes.[15] People consume media differently today, with ample options that include successful subscription services like Netflix and Hulu, as well as a la carte services like iTunes.[16] Some companies offer both types of services, such as Amazon, which has both Prime and Video.[17] In addition, third-party set-top box manufacturers exist and are meeting success, including Roku, Google Chromecast, AppleTV, Amazon Fire, PlayStation, Xbox, TiVo and Silcondust.[18] Studies estimate that 21 percent of U.S. households have

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6 John Howes, *Today's FCC Action on Cable Boxes, 20 Years in the Making*, Project Disco at 2 (Feb. 18, 2016), http://www.project-disco.org/021816/todays-fcc-action-on-cable-boxes-20-years-in-the-making#.V2vugPkrJD8. Section 629 of the Telecommunications Act provides:

> The [FCC] shall, in consultation with appropriate industry standard-setting organizations, adopt regulations to assure the commercial availability, to consumers of multichannel video programming and other services offered over multichannel video programming systems, of converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems, from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor.

Telecommunications Act of 1996, Pub. L. No. 104-104, § 304, 110 Stat. 56, 125-126 (1996); 47 U.S.C. § 549(a).

7 *See* Howes, *supra* note 6.

8 *See id.*

9 NPRM, *supra* note 1 at ¶ 13.

10 Scott Wallsten, *An Economic Analysis of the FCC's Set-Top Box NPRM*, Technology Policy Institute (Apr. 2016), 4, https://techpolicyinstitute.org/wp-content/uploads/2016/04/Wallsten_An_Economic_Analysis_of_the_FCCs_Set-Top_Box_NPRM.pdf.

11 Anthony Wood, *How the FCC's 'Set-Top Box' Rule Hurts Consumers*, Wall Street Journal (Apr. 21, 2016), http://www.wsj.com/articles/how-the-fccs-set-top-box-rule-hurts-consumers-1461279906; Paul Ausick, *Pay-TV Players Offer Alternative to FCC Set-Top Box Proposal*, 24/7 Wall St (Jun. 17, 2016), http://247wallst.com/media/2016/06/17/pay-tv-players-offer-alternative-to-fcc-set-top-box-proposal/.

12 Wallsten, *supra* note 10 at 4.

13 Wood, *supra* note 11.

14 Over-the-top programming typically refers to content that is provided over a third party telecommunications network.

15 Wallsten, *supra* note 10 at 4-5.

16 *Id.*

17 *Id.*

18 *Id.*

an alternative streaming device, and that 10 percent of U.S. households have completely "cut the cord" and eliminated their MVPD entertainment packages in favor of an OTT service.[19]

In addition to these set-top box alternatives, customers can buy set-top boxes that rely on CableCARDs, such as TiVo or Silcondust.[20] While the market for CableCARD-based devices is relatively small, consumers' decision to lease from their cable provider rather than buy a box is not necessarily evidence of an anti-competitive market, as has been suggested by some proponents of the FCC's set-top box proposal. Nor is it unique to the U.S.[21] A review of 26 MVPDs across 11 OECD countries revealed that all but one require customers to get their set-top boxes from the MVPD.[22] Critics of the FCC's proposal have pointed out that this suggests the relationship between MVPDs and set-top boxes may be an efficient vertical integration; the FCC does not appear to have considered or explored this possibility yet.[23]

The many online competitors put pressure on MVPDs with original award-winning content[24] and access to content historically available only via MVPDs, such as ESPN.[25] Industry leaders like Roku CEO Anthony Wood have explained that today's media distribution models are highly dynamic and shifting from set-top boxes to application-based streaming platforms on computers, mobile phones, other streaming players, and smart TVs.[26] FCC Commissioner Ajit Pai, in his vigorous dissent from the proposed rule, recognizes these positive market developments and notes them as proof that regulatory intervention is unwarranted and counterproductive.[27]

Despite the evidence of numerous online options, critics of lighter touch regulation in this space have pointed to live sporting events as proof that online providers cannot compete on a level playing field with MVPDs, [28] but this concern, too, is evaporating as sports networks like ESPN begin to offer online packages.[29] The FCC noted that "three of the major U.S. professional sports leagues already offer access to out-of-market games over the Internet."[30] Moreover, online competition is not the only disciplining force in this industry. MVPDs themselves are aggressive competitors, and the FCC estimates that 99 percent of households can choose from at least three MVPDs.[31]

The FCC recognizes that the market for video delivery is changing,[32] but remains concerned that online alternatives do not offer enough competition for traditional MVPDs.[33] The agency appears to believe this mainly because most households still subscribe to, and lease a set-top box from, an MVPD.[34] Critics of the FCC position claim the agency is incorrectly conflating a lack of consumer demand for yet another box (under the CableCARD system) as evidence of a lack of competition.[35]

II. Nature of the Initial Proposed Rule

The FCC wants to "empower consumers" with choices and "promote innovation" in available content.[36] The FCC's initial proposal sought to achieve these aims by giving third parties the ability to "build devices or software solutions that can navigate the universe of multichannel video programming with a competitive user interface."[37] The initial rules passed by the FCC for comment in February include a requirement that MVPDs offer three flows of information to third party companies in a format to be developed by a standard-setting body.[38] Those information streams include: 1) service discovery information regarding program availability (*e.g.*, channel listings); 2) entitlements information specifying what a device can do with content (*e.g.*, record it); and 3) content (*i.e.*, the actual programming).[39]

In addition, each MVPD would have to support one content protection system and offer the three flows of information to unaffiliated applications without MVPD-specific equipment.[40] The proposal also provides that each unaffiliated navigation device must honor copyright and recording limits, public interest requirements such as emergency alerts, consumer privacy, and

19 *Id*. at 6-8.

20 *Id*. at 9.

21 *Id*. at 12-13.

22 *Id*.

23 *Id*. at 21-24.

24 *Id*. at 4 (noting that Netflix, Amazon, and Hulu produce original, exclusive content).

25 *Id*. at 7-8 (noting that Sling TV and PlayStation Vue offer packages with access to a range of channels for a monthly fee, including sports, movie, and foreign channels).

26 Wood, *supra* note 11.

27 *In the Matter of Expanding Consumers' Video Navigation Choices Commercial Availability of Navigation Devices*, Dissenting Statement of Commissioner Ajit Pai (Feb. 18, 2016), https://apps.fcc.gov/edocs_public/attachmatch/FCC-16-18A5.pdf [hereinafter Pai's Dissent to NPRM].

28 Tom Govanetti, *With FCC set-top box overreach, time is now for Congress to rein in agency*, The Hill (Jun. 20, 2016), http://thehill.com/blogs/congress-blog/technology/283885-with-fcc-set-top-box-overreach-time-is-now-for-congress-to.

29 Wallsten, *supra* note 10, at 4-5.

30 *Id*. at 7 (quoting FCC, *In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees*, ¶ 83 (Jan. 18, 2011), https://transition.fcc.gov/FCC-11-4.pdf).

31 Wood, *supra* note 11, at 4-5.

32 *Id*. at 8 (quoting former FCC General Counsel Jonathan Sallet's speech at the 2015 Telecommunications Policy Research Conference, which acknowledged the competition and rapid change in this market).

33 NPRM, *supra* note 1, at 9, ¶¶ 14-15.

34 *Id*.

35 Wallsten, *supra* note 10, at 8-9.

36 NPRM, *supra* note 1, at 2.

37 *Id*.

38 *Id*. at 2-3.

39 *Id*.

40 *Id*.

children's programming advertising limits.[41] Licensing terms such as channel placement and advertising will be left to the market. The proposal exempts all cable providers offering only analog services.[42] A more recent version of the rule, announced in September, would create an FCC-overseen licensing body to administer search and security issues and require development of applications by MVPDs.[43]

III. Areas of Criticism and Concern

The FCC proposal has met with widespread criticism from many stakeholders. As a threshold matter, the proposal does not provide any meaningful way to protect content owned by the MVPDs, potentially allowing third party set-top box makers the ability to profit from and use MVPD content (including copyrighted material) without adequate compensation. Some critics have pointed out that the proposal does not address practical matters, such as the development of interoperability standards. It could take years for these standards to be developed. The CableCARD standard took more than four years to develop![44] Worse still, video distributors, content creators, and the consumer electronics industry strongly disagree about nearly every aspect of the current proposal, making the probability of their agreeing to a common standard incredibly small.[45]

By the time these parties develop an interoperability standard, consumers will likely have moved well beyond set-top boxes, relying on direct access to content providers through streaming services. The cable industry is pushing in this direction, as seen in an alternative proposal to the NPRM to develop a free downloadable app within two years.[46] Cable companies already offer packages that allow access to content on streaming players, mobile phones, and other delivery methods that do not rely on set-top boxes.[47]

Several groups have noted that the proposal does not include the kind of protections for consumer data and privacy, including personally identifiable information, that Congress has applied to cable operators.[48] The NPRM proposes that third party set-top box manufacturers "certify compliance" with these privacy obligations, and there is an open question as to whether state privacy laws would also apply.[49] The Electronic Privacy Information Center (EPIC) has argued that the FCC should not issue any final rule until the cable privacy rules are "directly applied to all manufacturers and developers with access to cable subscriber data."[50] EPIC noted that some third-party device makers already track and collect device and usage data from consumers to allow more targeted advertising.[51]

A final criticism of the rule—at least the initial iteration—has been that it would continue to reinforce an entrenched and outdated set-top box access model, possibly resulting in consumers buying or leasing two boxes (as is the case under the CableCARD model). Commissioner Pai[52] and Republican lawmakers[53] have both noted that this would be a logical result of the proposal. In his dissent, Commissioner Pai notes that any proposal should be focused on expediting the move away from old set-top box technology. He has said that "[o]ur goal should not be to unlock the box; it should be to eliminate the box."[54] Chairman Wheeler, however, has stated that these criticisms are "spreading misinformation" and subsequently advanced an app-based proposal, described below.[55]

IV. Where the Proposal Stands Today: Revisions and Defection

As of this writing, the FCC's proposal appears to be adrift. In early September, FCC Chairman Wheeler distributed to the Commission a revised proposal for consideration. These proposed rules focus on an apps-based approach, requiring MVPDs to develop and provide free apps allowing consumers to access cable programming on any device.[56] The FCC would oversee the development of a standard license between MVPDs and device makers.[57] The proposal is based on an alternative advanced by the cable and satellite industry in mid-June.[58] The FCC was set to vote on the final rule September 29, but the vote was taken off

41 *Id.*

42 *Id.*

43 *Id.*

44 NPRM, *supra* note 1 at 3-4, ¶¶ 6-7.

45 Pai's Dissent to NPRM, *supra* note 27, at 1.

46 Lydia Beyoud, *Comcast, DirecTV Pitch Compromise Set-Top Box Proposal*, Bloomberg (Jun. 20, 2016), http://www.bna.com/comcast-directv-pitch-n57982074470/.

47 Wood, *supra* note 11. *See, e.g.*, Time Warner Cable TV Roku Trial, http://www.timewarnercable.com/en/enjoy/roku.html (starter package at $9.99 per month with no TV equipment charge).

48 47 U.S.C. § 551.

49 NPRM, *supra* note 1, at 38, ¶ 78.

50 *In the Matter of Expanding Consumers' Video Navigation Choices Commercial Availability of Navigation Devices*, Comments of the Electronic Privacy Information Center (Apr. 22, 2016), MB Docket No. 16-42, CS Docket No. 97-80, 1, 6, https://ecfsapi.fcc.gov/file/60001690745.pdf [hereinafter EPIC comments to NPRM].

51 *Id.* at 3-5.

52 Pai's Dissent to NPRM, *supra* note 27, at 2 ("In order to carry out the standards called for in this Notice, MVPDs would probably have one of two options. First, they could make substantial changes to their network architecture. Or second, they could provide each customer with an additional box. And during my discussions with MVPDs in the weeks leading up to this meeting, each and every company has told me that it would be less expensive to deploy additional boxes in their customers' homes.").

53 John Brodkin, *FCC votes to "unlock the cable box" over Republican opposition*, Ars Technica (Feb. 18, 2016), http://arstechnica.com/business/2016/02/fcc-votes-to-unlock-the-cable-box-over-republican-opposition/.

54 Pai's Dissent to NPRM, *supra* note 27, at 1.

55 *Id.*

56 Tom Wheeler, *FCC Chairman: Here are the new proposed rules for set-top boxes*, L.A. Times (Sept. 8, 2016), http://www.latimes.com/opinion/op-ed/la-oe-wheeler-set-top-box-rules-20160908-snap-story.html.

57 Brendan Bordelon, *Set-Top Box Rule Set for FCC Vote This Month*, Morning Consult (Sept. 8, 2016), https://morningconsult.com/2016/09/08/set-top-box-rule-set-fcc-vote-month/.

58 Beyoud, *supra* note 46.

the agenda at the last minute and put on hold indefinitely.[59] In an announcement following the Commission's November open meeting, the agency noted that the matter would be taken off the agenda until 2017, following the transfer of agency leadership.[60]

The rule, in all its incarnations, has resulted in a lot of activity in Congress, with even Democrat members of the FCC pushing back. During a Senate Commerce Committee hearing, FCC Commissioner Jessica Rosenworcel noted that "I have some problems with licensing and the FCC getting a little bit too involved with the licensing scheme here."[61] She went on to say that "when I look at the Communications Act and Section 629, I just don't think we have the authority."[62] This is not the first time that Rosenworcel has expressed skepticism, having said in the summer that "it has become clear the original proposal has real flaws. . . We need to find another way forward."[63] Her lack of enthusiasm for the plan, combined with the opposition from Commissioners Ajit Pai—who has long said the plan should, if anything, "eliminate the box"[64]—and Michael O'Rielly, strongly suggest the plan would be voted down if a vote was taken today.

But the withdrawal of the set-top box matter from the meeting agenda may not be the end of the story. While not on the agenda, the set-top box proposal is still in circulation at the Commission and could be voted on once there are three votes. This has prompted additional efforts by interested parties. For instance, Commissioner Rosenworcel is up for re-confirmation in the Senate, and this has been used by interested senators to advocate for their positions with her and the agency. Two Democrats appear to have placed holds on her nomination to express frustration with her position on the set-top box rule, and then lifted those holds based on a promise of some near-term action at the FCC.[65] Republicans in the Senate opposing the proposed rule have held up a floor vote on Rosenworcel to put pressure on Wheeler not to take action before the transfer of agency leadership next year.[66]

Given the change of leadership in Washington and these most recent maneuvers, it is difficult to predict the outcome of the set-top box debate. It is highly unlikely that a proposal similar to the current one will be implemented. However, given its history and the obvious interest of some industry and consumer advocacy players in the issue, we are likely in the middle of a very long debate about how to monetize the American living room.

59 Seth Fiegerman, *FCC Delays Vote on Controversial Cable Box Plan*, CNN (Sept. 29, 2016), http://money.cnn.com/2016/09/29/technology/fcc-set-top-box-vote/.

60 Macri, *supra* note 2.

61 David McCabe, *Dem FCC Member Doubts Agency's Television Box Proposal*, The Hill (Sept. 15, 2016), http://thehill.com/policy/technology/296137-key-fcc-member-doubts-agencys-television-box-proposal.

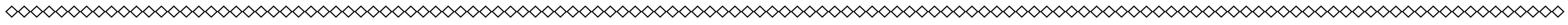
62 *Id.*

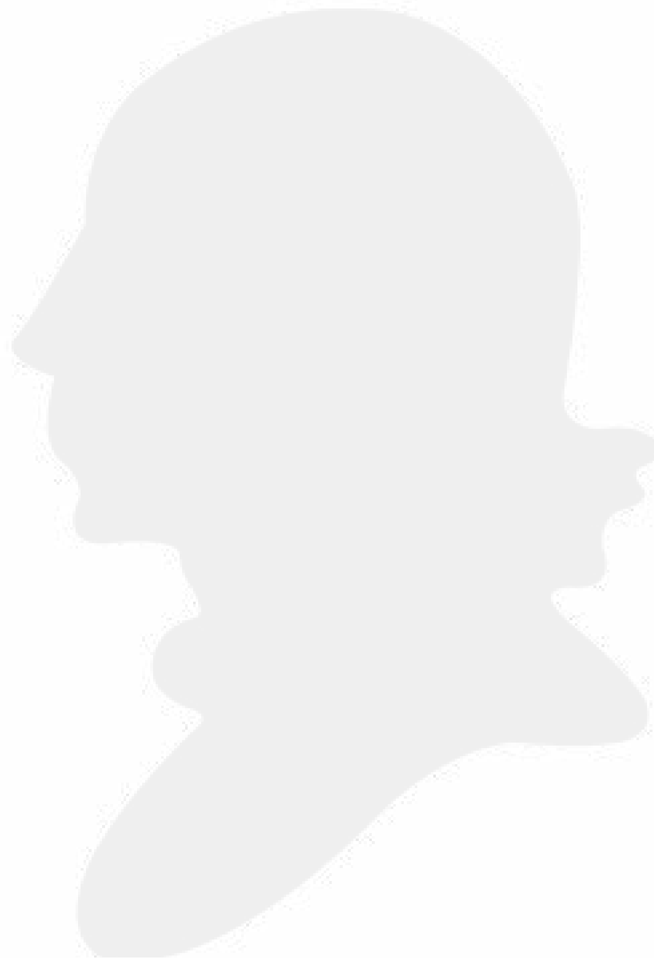
63 Brian Finke, *FCC's cable box plan is "too complicated," says Democrat who voted for it*, Ars Technica (Jun. 21, 2016), http://arstechnica.com/business/2016/06/tom-wheelers-set-top-box-plan-may-be-losing-democratic-support/.

64 Pai's Dissent to NPRM, *supra* note 27.

65 John Eggerton, *Hold on Rosenworcel Lifted*, Multichannel News (Nov. 18, 2016), http://www.multichannel.com/news/fcc/hold-rosenworcel-nomination-lifted/409209.

66 *Id.*





How to Regulate the Internet

By Kathleen Q. Abernathy

Note from the Editor:

This article traces the history of the FCC's approach to regulating the internet and favorably reports on the changes the new FCC Chairman Ajit Pai is making.

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• Reed Hastings, *Internet Tolls And The Case For Strong Net Neutrality*, Netflix Media Center (Mar. 20, 2014), https://media.netflix.com/en/company-blog/internet-tolls-and-the-case-for-strong-net-neutrality.

• Willmary Escoto, *Net Neutrality: The Social Justice Issue of Our Time*, Public Knowledge (July 19, 2017), https://www.publicknowledge.org/news-blog/blogs/net-neutrality-the-social-justice-issue-of-our-time.

• *Net Neutrality: What You Need to Know Now*, Save the Internet, https://www.savetheinternet.com/net-neutrality-what-you-need-know-now.

• Todd Shields, *Microsoft, Google Back Strong Net Neutrality Rules*, Bloomberg Politics (July 17, 2017), https://www.bloomberg.com/news/articles/2017-07-17/microsoft-google-back-strong-net-neutrality-on-broadband-firms.

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Kathleen Q. Abernathy recently returned to Wilkinson Barker Knauer LLP as special counsel. She was previously elected to the Board of Directors of Frontier Communications as an independent director in 2006 following her term as a Commissioner at the Federal Communications Commission from 2001 to 2005. In 2010 she joined the company as Chief Legal Officer and Executive Vice President, Regulatory and Governmental Affairs. Prior to her term as an FCC Commissioner, Ms. Abernathy worked for a number of different telecommunications companies and law firms. She has received numerous awards in recognition of her professional accomplishments and has taught as an adjunct professor at Georgetown University Law Center and Catholic University's Columbus School of Law. She received her B.S. from Marquette University and her J.D. from Catholic University's Columbus School of Law.

For more than two decades, the internet has flourished in an environment that was, until recently, essentially devoid of heavy-handed regulatory oversight. The Federal Communications Commission (the Commission or FCC) primarily focused its efforts on ensuring that consumers had access to broadband infrastructure and gingerly asserted regulatory oversight to ensure that internet service providers (ISPs) did not unlawfully discriminate or block lawful content. Notably, the FCC's legal authority to regulate the internet remained somewhat questionable given that its statutory authority was last updated in 1996, prior to the growth of broadband. But as the internet flourished, as companies developed business models dependent on free access to internet infrastructure, as smartphones and tablets replaced traditional stand-alone computers, and as the public embraced life-changing broadband applications, government regulators, public interest groups, elected officials, and some corporations decided the internet marketplace required more direct government oversight and should be regulated more comprehensively.

In the early days of the debate over the extent to which the internet should be regulated, internet start-up companies such as Google and Netflix, whose businesses were built around free access to ISP infrastructure, sought regulatory protection to avoid potential financial obligations to contribute to network costs. As more and more companies thrived in the internet space and as ISPs looked for ways to recover broadband infrastructure investments—other than through direct charges to their end user customers—the net neutrality debate was launched. While there is little disagreement regarding the importance of a free and open internet, there is extensive disagreement regarding the proper scope and scale of "network neutrality" laws and principles and the FCC's legal authority to regulate the internet. Over the past ten years, the debate has intensified, and lawyers and courts have spent countless hours dissecting the scope of the FCC's statutory authority.

A tipping point occurred in 2015, when the FCC, on a party-line vote, dramatically changed course through a *Report and Order on Remand, Declaratory Ruling, and Order* (2015 Open Internet Order).[1] In the 2015 Open Internet Order, the FCC reclassified broadband as a common carrier service regulated under Title II of the Communications Act of 1934 (the "1934 Act"), instead of continuing to rely on the Supreme Court-approved Title I regime that had been in place since the dawn of the broadband era.[2] At the time, then-FCC Commissioner Ajit Pai called the Order an "unprecedented attempt to replace [internet] freedom with government control."[3] Following President Trump's appointment of Pai as FCC Chairman, the FCC swiftly initiated a new proceeding called "Restoring Internet Freedom," and it once again sought comment on the FCC's authority to regulate the

1 *In re Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015) (2015 Open Internet Order).

2 *Id.*

3 *Id.* (dissenting statement of Commissioner Ajit Pai).

internet. This article explores the ongoing debate over internet freedom and the current political gridlock.

I. The Long and Winding Road of Internet Freedom

A. The Two-Decade Debate Over the Classification of Broadband

Much of the legal debate that has occupied the courts arises from the lack of any explicit, clearly articulated FCC authority in the 1934 Act to regulate the internet. There is specific statutory authority for the FCC to regulate common carrier "telecommunications services" under Title II of the Act. And the agency has additional authority to impose regulation on "information services" under Title I of the Act, but the scope of that authority is unclear. The Act defines an "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[4] The Act defines a "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public."[5] And "telecommunications" is defined by the Act as the "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[6]

Section 706 of the Telecommunications Act of 1996 was inserted by Congress under Title I and directs the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."[7] Since 1996, a debate has raged as to whether this provision gives the FCC specific authority on its own, or merely tells the FCC to exercise authority granted by other statutory provisions. Title II of the 1934 Act, in contrast, undisputedly gives the Commission the authority to regulate entities classified as common carriers. It contains hundreds of pages of regulation with an emphasis on price regulation and, among other things, specifically prohibits "unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services."[8] At various times over the course of the Open Internet debate, parties have lined up either in the Title I camp or the Title II camp, with Title I proponents generally urging light-touch regulatory oversight and Title II proponents embracing a more heavy-handed common carrier form of regulation.

In 2000, the Ninth Circuit ruled in *AT&T Corp. v. City of Portland* that cable modem service is a "telecommunications service" under the Act.[9] Two years later, the FCC issued a *Declaratory Ruling and Notice of Proposed Rulemaking* (2002 Cable Modem Order) reclassifying cable modem service as a Title I "interstate information service."[10] And in July 2005, the Supreme Court upheld the classification of cable modem service as an "interstate information service" after it was challenged in *NCTA v. Brand X*.[11] In a 6-3 decision, the Court found that the FCC's interpretation of the meaning of "telecommunications service" under the Act was entitled to *Chevron* deference.[12] Following that decision, in August 2005, the FCC adopted a *Report and Order and Notice of Proposed Rulemaking* similarly classifying wireline broadband service as a Title I "information service."[13] And in 2007, the FCC issued a *Declaratory Ruling* classifying wireless broadband, like cable modem service and wireline broadband, as an "information service."[14]

Following the D.C. Circuit's decision in *Comcast v. FCC*, which held that the FCC did not have Title I ancillary jurisdiction over Comcast under the 1934 Act,[15] the FCC, led at that time by Chairman Julius Genachowski, adopted a *Notice of Inquiry* seeking comment on whether to reclassify broadband from a Title I service to a Title II service.[16] The Commission ultimately rejected this approach and instead adopted a new net neutrality framework that principally relied on Section 706 of the Act, which it implemented in a *Report and Order* adopted in 2010 (2010 Open Internet Order).[17] Although the D.C. Circuit, in *Verizon v. FCC,* ultimately struck down most of the rules adopted in the 2010 Open Internet Order, the decision affirmed that Section 706 did constitute affirmative authority for the FCC to promulgate regulations.[18] Indeed, the court called Sections 706(a) and (b) "independent and overlapping grants of authority that give the Commission the flexibility to encourage deployment of broadband internet access service through a variety of regulatory methods."[19] But because the

4 47 U.S.C. § 153(20).

5 47 U.S.C. § 153(46).

6 47 U.S.C. § 153(43).

7 47 U.S.C. § 1302(a).

8 47 U.S.C. § 202.

9 *See generally* AT&T Corp. v. City of Portland, 216 F.3d 871 (9th Cir. 2000).

10 *In re Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4802 (2002).

11 Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).

12 *Id.*

13 *In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities Universal Service Obligations of Broadband Providers Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005).

14 *In re Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901 (2007).

15 *See* Comcast Corp. v. FCC, 600 F.3d 642 (D.C. Cir. 2010).

16 *In re Framework for Broadband Internet Service*, Notice of Inquiry, 25 FCC Rcd 7866, 7867 ¶ 2 (2010) ("[W]e seek comment on whether our 'information service' classification of broadband Internet service remains adequate to support effective performance of the Commission's responsibilities.").

17 *See In re Preserving the Open Internet; Broadband Industry Practices*, Report and Order, 25 FCC Rcd 17905, 17906 (2010), *affirmed in part and vacated in part by, remanded by* Verizon v. FCC, 740 F.3d 623 (2014) (2010 Open Internet Order).

18 740 F.3d at 628.

19 *Id.* at 637.

Commission had classified broadband as an information service exempt from Title II common carrier regulation, the no-blocking and non-discrimination rules were found to be unlawful.

B. The Origin of the Internet Freedoms

Law professor Tim Wu coined the term "network neutrality" in a 2003 paper, "Network Neutrality, Broadband Discrimination."[20] Wu argued for the protection of online traffic through both general anti-discrimination regulations and self-policing by providers.[21] Relying on the FCC's decisions in *Hush-A-Phone Corp. v. United States*[22] and *Use of the Carterfone Device in Message Toll Telephone Service*,[23] he pointed out that the "principle behind a network anti-discrimination regime is to give users the right to use non-harmful network attachments or applications, and give innovators the corresponding freedom to supply them."[24] He argued, however, that the threat of anti-discrimination regulation alone can "force broadband operators to consider whether their restrictions are in their long-term best interests."[25] Wu ultimately suggested that an anti-discrimination principle, combined with self-policing, would be a sufficient proposal for solving the issue of network neutrality.[26]

In 2004, then-FCC Chairman Michael Powell articulated four principles of "Internet Freedoms" in a speech delivered at the University of Colorado.[27] Before articulating these principles, Powell acknowledged arguments made by Professors Phil Weiser and Joe Farrell that network owners may be incentivized to restrict some uses of their networks.[28] In order to address this potential problem, while also "giv[ing] the private sector a clear road map by which it can avoid future regulation on this issue" Powell announced the four freedoms network owners should preserve for consumers when developing their business practices: the freedom to access content, the freedom to use applications, the freedom to attach personal devices, and the freedom to obtain service plan information.[29] These principles served as precursors to the Commission's regulatory efforts.

In August 2005, the FCC issued a non-binding three-page *Internet Policy Statement*, generally adopting Powell's four freedoms.[30] That document stated that consumers were entitled to access all legal content, to use the applications and services of their choice, to connect legal devices to the network as long as they do not cause harm, and to have competition among network, application, service, and content providers.[31] The FCC emphasized that the principles were to be incorporated into "ongoing policymaking activities" while stressing that it was "not adopting rules."[32] In 2008, however, the FCC issued a *Memorandum Opinion and Order* attempting to use its ancillary Title I authority to penalize Comcast for violating federal policy by allegedly impeding and blocking certain traffic over Comcast's network.[33] The *Memorandum Opinion and Order* would have required Comcast to disclose certain network management practices, submit a compliance plan to stop these practices by the end of the year, and disclose to the FCC and the public future network management practices.[34] In April 2010, the FCC's *Memorandum Opinion and Order* was vacated by the D.C. Circuit in *Comcast v. FCC* on the grounds that the agency had not cited an appropriate basis for its exercise of ancillary authority to impose rules on a non-common carrier.[35]

Several months later, in the 2010 Open Internet Order, the FCC attempted to put more legal force behind, and expand, the internet principles. The Commission barred fixed broadband providers from blocking or unreasonably discriminating;[36] barred mobile broadband providers from blocking certain kinds of traffic; and adopted reporting and transparency requirements for fixed and mobile providers, once again declining to deem broadband a Title II common carrier service.[37] In *Verizon v. FCC*, however, the D.C. Circuit struck down the majority of the 2010 Open Internet Order, finding that the anti-discrimination and anti-blocking provisions impermissibly imposed Title II common carriage obligations on Title I non-common carriage information

20 Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. on Telecomm. & High Tech. L. 141 (2003).

21 *See id.* at 144, 167-68.

22 Hush-A-Phone Corp. v. United States, 238 F.2d 266 (D.C. Cir. 1956).

23 Use of the Carterfone Device in Message Toll Tel. Serv., 31 F.C.C.2d 420 (1968).

24 Wu, *supra* note 20, at 142-43.

25 *Id.* at 157.

26 *Id.* at 167-68.

27 Michael Powell, *Preserving Internet Freedom: Guiding Principles for the Industry*, Remarks at the University of Colorado School of Law (Feb. 8, 2004), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-243556A1.pdf. The author was Commissioner at the FCC at this time and supported the approach proposed by FCC Chairman Powell.

28 *Id.* at 4.

29 *Id.* at 5.

30 *In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements; Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities Internet Over Cable Declaratory Ruling Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*; Policy Statement, 20 FCC Rcd 14986 (2005).

31 *Id.* at 14987-88 ¶ 4.

32 *Id.* at 14988 ¶ 5 & n.15.

33 *In re Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management,"* Memorandum Opinion and Order, 23 FCC Rcd 13028 (2008).

34 *Id.*

35 *See generally* 600 F.3d 642.

36 2010 Open Internet Order at 17906.

37 *Id.*

services.[38] The transparency rules, which did not impose common carrier obligations, were upheld by the court.

C. The Saga Continues: The 2015 Open Internet Order

In May 2014, following the decision in *Verizon v. FCC*, the Commission launched a new rulemaking on "Protecting and Promoting the Open Internet."[39] Then-FCC Chairman Tom Wheeler proclaimed that he would "not allow the national asset of an Open Internet to be compromised."[40] Following a notice and comment period, during which the rallying cry of "net neutrality" replaced popular concerns about crime, health care, and jobs, four million Americans submitted comments to the FCC.[41] The end product was the 2015 Open Internet Order that prohibited blocking, throttling, and paid prioritization by ISPs.[42] The FCC also enhanced the 2010 Open Internet Order's transparency requirements[43] and adopted a vague case-by-case "general conduct" standard prohibiting broadband providers from "unreasonably interfer[ing]" with user and edge provider activity. Finally, the Commission reclassified broadband internet access as a telecommunications service under Title II of the 1934 Act.[44]

The 2015 Open Internet Order has been criticized for many reasons, including its legal reliance on outdated statutory authority and the lack of a cost-benefit analysis. The primary flaw of the Order is the FCC's conclusion that a legal framework created for a price-regulated monopoly telephone service provider can be repurposed to address potential problems in the internet space. Secondary flaws include its failure to take into account the economic burdens imposed by the new rules, the assumption of a market failure, and the fact that it was designed to fix purely hypothetical problems.

Since the Clinton era, agencies have been directed to "assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify."[45] In other words, agencies should not impose unnecessary regulatory costs that greatly outweigh any potential benefits. The 2015 Open Internet Order, however, failed to consider potential costs and burdens; the FCC's chief economist at the time the order was written, Tim Brennan, called it "an economics-free zone."[46] Brennan also acknowledged that "the agency failed to conduct the cost-benefit analysis the Supreme Court requires for regulatory agencies to justify their rules."[47] The costs of the 2015 Open Internet Order are now apparent. Between 2011 and 2015, just the threat of reclassification of broadband internet access as a Title II common carrier service created a disincentive to investment of nearly $30 to 40 billion annually.[48] Following the reclassification under Title II in 2015, capital expenditures from the nation's twelve largest ISPs alone fell 5.6 percent, or $3.6 billion.[49]

In *USTelecom v. FCC*, the D.C. Circuit upheld the 2015 Open Internet Order,[50] finding that the FCC's interpretation of the 1934 Act was entitled to deference, whether or not the court agreed with its conclusions. The court declined to rehear *USTelecom* en banc in May 2017.[51]

II. Changes at the FCC

The political shift that accompanied the election of President Trump resulted in the selection of then-Commissioner Ajit Pai as the new FCC Chairman.[52] At the end of April 2017, Chairman Pai vowed to "reverse the mistake of Title II and return to the light-touch regulatory framework" that existed during the Clinton and Bush administrations, and for most of President Obama's term in office.[53] He subsequently released a draft *Notice of Proposed Rulemaking* (2017 NPRM) in a newly opened "Restoring Internet Freedom" docket. At the May 2017 open meeting, the FCC adopted a slightly modified version of the 2017 NPRM on a 2-1 party line vote.[54] The item proposes to reclassify broadband from a Title II telecommunications service to a Title I information service and eliminate the vague "general conduct standard." It also seeks comment on how to approach the existing bright line

38 *Verizon*, 740 F.3d 623.

39 *In re Protecting and Promoting the Open Internet*, Notice of Proposed Rulemaking, 29 FCC Rcd 5561 (2014).

40 *Id.* (statement of Chairman Tom Wheeler).

41 Soraya Nadia McDonald, *John Oliver's net neutrality rant may have caused FCC site crash*, Washington Post (June 4, 2014) https://www.washingtonpost.com/news/morning-mix/wp/2014/06/04/john-olivers-net-neutrality-rant-may-have-caused-fcc-site-crash/?utm_term=.2eacf62c9a43; *see also* 2015 Open Internet Order.

42 *See* 2015 Open Internet Order.

43 *Id.*

44 *Id.*

45 Executive Order 12866 (Sept. 30, 1993), https://www.whitehouse.gov/sites/default/files/omb/inforeg/eo12866/eo12866_10041993.pdf.

46 L. Gordon Crovitz, *'Economics-Free' Obamanet*, Wall Street Journal (Jan. 31, 2016), https://www.wsj.com/articles/economics-free-obamanet-1454282427.

47 *Id.*

48 *Id.* (citing George S. Ford, *Net Neutrality, Reclassification and Investment: A Counterfactual Analysis*, Phoenix Center for Advanced Legal & Economic Public Policy Studies, Perspectives 17-02, at 2, http://www.phoenixcenter.org/perspectives/Perspective17-02Final.pdf).

49 2017 NPRM at ¶ 45 (citing Hal Singer, *2016 Broadband Capex Survey: Tracking Investment in the Title II Era* (Mar. 1, 2016), https://haljsinger.wordpress.com/2017/03/01/2016-broadband-capex-survey-tracking-investment-in-the-title-ii-era).

50 United States Telecom Ass'n v. FCC, 825 F.3d 674 (D.C. Cir. 2016), *reh'g en banc denied*, No. 15-1063, 2017 WL 1541517 (D.C. Cir. May 1, 2017).

51 *Id.*

52 Mike Snider, *FCC's New Chairman No Fan of Net Neutrality*, USA Today (Jan. 23, 2017) https://www.usatoday.com/story/tech/news/2017/01/23/new-fcc-chairman-ajit-pai-no-net-neutrality-fan/96967372/.

53 FCC Chairman Ajit Pai, The Future of Internet Freedom, Remarks at the Newseum, Washington, D.C. (Apr. 26, 2017), available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-344590A1.pdf.

54 2017 NPRM.

rules banning blocking, throttling, and paid prioritization, and the transparency rule.[55]

Reactions of elected officials and scholars to the 2017 NPRM have broken down along party lines. Senators such as Kamala Harris of California have posted forms on their websites to enable visitors to submit pro-Title II comments to the FCC.[56] Some public interest organizations have also loudly voiced opposition. For example, Free Press published a blog post attacking Chairman Pai for using "lobbyists[']" data on broadband investment, including multiple charts and linking to a previously published study to argue that capital expenditure investment in "internet access" has thrived under the Title II classification.[57] Others, such as Wisconsin Senator Ron Johnson, USTelecom, and Oracle applauded the Chairman's efforts to step away from heavy-handed, burdensome regulation. The general public has also engaged; comedian John Oliver, who helped drive public interest prior to the 2015 decision, commented on the 2017 NPRM, stating "net neutrality is in trouble" and encouraging his viewers to "take the matter into [their] own hands."[58] Since the release of the draft 2017 NPRM, the Commission has received almost 5 million comments from the public. In response to the criticism, Chairman Pai has stated that the Commission will "rely not on hyperbolic statements about 'the end of the Internet as we know it' and 140-character commentary, but on the data."[59]

The 2017 NPRM proposes to return to the classification of broadband service as a Title I information service[60] as opposed to a Title II common carrier service. Although Title I statutory authority is a catch-all section of the 1934 Act, it previously sufficed to support a framework that both encouraged investment and protected consumers. As discussed above, Title II regulation, even for companies historically categorized as common carriers, is an outdated and cumbersome regulatory framework.

For almost twenty years, the internet has flourished under the successful bipartisan framework adopted in the Telecommunications Act of 1996,[61] a framework that enables the government to lightly manage the internet. Pursuant to Title I regulation, ISPs have invested more than $1.5 trillion in the internet ecosystem.[62] In that time, the internet has become intertwined in every part of our daily lives as a result of the government's willingness to step back from heavy-handed regulation. The Title I light-touch approach also allows for regulatory flexibility as new technologies, content, and applications are introduced into the internet ecosystem.

III. The Future of Net Neutrality

Congressional action may be the only permanent solution to the issue of "internet freedom" because the 1934 Act is an outdated tool incapable of addressing the regulatory challenges of 2017 and beyond. Of course, bipartisan legislation has been in short supply lately, and Congress is focused on numerous other issues. In the meantime, despite conflicting regulatory approaches, we have the benefit of living in a country that embraces innovation and competition, and so the internet is alive and well. Although misguided regulation can deter investment, drive up costs, and be used to advantage some business models over others, markets ultimately tend to respond to consumer demands and deliver products and services valued by customers.

55 *See id.*

56 *See* Kamala Harris, *Submit an Official Comment to the FCC*, http://go.kamalaharris.org/page/s/net-neutrality?source=em170522-nn-full (last visited July 10, 2017).

57 Dana Floberg, *FCC Chairman Pai Doesn't Know How to Measure Investment*, Free Press (May 24, 2017), https://www.freepress.net/blog/2017/05/24/fcc-chairman-pai-doesnt-know-how-measure-investment.

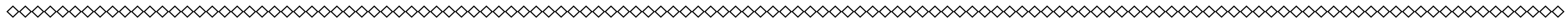
58 Net Neutrality II: Last Week Tonight with John Oliver (HBO), YouTube (May 7, 2017), https://www.youtube.com/watch?v=92vuuZt7wak.

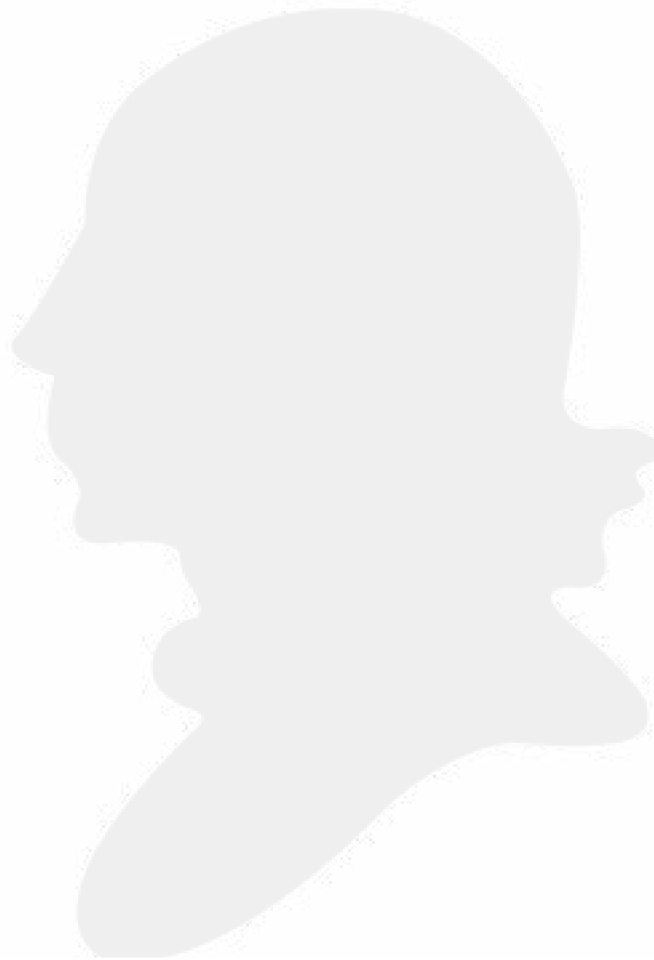
59 2017 NPRM (statement of Chairman Ajit Pai).

60 *In re Restoring Internet Freedom*, Notice of Proposed Rulemaking, WC Docket No. 17-108, FCC 17-60 (May 23, 2017) (2017 NPRM).

61 Telecommunications Act of 1996, Pub. LA. No. 104-104, 110 Stat. 56 (1996).

62 2017 NPRM at ¶ 2 (citing USTelecom, Broadband Investment, Historical Broadband Provider Capex (2017) (data through 2015), https://www.ustelecom.org/broadband-industry/broadband-industry-stats/investment).





Net Neutrality Without the FCC?: Why the FTC Can Regulate Broadband Effectively

By Roslyn Layton & Tom Struble

Note from the Editor:

This article argues that the FTC has jurisdiction over broadband and the tools to regulate it, and that it would do a better job of regulating it than the FCC.

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• Abigail Slater, *The FTC and Net Neutrality's Plan B*, The Regulatory Review (Aug. 16, 2017), https://www.theregreview.org/2017/08/16/slater-ftc-net-neutrality/.

• Anant Raut, *Unlike FCC, FTC cannot protect net neutrality*, The Hill (Aug. 21, 2017), http://thehill.com/blogs/pundits-blog/technology/347363-unlike-fcc-ftc-cannot-protect-net-neutrality.

• Hal J. Singer, *Paid Prioritization and Zero Rating: Why Antitrust Cannot Reach the Part of Net Neutrality Everyone Is Concerned About*, The Antitrust Source (Aug. 2017), https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/aug17_singer_8_2f.authcheckdam.pdf.

• Susan Crawford, *The FCC Is Leading Us Toward Catastrophe*, Wired (Apr. 17, 2017), https://www.wired.com/2017/04/the-fcc-is-leading-us-toward-catastrophe/.

• Gigi Sohn, *The FCC's plan to kill net neutrality will also kill internet privacy*, The Verge (Apr. 11, 2017), https://www.theverge.com/2017/4/11/15258230/net-neutrality-privacy-ajit-pai-fcc.

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The sale of broadband internet access service (broadband) to consumers was subject to Federal Trade Commission (FTC) jurisdiction until 2015. In 2015, the Federal Communications Commission (FCC) issued the second Open Internet Order, which reclassified broadband as a "telecommunications service" under Title II of the Communications Act.[1] This reclassification subjected broadband providers to the FCC's "common carrier" authority, preempting the jurisdiction of the FTC.[2] Former FTC Commissioner Joshua Wright colorfully described this incident as the FCC taking the FTC's "jurisdictional lunch money[.]"[3]

The FCC used its new authority to impose certain rules and regulations on broadband providers, with the goal of promoting "Internet openness" and "net neutrality." While these terms lack precise, internationally-agreed definitions, they suggest notions of all internet traffic being treated equally, and thus all discrimination being unlawful.[4] The resulting Open Internet Order rules, and the Title II framework that supports them, are a set of price and traffic controls that amounts to a centrally planned broadband network under government supervision.[5] These contrast sharply with the notion of "Internet Freedom," the FCC's first attempt to provide guiding principles for the broadband industry.[6] Internet Freedom suggests that users should be free to use the applications and devices they want to, and access the content of their choosing.[7] Necessarily, that implies that any action by a broadband provider to abridge those freedoms would be illegal, but there are no proscriptive rules or rigid constraints that deny network providers the freedom to compete and innovate.[8]

Shortly after the new presidential administration took office in January 2017, Commissioner Ajit Pai was elevated to Chairman of the FCC. The newly constituted FCC has since proposed to undo the FCC's 2015 Open Internet Order and restore the previous classification of broadband as an "information service" under Title I of the Communications Act.[9] If the FCC follows through with this Restoring Internet Freedom proposal,

1 *See* Protecting and Promoting the Open Internet, *Report and Order on Remand, Declaratory Ruling, and Order*, GN Docket No. 14-28 (Mar. 12, 2015) [2015 Open Internet Order], *available at* https://goo.gl/QafQCE.

2 *See id.* at ¶ 283.

3 Joshua Wright (@ProfWrightGMU), Twitter (Mar. 29, 2017, 1:55 PM), *available at* https://goo.gl/697SCS.

4 Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. on Telecomm. & High Tech. L. 141 (2003), *available at* https://goo.gl/Gxgiaj (describing the general contours of a proposed framework for Net Neutrality).

5 Roslyn Layton & Bronwyn Howell, *How Title II Harms Consumers and Innovators*. Am. Enterprise Inst. (July 2017), *available at* https://goo.gl/KZQXuT.

6 Michael Powell, Chairman, Fed. Commc'ns Comm'n, *Preserving Internet Freedom: Guiding Principles for the Industry*, Silicon Flatirons Symposium (Feb. 8, 2004), *available at* https://goo.gl/xlWVRl.

7 *Id.* at 5.

8 *Id.* at 5.

9 Restoring Internet Freedom, *Notice of Proposed Rulemaking*, WC Docket No. 17-108 (May 23, 2017) [RIF NPRM], *available at* https://goo.gl/d4E1Wh.

the FTC's jurisdiction will cover broadband once again.[10] This would restore the pre-2015 status quo that had been in place since the dawn of the commercial Internet, and allow the FTC to use its broad authority under Section 5 of the FTC Act to protect consumers from any anticompetitive behavior or unfair or deceptive practices.[11]

In spite of decades of experience with this regime, including both successful enforcement actions and thoughtful industry guidance, some claim that the FTC is unable to adequately police the harms described in the FCC's Open Internet Order, or to regulate broadband more generally.[12] This article reviews four common arguments supporting the claim that the FTC is not competent to regulate broadband and shows why they are either unfounded or unpersuasive. We therefore conclude that restoring FTC jurisdiction over broadband will not create a regulatory vacuum or endanger the future of the internet as suggested by opponents of the move, and indeed that the FTC will be able to deter harms and police abuse while also supporting the innovation and investment that have been stymied by the FCC.

I. The FTC Will Soon Have Jurisdiction Over Broadband Once Again

While the FTC currently lacks jurisdiction over broadband, through action of either the FCC, courts, or Congress, the FTC may soon have jurisdiction over broadband once again. The FTC's jurisdiction is constrained by Section 5(a)(2) of the FTC Act, which expressly exempts all "common carriers subject to the Acts to regulate commerce."[13] Historically, this meant the telephony services that the FCC regulated under Title II were outside the FTC's jurisdiction. Former FTC Commissioner Rausch explained that this exemption was a:

> [P]roduct of institutional design; when Congress created the FTC in 1914, it did not intend for the new agency to enforce Section 5 against common carriers because these entities were already subject to regulation by another agency, namely, the Interstate Commerce Commission ("ICC"), under the Interstate Commerce Act of 1887. Thus, in a congressional scheme intended to avoid interagency conflict, the ICC retained jurisdiction over telephone common carriers (as well as railroads) until 1934, when Congress enacted the Communications Act that created the FCC and transferred the ICC's jurisdiction over telephony to this new agency.[14]

Reversing the reclassification of broadband as a common carrier service, as the FCC has proposed to do,[15] would restore the FTC's authority over broadband.

However, jurisdiction could continue to shift between the two agencies if a future FCC reverses course and reclassifies broadband as a Title II common carrier service once again, so broadband jurisdiction won't be truly settled unless Congress intervenes or the courts settle the matter in a legal challenge. Although the 2015 Open Internet Order was upheld by the D.C. Circuit and *en banc* rehearing was denied, seven petitions for a writ of certiorari are pending at the Supreme Court.[16] These petitions argue that the order is illegal on administrative law, separation of powers, and First Amendment grounds.[17] Broadly, they maintain that the FCC's interpretations underlying the Title II reclassification should be rejected because the fundamental approach to broadband regulation is such a major question of economic and political significance that typical *Chevron* deference is inapplicable.[18] If the Supreme Court grants these petitions and overturns the Title II reclassification, the FTC will once again have plenary jurisdiction over broadband, and a future FCC will likely be unable to reinstate the 2015 order.

Even with the Title II reclassification undone, the FTC may still run into jurisdictional problems in the 9th Circuit, due to a panel's broad interpretation of the FTC Act's common carrier exemption in a case last year.[19] In *FTC v. AT&T Mobility LLC*, the panel concluded that the exemption prohibits the FTC from regulating any *firm* that offers common carrier services, rather than merely prohibiting the agency from regulating those common carrier *services*; in other words, it took a status-based approach to determining jurisdiction rather than the more typical activities-based approach.[20] This is significant with respect to firms such as Verizon, Comcast, and Google/Alphabet—which provide some common carrier services, but also many digital services that do not resemble common carriage—as it could potentially remove FTC jurisdiction over all of their actions. The *en banc* 9th Circuit—which has granted review—or the Supreme Court may overturn that panel decision and determine that the common

10 Although an ongoing case in the 9th Circuit could potentially disrupt this outcome. *See* FTC v. AT&T Mobility LLC, 835 F.3d 993 (9th Cir. 2016).

11 Federal Trade Commission Act, Pub. L. No. 63-311, § 5, 38 Stat. 719 (1914) (codified as amended at 15 U.S.C. § 45).

12 *See* Wu, *supra* note 4.

13 15 U.S.C. § 45(a)(2); *see also* 15 U.S.C. § 44 (defining "Acts to regulate commerce" to mean, inter alia, "the Communications Act").

14 J. Thomas Rosch, Commissioner, Fed. Trade Comm'n, Remarks Before the Global Forum 2011: Vision for the Digital Future, *Neutral on Internet Neutrality: Should There Be a Role for the Federal Trade Commission?* (Nov. 7, 2011), *available at* https://goo.gl/hfRB5T (citing FTC v. Verity Int'l Ltd., 443 F.3d 48, 57 (2d Cir. 2006)) (internal citations omitted).

15 *See* RIF NPRM, *supra* note 9.

16 *See* Aurora Barnes, *Petitions of the Day*, SCOTUSblog (Oct. 31, 2016), *available at* https://goo.gl/8wQu8x.

17 *See* Adam White, et al., *Litigation Update: United States Telecom Association v. Federal Communications Commission*, Federalist Soc'y Telecomm. Prac. Group Podcast (June 6, 2017), *available at* https://goo.gl/Yju7ho.

18 *Id.*

19 *See AT&T Mobility LLC*, 835 F.3d at 998 (concluding that the common carrier exemption is status-based, rather than activities-based).

20 *Id.* at 995.

carrier exemption is based on the activity, rather than the status, of the firm in question.[21] If the *AT&T Mobility LLC* decision is overturned and the FCC reverses the Title II reclassification, the FTC will once again have authority to regulate broadband, even where broadband services are provided by a firm that also provides common carrier services, such as telephony. Otherwise, complex and costly structural separation orders would be necessary to force firms to segregate their common carrier services from non-common carrier services, allowing the FCC to regulate the former and the FTC to regulate the latter.

But given the long debate over net neutrality at the FCC and the impending court decisions, ideally Congress would resolve this lingering uncertainty through legislation. A first step would be to repeal the common carrier exemption, or at least clarify that the exemption is activities-based, not status-based. The exemption is anachronistic, particularly in the context of modern communications markets. Assumptions of common carriage are obsolete in the converged world because technological progress has overcome earlier perceived barriers to competition. Common carrier regulation typically assumed a communication infrastructure with zero marginal costs and undifferentiated demand, but that has not been the case for communication networks for decades.[22]

Congress should also clarify the respective roles of the FCC and FTC in regulating broadband. The last time Congress addressed broadband regulation was over twenty years ago, when it noted that it is 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, unfettered by Federal or State regulation."[23] Lawmakers sought to update the Communication Act as recently as 2014,[24] but the process was disrupted by the FCC's third attempt to create net neutrality rules.[25] Congress should clarify that FCC regulation of broadband under Title II—a framework of price and traffic controls developed to regulate a nationalized monopoly telephony network—is unlawful. Technology advances in broadband delivery allow us to overcome natural monopolies and foster a competitive environment,[26] so the FTC's general purpose competition and consumer protection framework is a far better fit than the FCC's common carrier framework.

II. The FTC's Enforcement Tools Can Ensure a Free and Open Internet

The FTC's substantial authority to prohibit "unfair methods of competition" and "unfair or deceptive acts and practices," along with its numerous enforcement tools, can adequately ensure consumers and entrepreneurs continue to benefit from a free and open Internet. However, some commenters question this assertion. For example, Tim Wu, who coined the term "net neutrality," recently observed on Twitter, "In the language of American telecommunications policy, invoking antitrust as an alternative is a polite code for doing nothing."[27] But antitrust law was used successfully in telecom to break up the Bell monopoly in the 1980s, although some more recent attempts have been rejected by the courts.[28] However, the FTC's consumer protection authority remains a potent force. Wu himself, while working at the New York Attorney General's office, vigorously applied state consumer protection laws against broadband providers, recently charging two cable companies for failing to deliver promised speeds to consumers.[29] With the FTC's authority restored, it can cooperate with both the U.S. Department of Justice and state attorneys general to jointly pursue these types of investigations and enforcement actions, providing more layers of law enforcement than what is available at the FCC.

Enforcement of net neutrality and internet openness under the rubric of transparent traffic management and speed disclosures is the modus operandi for Europe's net neutrality regime.[30] Wu's seminal paper showing the need for net neutrality used a set of contract disclosures as evidence.[31] In essence, broadband is a

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21 *See, e.g.*, John Eggerton, *Ninth Circuit to Review FTC v. AT&T Mobility*, Broadcasting & Cable (May 9, 2017), *available at* https://goo.gl/Wjtevx.

22 *See, e.g.*, Mark A. Jamison & Janice A. Hauge, *Do Common Carriage, Special Infrastructure, and General Purpose Technology Rationales Justify Regulating Communications Networks?* 10 J. of L., Econ. & Org. 475 (Feb. 24, 2014), *available at* https://goo.gl/PDnwQ6; Christopher S. Yoo, *Is There a Role for Common Carriage in an Internet-Based World?*, 51 Houston L. Rev. 545 (2013), *available at* https://goo.gl/eVPRJd.

23 Telecommunications Act of 1996, Pub. L. No. 104-104, § 509, 110 Stat. 138 (1996) (codified at 47 U.S.C. § 230(b)(1)).

24 U.S. House of Representatives, Energy & Commerce Committee, *#CommActUpdate* (last visited Oct. 28, 2017), *available at* https://goo.gl/vQwcMj.

25 2015 Open Internet Order.

26 *See, e.g.*, Alfred E. Kahn, Economics of Regulation: Principles and Institutions (1988). Indeed, one of the leading texts on telecom regulation describes its objective to end ex ante sector-specific, common carrier regulation. The textbook's authors observe, "No matter how capable and well-intentioned regulators are, they will never be able to produce outcomes as efficient as a well-functioning market." *See* International Bank for Reconstruction and Development, World Bank, InfoDev, and International Telecommunication Union, *The Telecommunications Regulation Handbook* (2011), *available at* https://goo.gl/tiBVgg.

27 Tim Wu (@SuperWuster), Twitter (July 6, 2017, 11:11 PM), *available at* https://goo.gl/2L4das.

28 *See, e.g.*, Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko LLP, 540 U.S. 398 (2004) (rejecting a complaint brought under the Sherman Act alleging anticompetitive practices on the part of AT&T in its line-sharing arrangement with Verizon).

29 Press Release, A.G. Schneiderman Announces Lawsuit Against Spectrum-Time Warner Cable and Charter Communications for Allegedly Defrauding New Yorkers Over Internet Speeds and Performance (Feb. 1, 2017), *available at* https://goo.gl/ryjX32.

30 European Parliament & Council, *Regulation 2015/2120 of the European Parliament and of the Council of 25 November 2015 Laying Down Measures Concerning Open Internet Access and Amending Directive 2002/22/EC on Universal Service and Users' Rights Relating to Electronic Communications Networks and Services and Regulation No. 531/2012 on Roaming on Public Mobile Communications Networks Within the Union* (Nov. 25, 2015), *available at* https://goo.gl/h9W8jb; *see also* the Body of European Regulators for Elec. Commc'ns, *Net Neutrality Assessment Methodology* (Oct. 5, 2017), *available at* https://goo.gl/oxBXgo.

31 Wu, *supra* note 4, at 158–62 (reviewing various contractual terms in broadband contracts).

service with a set of terms and conditions, which buyer and seller freely agree to in a contract. These contracts are enforceable under the FTC's consumer protection authority without any need for ex ante regulation.

The 9th Circuit's aforementioned *AT&T Mobility LLC* case illustrates how such enforcement actions can work in practice. Both the FCC and the FTC charged the company with unlawfully throttling users on its "unlimited" plans; the FCC relied on its 2010 Open Internet Order, and the FTC relied on its consumer protection authority in Section 5 of the FTC Act. In 2015, the FCC Enforcement Bureau charged AT&T Mobility with a violation of its 2010 Open Internet Order's transparency rule, arguing that the practice of labeling a mobile data plan as "unlimited" was misleading and inaccurate because customers experienced speed reductions after passing a certain data threshold, and that AT&T did not provide sufficient disclosure of the practice.[32] As punishment, the FCC proposed to levy a $100 million fine.[33] The item was voted out 3-2 along party lines; then-Commissioner Ajit Pai dissented, saying that AT&T had engaged in the practice since 2007 and repeatedly made clear disclosures to customers.[34] AT&T challenged the action in court and the fine was never collected;[35] the FCC eventually bowed out to allow the FTC to pursue its parallel action on the same issue, which predated the FCC's action.[36] The FTC's enforcement action against AT&T began in 2014 with a unanimous 5-0 vote, charging that the company misled consumers with its "unlimited" plans beginning in 2011, which constituted a "deceptive" practice.[37] AT&T Mobility continues to fight that case, but only on jurisdictional grounds. Separately, the FTC also required AT&T to send $88 million in refunds to 2.7 million customers who were victims of "mobile cramming," when unauthorized charges of third party fees were added to their mobile bills.[38]

These enforcement actions illustrate that not only does the FTC have the necessary authority to punish broadband providers that engage in anti-consumer or anti-competitive behavior, but it also has the enforcement tools to order specific consumer redress, such as refunds and disgorgement of ill-gotten gains.[39] The FCC, by contrast, can only issue fines, and its statute of limitations for bringing an enforcement action is one year, compared with five years for the FTC.[40]

Some net neutrality advocates may concede these points, but still claim that the FTC is incapable of policing broadband. These advocates claim that ex ante rules are required, because allegedly harmful practices like "paid prioritization" must be banned outright. Competition law would recognize that "paid prioritization" agreements—the idea that parties could contract for different quality of service levels for data delivery—are a type of vertical restraint, which are not inherently harmful, and may on net be beneficial for both consumers and competition. Therefore, such arrangements would be assessed case by case, with anti-competitive and anti-consumer harms being weighed against pro-competitive and pro-consumer benefits. For the net neutrality advocates who take the idea literally and believe that all data should be treated equally regardless of effects on consumers, arrangements for so-called "fast lanes" are inherently harmful and discriminatory. However, similar priority arrangements in other sectors of the economy are found to benefit both consumers and innovators alike, so they may be beneficial in broadband too.[41]

It seems that many net neutrality advocates are simply opposed to the idea of a free market for broadband, in which different technologies and services compete for superiority and consumers decide the parameters of their broadband experience.[42] In such a free market, there is a limited role for an ex ante regulator. And while the FCC asserted that such ex ante provisions are necessary to protect "openness," some question their true motives. For example, Brent Skorup and Joseph Kane suggest that the advent of new technologies put the FCC on a path to obsolescence, but the agency used net neutrality to resuscitate the notion of common carriage and thus extend its life repositioned as a social regulator.[43] Whether or not that theory is true, the FTC does have adequate enforcement tools to police net neutrality and pursue other broadband regulation goals; whether claims to the contrary are ideologically-driven pretexts or based on sincere concerns, they should be rejected.

III. The FTC's Regulatory Framework Would Weigh the Costs and Benefits of Paid Prioritization

Some net neutrality advocates believe that paid prioritization—the practice of individually negotiating for dedicated bandwidth or other forms of preferential treatment for broadband traffic associated with a particular service or

32 In re AT&T Mobility LLC, *Notice of Apparent Liability for Forfeiture and Order*, EB-IHD-14-00017504 (June 17, 2015), *available at* https://goo.gl/JBkgCU.

33 *Id.* at 6613 ¶ 2.

34 *Id.* at 6629.

35 David McCabe, *How the FCC's $100 Million Fine Against AT&T Faded Away*, Axios (June 22, 2017), *available at* https://goo.gl/yYmV6j.

36 Press Release, FTC Says AT&T Has Misled Millions of Consumers with "Unlimited" Data Promises (Oct. 28, 2014), *available at* https://goo.gl/Gk3mqe.

37 *Id.*

38 Press Release, FTC Providing Over $88 million in Refunds to AT&T Customers Who Were Subjected to Mobile Cramming (Dec. 8, 2016), *available at* https://goo.gl/Cir0n4.

39 *See, e.g.*, Joshua D. Wright, *Wrecking the Internet to Save it? The FCC's Net Neutrality Rule*, Testimony Before the U.S. House of Representatives, Committee on the Judiciary at 17 (Mar. 25, 2015), *available at* https://goo.gl/c7SE3Z.

40 *Id.*

41 *See, e.g.*, Bruce M. Owen, *Antitrust and Vertical Integration in "New Economy" Industries with Application to Broadband Access*, 38 Rev. of Indus. Org. 363 (2011), *available at* https://goo.gl/Aco6z6.

42 *See* Maureen K. Ohlhausen, *Antitrust over Net Neutrality: Why We Should Take Competition in Broadband Seriously*, 15 Colo. Tech. L. J. 119 (2016) (explaining how antitrust can protect against anticompetitive violations of net neutrality).

43 Brent Skorup & Joseph Kane, *The FCC and Quasi-Common Carriage: A Case Study of Agency Survival*, 18 Minn. J. L. Sci. & Tech. 631 (2017), *available at* https://goo.gl/yeqBwM.

providers—is so harmful that it needs to be banned outright. Such a ban is justified, in their minds, because the risks of preventing all possible and even improbable harm outweigh the benefits of welfare enhancing arrangements. Of course, the FTC could find that paid prioritization agreements do cause significant harm to consumer welfare, and establish binding precedent declaring such agreements to be unlawful, but only if it has substantial evidence showing actual or likely harm to consumers or competition. The FCC, on the other hand, banned paid prioritization outright in its 2015 Open Internet Order by simply asserting that such practices are harmful, without giving any real-world examples.[44]

Conjuring of theoretical doom that will result if not for regulatory intervention can have a powerful effect on an agency, especially one like the FCC with goals as broad as "the public interest." Mark Lemley and Lawrence Lessig, in their paper re-interpreting the end-to-end principle of engineering as an argument for ex ante regulation, observed, "To say there is no reason to use a seatbelt because there is always the care of an emergency room is to miss the extraordinary costs of any ex post remedy."[45] This analogy is inapt because, unlike the FCC's precautions against merely hypothetical broadband harms, seat belt use is known to prevent harm based upon an empirical and verifiable dataset,[46] and seat belt rules were made through legislation.[47] The FCC's 2015 net neutrality rules were not grounded in either.

Lemley and Lessig's ultimate goal was to make the case for mandated wholesale access to network infrastructure (what they call "open access"), specifically the forced unbundling of cable networks from the broadband service provided over them. Lemley and Lessig asserted that "allowing such bundling will compromise an important architectural principle that has governed the Internet since its inception: the principle of 'end-to-end' design ('e2e'). Nothing less than the structure of the Internet itself is at stake in this debate."[48] When presented with the issue of cable bundling in *NCTA v. Brand X Internet Services*, the Supreme Court disagreed with this analysis.[49] The six-Justice majority found reasonable the FCC's determination that cable broadband can be offered as a bundled or integrated information service, and not a service with separate information and telecommunications service components, which denied resellers the privilege to obtain mandatory wholesale access to cable infrastructure at regulated rates.[50] Some believe the net neutrality movement was born as a result of this dispute as another way to achieve regulation of access to privately owned networks.[51]

Interestingly, "paid prioritization" did not enter the FCC's lexicon until the 2015 Open Internet Order, and it only reflects a theoretical discussion that appears to have been catalyzed by a bill from Senator Wyden, the Internet Nondiscrimination Act of 2006, in which:

> [N]etwork operators would be prohibited from charging companies for faster delivery of their content to consumers over the internet or favoring certain content over others. "Creating a two-tiered system could have a chilling effect on small mom and pop businesses that can't afford the priority lane, leaving these smaller businesses no hope of competing against the Wal-Marts of the world."[52]

While Wyden provided no examples of broadband providers offering such tiered services, the practice has been commonplace among transit providers and in the content delivery network (CDN) industry, in which service providers store copies of popular content in caches close to end users.[53] The 2015 Open Internet Order carved out CDNs from regulation by regulating only the "last mile" of broadband networks,[54] a fact that dissenting commissioner Mike O'Rielly used to show the inconsistency of the rules.[55]

The FCC has never provided any examples of broadband providers deterring innovation or blocking new startups from entering the marketplace because they are able to treat different content differently. However, there is a real-world example of the FCC's rules deterring innovation and blocking a startup: Daniel Berninger's HelloDigital, which seeks to use voice to enable a ubiquitous process of facilitating user commentary on the web—basically, replacing comment threads on websites with real-time discussions between users. Berninger sued the FCC because the ban on paid prioritization effectively makes his service illegal. Senior Justice Stephen Williams noted in oral arguments that

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44 2015 Open Internet Order, ¶ 125.

45 Mark A. Lemley & Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. Rev. 925, 956 (2000), *available at* https://goo.gl/BnTDdN.

46 *See, e.g.*, Nat'l Highway Traffic Safety Admin., *Traffic Safety Facts: Lives Saved in 2015 by Restraint Use and Minimum-Drinking-Age Laws* (Aug. 2016), *available at* https://goo.gl/umF1vg.

47 Highway Safety Act of 1966, Pub. L. No. 89-564, 80 Stat. 731 (1966).

48 Lemley & Lessig, *supra* note 45, at 928.

49 *See* NCTA v. Brand X Internet Servs., 545 U.S. 967 (2005).

50 *Id.*

51 *See, e.g.*, Gerald R. Faulhaber, *Economics of Net Neutrality: A Review*, 3 Commc'ns & Convergence Rev. 53, 54 (2011), *available at* https://goo.gl/p522RW ("'Network Neutrality' became the new policy advocated by those previously in favor of open access.").

52 Press Release: Wyden Moves to Ensure Fairness of Internet Usage with New Net Neutrality Bill (Mar. 2, 2006), *available at* https://goo.gl/R7mHhB.

53 *See, e.g.*, Alex Balford, *Akamai Introduces New Performance Enhancements with Media Delivery 4.5*, Akamai Community (Aug. 21, 2017), *available at* https://goo.gl/cWHQk6 (describing Akamai's latest enhancements to its CDN).

54 2015 Open Internet Order, ¶ 418 ("Some opponents argue that classifying broadband Internet access services as telecommunications services will necessarily lead to regulation of Internet backbone services, CDNs, and edge services, compounding the suppressive effects on investment and innovation throughout the ecosystem. Our findings today regarding the changed broadband market and services offered are specific to the manner in which *these particular* broadband Internet access services are offered, marketed, and function. We do not make findings with regard to the other services, offerings, and entities over which commenters raise concern, and in fact explicitly exclude such services from our definition of broadband Internet access services.") (internal citations omitted).

55 *Id.* at 392.

paid prioritization "can be utterly reasonable."[56] The judge likened paid prioritization to refrigerated cars on a train: "Some packets require prioritization. Some packets are inherently time-sensitive. Latency and jitter are important . . . So that there should be a channeling of services that need prioritization and others that don't."[57] He noted:

> The ultimate irony of the Commission's unreasoned patchwork is that, refusing to inquire into competitive conditions, it shunts broadband service into the legal track suited for natural monopolies. Because that track provides little economic space, for new firms seeking market entry or relatively small firms seeking expansion through innovations in business models or in technology, the Commission's decision has a decent chance of bringing about the conditions under which some (but by no means all) of its actions could be grounded—the prevalence of incurable monopoly. . . . This obvious point explains why Berninger is a petitioner here.[58]

The ban on paid prioritization essentially prohibits entrepreneurs like Berninger from deploying their innovations, which require priority treatment and ultra-low latency in order to function. In fact, the record evidence in Berninger's lawsuit, one of the seven petitions seeking review at the Supreme Court,[59] shows the opposite of what the FCC claims—prohibiting paid prioritization can actually harm consumers and deter innovation. Thus, the claim that the harms from paid prioritization always outweigh the benefits is unpersuasive.

And if an instance of harmful paid prioritization were to arise, to the detriment of consumers or competition, the FTC would be better able to detect and address it than the FCC, given its superior enforcement tools and experience dealing with vertical restraints like priority distribution agreements and bundling. For example, in 2009 the FTC charged that Intel was using anticompetitive tactics to cut off rivals' access to the marketplace, thereby depriving consumers of choice and innovation in the microchips used for computers' central processing units.[60] In a settlement, Intel was prohibited from "conditioning benefits to computer makers in exchange for their promise to buy chips from Intel exclusively or to refuse to buy chips from others; and retaliating against computer makers if they do business with non-Intel suppliers by withholding benefits from them."[61] Similar remedies could be used to address any harmful paid prioritization arrangements should they emerge.

IV. The FTC Can Detect the Harms Targeted by Net Neutrality Rules

Finally, some have claimed that the FTC's competition and consumer protection framework in Section 5 of the FTC Act cannot detect the harms the FCC's 2015 net neutrality rules sought to prevent. Republican FTC Commissioner Rosch expressed doubt about the agency's abilities here, noting that the Sherman Act is not generally conducive to policing access conditions and citing recent cases rejecting the FTC's attempts to enforce antitrust law in industries that were already heavily regulated by other agencies.[62] Similarly, economist Hal Singer, though no fan of the FCC, observes that antitrust cannot accommodate net neutrality violations nor other mild forms of discrimination on the Internet, and he suggests that a separate "Internet tribunal" should be established to police the issue.[63] These concerns are legitimate, but ultimately unpersuasive.

Net neutrality regimes have taken many forms across different countries over the past decade. Rules have been promulgated in a variety of ways, including by legislation, regulation, code of conduct, and multi-stakeholder dialogue. Legal disputes have been adjudicated by telecom regulators, competition authorities, arbitration boards, and courts.[64] The FCC has adequate authority and resources to enforce net neutrality, but it isn't the only, or even the preferred option. Indeed, the pernicious problem of regulatory capture actually makes the FCC an unfavorable venue for adjudication of net neutrality disputes in a converged world. Broadband regulation at the FCC has been and would continue to be extremely politicized,[65] compromising the independence of the agency and quality of its judgement.[66] In fact, Denmark, a top digital nation for years, recently disbanded its telecom authority for the very purpose of reducing regulatory capture.[67] Former regulatory employees say that Danish telecom policy today is more effective as a result.[68] Denmark also managed to implement

56 Oral Argument, U.S. Telecom Assoc. v. FCC, 825 F.3d 674 (DC Cir. 2016), *available at* https://goo.gl/8Bwe8i.

57 *Id.*

58 *U.S. Telecom Assoc.*, 825 F.3d at 769–78.

59 *See* Petition for Writ of Certiorari, Berninger v. FCC (Sept. 27, 2017), *available at* https://goo.gl/1RTTBj.

60 *See* Press Release: FTC Settles Charges of Anticompetitive Conduct Against Intel (Aug. 4, 2010), *available at* https://goo.gl/F262fv.

61 *Id.* The FTC agreed to the settlement unanimously.

62 *See* Rosch, *supra* note 14, at 16–18 (citing Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398 (2004); Pac. Bell Tel. Co. v. linkLINE Commc'ns Inc., 555 U.S. 438 (2009)).

63 *See* Hal J. Singer, *Paid Prioritization and Zero Rating: Why Antitrust Cannot Reach the Part of Net Neutrality Everyone is Concerned About*, Antitrust Source (Aug. 2017), *available at* https://goo.gl/F6JkVv.

64 Roslyn Layton, *Which Open Internet Framework Is Best for Mobile App Innovation?: An Empirical Inquiry of Net Neutrality Rules Around the World*, Aalborg University Copenhagen (2017), *available at* https://goo.gl/7ydQeg.

65 Roslyn Layton, *Dominated by the Digital Elite: Net Neutrality Supporters are Drowning out the Voices of Underserved Communities*, US News & World Report (Aug. 8, 2017), *available at* https://goo.gl/XEgbmq.

66 Roslyn Layton, *Net Neutrality: A Numbers Game*, Am. Enterprise Insit. (July 25, 2016), *available at* https://goo.gl/KE66PB.

67 Roslyn Layton & Joseph Kane, *Alternative Approaches to Broadband Policy: Lesson on Deregulation from Denmark*, Mercatus Ctr. Working Paper (Mar. 22, 2017), *available at* https://goo.gl/UsiIUI.

68 Anders Henten & Morten Falch, *The Future of Telecom Regulation: The Case of Denmark*, Paper presented at ITS, Brussels, Belgium, (June 23,

net neutrality successfully via self-regulation five years before the EU law came into effect, and now administers broadband regulation via the Danish Energy Agency.[69] With its broad grant of jurisdiction and its general mandate to police competition and protect consumers, the FTC is less likely to be captured than a sector-specific agency like the FCC, where interested parties can more easily target their advocacy and lobbying efforts to gain influence with regulators and win preferred outcomes in rulemakings and adjudications.[70]

The FTC also has substantial experience with the harms to consumers and competition that net neutrality rules seek to deter. In 2007, three years before the FCC's first Open Internet Order, FTC staff published a 170-page report examining the effects of various hypothetical broadband practices—such as discrimination, blocking, degradation, vertical integration, and data prioritization—and the likely effects these practices would have on consumer welfare and on competition among broadband, application, and content providers.[71] Acting FTC Chairman Maureen Ohlhausen, who worked on the 2007 report, also recently described at length how the FTC's antitrust authority is capable of addressing "non-economic goals like free speech and democratic participation" by protecting the "competitive process, which delivers the qualities that consumers demand."[72]

More recently, in comments filed with the FCC, FTC staff specifically noted its ability to take action against firms that engage in "unfair methods of competition," including any contractual agreement deemed to substantially reduce competition.[73] Acting Chairman Ohlhausen reiterated these points when testifying on this topic before the U.S. House of Representatives' Committee on the Judiciary in a hearing titled, "Net Neutrality and the Role of Antitrust."[74] FTC staff detailed how its authority under the Sherman Act could be used to regulate broadband:

> In conducting an antitrust analysis, the ultimate issue would be whether broadband Internet access providers engage in unilateral or joint conduct that is likely to harm competition in a relevant market, depriving customers and consumers of the benefits of a free market. There is no reason to assume that Internet-related firms are any more or less willing or able to engage in anticompetitive behavior than firms in other economic sectors.
>
> Internet-related markets may be susceptible to a number of practices that traditionally raise antitrust issues. Unilateral conduct on the part of broadband providers—for example, foreclosing rival content in an exclusionary or predatory manner—may be challenged under Section 2 of the Sherman Act. Section 1 of the Sherman Act could be used to analyze contractual relationships that may block access to the Internet by content or applications providers or discriminate in favor of a supplier with whom the broadband provider has an affiliated or contractual relationship under exclusive dealing theories. Vertical integration into content or applications markets by broadband providers would be analyzed under the merger laws.[75]

While the FTC would not *assume* that net neutrality harms are going to arise, its antitrust authority would be perfectly capable of addressing such harms if they do arise, if and when the FCC's 2015 Open Internet Order is undone.[76]

The FTC's authority to police all "unfair or deceptive acts or practices," could also be used to protect consumers even in cases where no competitive harm can be shown, such as with fraud, deceptive advertising, or unauthorized billing practices.[77] This authority has been crucial to the FTC's considerable work in the areas of privacy and data security.[78] The FTC has regulated the advertising, marketing, and billing practices of broadband providers since long before the FCC's Order, including bringing charges against America Online (AOL), Prodigy, and CompuServe.[79] The FTC challenged Juno Online Services for deceptive representations about the actual cost to consumers of the company's free and fee-based dial-up broadband services and the company's failure to honor cancellations during a purported free trial period.[80] The FCC then brought another case against AOL and CompuServe, which continued to bill broadband subscribers who had asked that their service be cancelled, and failed to timely deliver $400 rebates.[81] More recently, similar to its ongoing case against AT&T, the FTC challenged TracFone Wireless, the largest prepaid mobile provider in the United States, for deceiving consumers with regard to its "unlimited"

2014), *available at* https://goo.gl/QP66Kh.

69 Danish Energy Auth., *Report to European Union on Open Internet*, 1 (June 13, 2017), *available at* https://goo.gl/YWrkii.

70 Roslyn Layton*, Protecting the Public Interest, Not the Special Interest, at the FCC*, Am. Enterprise Inst. (Mar. 8, 2017), *available at* https://goo.gl/hfb6Gz.

71 Fed. Trade Comm'n, *Staff Report: Broadband Connectivity Competition Policy* (June 2007), *available at* https://goo.gl/Jo14aG.

72 *See* Ohlhausen, *supra* note 42, at 119.

73 Restoring Internet Freedom, *Comments of the Staff of the Federal Trade Commission*, WC Docket No. 17-108, 27 (July 17, 2017) [RIF FTC Staff Comments], *available at* https://goo.gl/FwU7MT.

74 Fed. Trade Comm'n, Prepared Statement Before the Subcommittee on Regulatory Reform, Commercial and Antitrust Law of the Judiciary Committee, U.S. House of Representatives, *Net Neutrality and the Role of Antitrust* (Nov. 1, 2017), *available at* https://goo.gl/T6t6bt.

75 RIF FTC Staff Comments, *supra* note 73, at 25.

76 *Verizon Commc'ns Inc.*, 540 U.S. at 406.

77 RIF FTC Staff Comments, at 21–23.

78 *Id.* at 3–21.

79 Press Release: America OnLine, Compuserve and Prodigy Settle FTC Charges over "Free" Trial Offers, Billing Practices (May 1, 1997), *available at* https://goo.gl/zqJ36g.

80 Press Release: Juno Online Settles FTC Charges Over Internet Service Advertisements (May 15, 2001), *available at* https://goo.gl/2aAAnu.

81 Press Release: AOL and Compuserve Settle FTC Charges of Unfair Practices (Sept. 23, 2003), *available at* https://goo.gl/aH9fgj.

data service. TracFone eventually agreed to pay $40 million in consumer refunds to settle the case.[82]

These examples and the FTC staff's own comments and reports show that, if broadband providers were to engage in any practices that harm consumers or competition in the Internet ecosystem, the FTC's Section 5 authority would be perfectly able to address such conduct. Moreover, its superior enforcement tools and statute of limitations makes it a better choice than the FCC for regulating net neutrality. All claims to the contrary should be rejected.

V. Conclusion: The FTC Can Regulate Broadband Effectively

Some commenters continue to argue that the FTC lacks the jurisdiction or the ability to regulate the broadband industry, but this paper shows that such arguments are either weak or unfounded. Jurisdictional gaps with regard to the application of the FTC Act's common carrier exemption to broadband will soon be resolved, but that arbitrary, obsolete distinction should be removed by Congress as soon as possible. Once its jurisdiction is restored, the FTC will be perfectly able to regulate broadband and protect consumers and competition from any harmful net neutrality violations.

The FTC's broad authority, strong toolkit, and wealth of experience in both antitrust and consumer protection law should make it a better regulator for broadband than the FCC. While the FTC would necessarily bring an open mind to practices such as paid prioritization and other vertical restraints on trade, assessing them case by case under the rule of reason, it could take action against any practice found to harm consumers or competition, and there is no net neutrality violation that could not be detected by the FTC. Moreover, FTC jurisdiction works in complement with the Department of Justice and state attorneys general, offering more layers of enforcement and adjudication. Altogether, these considerations suggest that, not only can the FTC regulate broadband effectively—it is the preferred agency for the job.

82 Press Release: Prepaid Mobile Provider TracFone to Pay $40 Million to Settle FTC Charges it Deceived Consumers About "Unlimited" Data Plans (Jan. 28, 2015), *available at* https://goo.gl/KKxX3U.

Book Reviews

Lions Under the Bureaucracy: Defending Judicial Deference to the Administrative State

by Evan Bernick

A Review of:

Law's Abnegation: From Law's Empire to the Administrative State, by Adrian Vermeule

https://www.amazon.com/Laws-Abnegation-Empire-Administrative-State/dp/0674971442

Note from the Editor:

This book review discusses and critiques Adrian Vermeule's book about the administrative state.

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• Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 Mich. L. Rev. 1355 (2016), http://repository.law.umich.edu/mlr/vol114/iss8/1/.

• Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. Chi. L. Rev. 393 (2015), https://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/uploads/82_1/14%20Sunstein%20%26%20Vermeule_ART_Internet.pdf.

• Cass R. Sunstein & Adrian Vermeule, *The New Coke: On the Plural Aims of Administrative Law*, 2015 Sup. Ct. Rev. 41 (2015), http://www.journals.uchicago.edu/doi/abs/10.1086/684806.

• Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511 (1989), http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3075&context=dlj.

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Criticism of the modern administrative state is an enduring theme in American legal and political discourse.[1] This is unsurprising since the administrative state is a complex bureaucracy that operates in ways that are often incomprehensible to members of the general public, that exercises regulatory authority over everything from the air we breathe[2] to our use and enjoyment of our property[3] to our speech[4] to our access to potentially life-saving medicines,[5] and that seems to consolidate powers that the Constitution is designed to keep separate. In Federalist 51, James Madison described the "accumulation of all powers, legislative, executive, and judiciary, in the same hands" as "the very definition of tyranny."[6] Today, federal agencies routinely make rules that govern our conduct, investigate whether those rules have been violated, adjudicate alleged violations, and impose heavy fines or imprisonment upon violators.[7] If this is not "tyranny," it does raise uncomfortable questions—questions that have been pressed for more than a century.

Recent years have seen the publication of striking academic and judicial attacks on the legal and political-philosophical premises on which the administrative state rests, as well as the jurisprudence that has facilitated its expansion—jurisprudence characterized by judicial deference to all sorts of assertions of administrative power.[8] Few scholars have defended the administrative state

1 *See* James O. Freedman, Crisis and Legitimacy 11 (1978) (describing "a strong and persisting challenge to the basic legitimacy of the administrative process").

2 *See* Whitman v. American Trucking Assns., Inc., 531 U.S. 457 (2001).

3 *See* Sackett v. EPA, 132 S. Ct. 1367 (2012).

4 *See* FCC v. Pacifica Foundation, 438 U.S. 726 (1978).

5 *See* Abigail Alliance for Better Access v. Von Eschenbach, 495 F.3d 695 (D.C. Cir. 2007).

6 The Federalist No. 51 (James Madison), at 271 (Liberty Fund, 2001).

7 *See* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231, 1247 (1994) (describing the "typical enforcement activities of a typical federal agency"); Adrian Vermeule, *Optimal Abuse of Power*, 109 Nw. U. L. Rev. 673, 679 (2015) (recognizing the "brute fact" that agencies "legislate," "enforce," and "adjudicate"); Stephen G. Breyer et al., Administrative Law and Regulatory Policy 743-87 (7th ed. 2011) (detailing the "combination of functions" within agencies).

8 *See, e.g.*, David Schoenbrod, Power Without Responsibility: How Congress Abuses the People Through Delegation (1993); Philip Hamburger, Is Administrative Law Unlawful? (2015); Charles Murray, By The People: Rebuilding Liberty Without Permission (2015). This scholarship is working its way into judicial opinions. *See, e.g.*, Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1152 (10th Cir. 2016) (questioning the constitutionality of judicial deference to agency interpretations of statutes and citing Is Administrative Law Unlawful? at 287-91); De Niz Robles v. Lynch, 803 F.3d 1165, 1171 n.5 (10th Cir. 2015) (questioning the constitutionality of "delegating to the Executive the power to legislate generally applicable rules of private conduct" and citing Is Administrative Law Unlawful? at 285-321); Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199 1213-1218 (2015) (Thomas, J., concurring) (questioning the "legitimacy of our precedents requiring

and administrative jurisprudence against such critiques more zealously than Adrian Vermeule.[9] Vermeule's new book, *Law's Abnegation*, is a cogent presentation of a bright, optimistic vision of our administrative jurisprudence—one comforting to what Vermeule refers to as the "traditional legal mind."[10] On Vermeule's account, judicial deference to administrative power is the result of *abnegation*,[11] that is, the voluntary renunciation of power by those whose "province and duty" it is to "say what the law is."[12] To borrow Francis Bacon's iconic image, our judicial "lions" have leashed themselves "under the throne"—which is to say, under the bureaucracy.[13] Adopting an interpretive model developed by legal philosopher Ronald Dworkin, Vermeule contends that judicial deference to administrative power both fits with and justifies our administrative jurisprudence—that it is not only consistent with our institutional history, but is normatively desirable. In Dworkin's terms, deference gives our administrative jurisprudence *integrity*. And, Vermeule avers, deference is here to stay.

Like all of Vermeule's work, *Law's Abnegation* is taut, insightful, and provocative—a must-read for anyone interested in administrative power and the duty of judges who confront it. Yet Vermeule's case for judicial deference is ultimately unpersuasive. In Part I of this article, I summarize Vermeule's arguments for deference. In Part II, I critique those arguments. In Part III, I sketch an alternative approach that better equips judges to discharge their constitutional duties in cases involving administrative power.

I. The Case for Deference

A. The Sound of Dworkin's Silence

The title and introduction to Vermeule's book take their inspiration from Ronald Dworkin's influential 1986 volume, *Law's Empire*.[14] In that volume, Dworkin offered a systematic articulation of his theory of the law, which he called "law as integrity."[15] Law as integrity has two components: "fit" and "justification."[16] Dworkin's ideal judge—"Hercules"—adjudicated cases in a way that was both consistent with "language, precedent, and practice" and which served the best normative justification of the law as a whole.[17]

As evinced by his description of courts as "capitals of law's empire," Dworkin's legal universe was profoundly jurocentric.[18] Vermeule thus finds it curious—and significant—that Dworkin utterly failed to discuss the administrative state, which, as Vermeule notes, had "come to structure citizens' experience of government" long before Dworkin was born.[19] Vermeule attributes this omission to "willful self-blinding"; he contends that Dworkin knew that there was no answer that he could give concerning the courts' long-since-established practice of deferring to administrative power that was consistent with his jurocentric vision.[20] Vermeule adopts an insight by David Dyzenhaus, who has written that "[t]here is no room in [Dworkin's] account for administrative agencies that have an authority to make or interpret the law in the sense that such administrative decisions are ones to which courts have reason to defer."[21] And yet our judiciary has ratified precisely such authority, in what Vermeule describes as "a considered, deliberate, voluntary, and unilateral surrender" on the part of "the law" (by which Vermeule means primarily, although not exclusively, Article III judges) to administrative power.[22]

It is the project of Vermeule's book to demonstrate that judicial deference to administrative power both fits with and justifies "the settled fabric of [administrative] law as it has developed across the Anglo-American world."[23] Law's empire, in Vermeule's telling, has been undone from within, not by coercion or treachery, but on the basis of "valid lawyerly reasons" that "good Dworkinians" ought to accept.[24]

B. Why Deference Fits

Tracing the trajectory of our administrative jurisprudence entails identifying a baseline from which we can measure the withdrawal or advance of the administrative state upon law's "heartland," that is, "courts, and judicial review."[25] Vermeule

deference to administrative interpretations of regulations" and citing Philip Hamburger, Law and Judicial Duty (2008)). For a summary and critique of these developments, see Cass R. Sunstein & Adrian Vermeule, *The New Coke: On the Plural Aims of Administrative Law*, 2015 Sup. Ct. Rev. 41 (2015).

9 *See, e.g.*, Adrian Vermeule, *'No,'* 93 Tex. L. Rev. 1547 (2015) (critiquing Hamburger's case against the lawfulness of administrative law); Sunstein & Vermeule, *supra* note 8 (generally critiquing academic and judicial critiques of various administrative law doctrines); *Optimal Abuse of Power*, *supra* note 7 (critiquing separation-of-powers arguments against the administrative state); Adrian Vermeule, *What Legitimacy Crisis?*, Cato Unbound (May 9, 2016), https://www.cato-unbound.org/2016/05/09/adrian-vermeule/what-legitimacy-crisis (last visited December 27, 2016) (denying that the administrative state is currently facing a legitimacy crisis).

10 Adrian Vermeule, Law's Abnegation (2016).

11 *See* Merriam-Webster Online, "abnegate," http://www.merriam-webster.com/dictionary/abnegate (last accessed December 27, 2016) (defining "abnegate" as "deny, renounce.").

12 Marbury v. Madison, 1 Cranch 137, 177 (1803).

13 Francis Bacon, Essay LVI, "Of Judicature," *in* Essays 140 (1995). Bacon, who was Lord Chancellor of England at the time, deployed this metaphor to make plain the subservient attitude he expected from judges in the face of claims of royal authority. The metaphor recalled the biblical throne of Solomon, as well as the carved animals which supported the English throne. *See* Law and Judicial Duty, *supra* note 8, at 155.

14 Ronald Dworkin, Law's Empire (1986).

15 *Id.* at 95.

16 *Id.* at 273.

17 *Id.*

18 *Id.* at 407.

19 Law's Abnegation, *supra* note 10, at 3.

20 *Id.* at 6.

21 David Dyzenhaus, "The Rule of Law as the Rule of Liberal Principle," *in* Ronald Dworkin 56, 71 (Arthur Ripstein ed., 2007).

22 Law's Abnegation, *supra* note 10, at 6.

23 *Id.* at 4.

24 *Id.* at 8.

25 *Id.* at 7.

chooses *Crowell v. Benson*, a 1932 case in which the Supreme Court upheld against an Article III challenge a statute that empowered administrative tribunals to adjudicate workmen's compensation claims arising from activities on navigable waters.[26] According to Vermeule's summary of *Crowell,* Chief Justice Charles Evans Hughes, writing for the majority, sought to "achieve a stable accommodation of the claims of law and the imperative of bureaucratic government" by distinguishing between questions of "law" and questions of "fact," as well as between "ordinary" facts, "jurisdictional" facts and "constitutional" facts.[27] Questions concerning the interpretation of the law, jurisdictional facts, and constitutional facts were to be determined by the courts de novo—without deference to administrative power—but Congress could give agencies exclusive power to decide any ordinary questions of fact in cases involving "public rights" (cases between government officials and citizens).[28] In cases involving "private rights" (between citizen and citizen), Congress could give agencies power to determine ordinary facts, subject only to deferential judicial review to ascertain whether those determinations were supported by "substantial evidence."[29] These distinctions and categories would subsequently be incorporated into the Administrative Procedure Act of 1946 (APA).[30]

Hughes's attempt to synthesize an accommodation between law and administrative power failed. "[E]very important element of the *Crowell* framework has come unglued," and the result has been the steady advance of judicial deference to administrative power.[31] Federal courts now defer broadly to administrative agencies' interpretations of statutes, as well as to agencies' interpretations of their own regulations.[32] Hughes failed to anticipate the rise of informal, off-the-record rulemaking, which is now the principal method of administrative decision-making.[33] Even "hard-look review," a standard for judicial scrutiny that is used to implement the APA's instruction that courts set aside actions that are "arbitrary, capricious, or not in accordance with law,"[34] is in practice highly deferential to agencies.[35]

Vermeule finds the failure of the Hughesian synthesis instructive. It is not "a tale of the conquest of law's empire from without," a top-down coup initiated by progressive political scientists and politicians and ratified by judges who bowed to mere political will or expediency.[36] It is, rather, the victory of a thoroughly orthodox understanding of the law over a species of idolatry, the latter of which treated "the classical separation of powers as an inviolable command, whatever the sacrifice required to respect it, even if those sacrifices worked to the overall detriment of law itself."[37]

As for latter-day idolaters—among them Philip Hamburger,[38] Gary Lawson,[39] Jeremy Waldron,[40] and the late Justice Antonin Scalia[41]—they come in for rough treatment. Vermeule takes seriously arguments that the administrative state (or at least core features of it) is unconstitutional and that certain judicial doctrines which command judicial deference to administrative power are illegitimate. Yet he ultimately finds these arguments to suffer from crippling flaws.

Vermeule's criticism of both Hamburger and Lawson focuses on the nature of executive power and the way in which the supposed departures from the Constitution that these scholars identify came about. He charges Hamburger in particular with a profound misunderstanding of the theory which animates current legal doctrine concerning "delegation"—whereby Congress statutorily authorizes agencies to issue general rules that bind members of the public. Everyone agrees, argues Vermeule, that legislators cannot *sub*delegate *legislative* power that is constitutionally delegated exclusively to Congress by

26 285 U.S. 22 (1932).

27 Law's Abnegation, *supra* note 10, at 12.

28 *Id.* at 25.

29 *Id.*

30 5 U.S.C. §706 (2)(E).

31 Law's Abnegation, *supra* note 10, at 12.

32 *See* Chevron USA, Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) (deference to statutory interpretation); Auer v. Robbins, 519 U.S. 452 (1997) (deference to interpretation of regulations).

33 For a concise overview of the "rulemaking revolution," see Ronald M. Levin, *The Administrative Law Legacy of Kenneth Culp Davis*, 42 San Diego L. Rev. 315 (2005).

34 5 U.S.C. §706(2)(A).

35 Law's Abnegation, *supra* note 10, at 190-9 (collecting all Supreme Court merits arbitrary-and-capricious holdings from 1983 to 2014 and finding that agencies win arbitrariness challenges in the Supreme Court about 87 percent of the time).

36 *Id.* at 36. *Compare* Gary L. McDowell, *The Corrosive Constitutionalism of Edward S. Corwin*, 14 Law and Social Inquiry 603 (1989); Hadley Arkes, The Return of George Sutherland: Restoring a Jurisprudence of Natural Rights (1994); Thomas G. West, "Progressives and the Transformation of American Government," *in* The Progressive Revolution in Politics and Political Science: Transforming the American Regime (John A. Marini and Ken Masugi, ads., 2005); Richard A. Epstein, How the Progressives Rewrote the Constitution (2006).

37 Law's Abnegation, *supra* note 10, at 56.

38 *See generally* Is Administrative Law Unlawful?, *supra* note 8 (arguing that the answer to the titular question "yes"). Vermeule's criticism of Hamburger is a distillation of a lengthier (and much harsher) critique in *'No,' supra* note 9. For Hamburger's rebuttal to the latter critique, see Philip A. Hamburger, *Vermeule Unbound*, 94 Tex. L. Rev. 205 (2016).

39 *See* Lawson, *supra* note 7 (contending that "[t]he post-New Deal administrative state is unconstitutional and its ratification by the judiciary amounts to nothing less than a bloodless constitutional revolution").

40 *See* Jeremy Waldron, *Separation of Powers in Thought and Practice?*, 54 B.C.L. Rev. 433 (2013) (arguing that the Constitution requires that "[t]he legislature, the judiciary, and the executive—each must have its separate say before power impacts on the individual" and that the modern administrative state runs afoul of this requirement).

41 *See* Talk America v. Michigan Bell Telephone, 131 S. Ct. 2254, 2266 (2011) (arguing that it "seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well"); Decker v. Northwest Environmental Defense Center, 113 S. Ct. 1326, 1341 (2013) (Scalia, J., concurring in part and dissenting in part) (calling for the Court to overrule *Auer v. Robbins*, in which the Court affirmed that courts are to defer to agency interpretations of regulations that the agencies promulgate); *Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment) (same).

"We the People" through Article I.[42] But, he goes on, the statutory authorization of agency rulemaking involves legislators *legislating* and executive officials *executing* the law, as they should, and Hamburger is wrong to claim that this arrangement is a subdelegation of legislative power to the executive branch.[43] The Supreme Court has so held in its better moments,[44] even if it is not above indulging a fiction that an "intelligible principle" must guide the exercise of delegated discretion to ensure that it is an exercise of executive rather than legislative power.[45]

Further, Vermeule contends that it is incoherent and pointless for Hamburger and Lawson to complain about the status quo.[46] For in Vermeule's telling, the rise of the administrative entities that Hamburger and Lawson decry because they (allegedly) consolidate legislative, executive, and judicial powers was facilitated "by judges exercising the intrinsically and quintessentially judicial power for statutory interpretation and judicial review" that Hamburger and Lawson believe it proper for them to exercise.[47] To call this a "dereliction of duty"[48] on the part of the judiciary is to indict oneself of "hubris"[49] and indeed to be "unfaithful . . . to the original public understanding of the Constitution"[50] by departing from the founding generation's allowance for the "liquidation of ambiguous written legal rules by practice and precedent."[51] The administrative state, Vermeule points out, has been so entrenched by "consistent recognition by Congress, President, and Court that capacious delegation of statutory authority is fundamentally legitimate."[52] Vermeule summarizes his argument elegantly: "When critics of the administrative state call for a return to the classical Constitution, they do not seem to realize they are asking for the butterfly to return to its own chrysalis."[53]

For his part, Vermeule admires both butterfly and chrysalis. As he sees it, the "classical lawmaking institutions"[54] have properly recognized that we "inhabit a different world of policy-making than did the theorists of the eighteenth century."[55] In this world, those institutions must "trade off the quality of policy,"[56] the "impartiality"[57] of decision-making, and indeed the "very goal of minimizing abuses of power"[58]—once of primary importance—in order to capture the benefits of "timeliness"[59] and "expertise."[60] Owing to the rate of change in the policy environment in an increasingly complex economy, "[l]egislative institutions are structurally incapable of supplying policy change at the necessary rates."[61]

Vermeule concludes his book by summarizing various doctrines that exemplify and facilitate deference. Certain examples are obvious. Take the doctrine of deference associated with *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*[62] and *United States v. Mead Corp.*,[63] which requires judges to defer to "reasonable" agency interpretations of "ambiguous" statutory language where Congress has demonstrated an intention to delegate law-interpreting power to the agency. "*Chevron* deference" disempowers lawyers and judges by allowing agencies to choose between a range of permissible policies rather than insisting that agencies arrive at one legally correct answer.[64] But other examples are counterintuitive. In *SEC v. Chenery Corp.*,[65] the Court ruled that agency actions can be upheld only on the rationale that the agency itself articulated when taking action, and thus that the agency may not employ post hoc rationalizations during litigation.[66] Allowing post hoc rationalization would make it easier for those actions to survive judicial review, but it would also empower the agency "lawyers who formulate ex post reasons that are presented to a court."[67] Thus, *Chenery* constrains lawyers

42 *See* Law's Abnegation, *supra* note 10, at 50-1. *Compare Vermeule Unbound*, *supra* note 38, 218 ("There is little difference between Vermeule's presentation of the Court's nondelegation theory and mine, except that I view it skeptically.").

43 Law's Abnegation, *supra* note 10, at 52.

44 *See, e.g.*, Field v. Clark, 143 U.S. 649 (1892), United States v. Grimraud, 220 U.S. 506 (1911), J.W. Hampton v. United States, 276 U.S. 394 (1928), Yakus v. United States, 321 U.S. 414 (1944).

45 *See 'No,' supra* note 9, at 1559 (stating that this is "not a view that [he] agree[s] with").

46 Law's Abnegation, *supra* note 10, at 42.

47 *Id.* at 41.

48 *Id.* at 45.

49 *Id.*

50 *Id.*

51 *Id. See* The Federalist No. 22 (Alexander Hamilton), *supra* note 6, at 110 ("Laws are a dead letter without courts to expound and define their true meaning and operation."); The Federalist No. 37 (Madison), *supra* note 6, at 183 ("All new laws . . . are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications."). Public understanding originalists seek to ascertain "the public or objective meaning that a reasonable listener would place on the words used in the [relevant legal] provision at the time of its enactment." Randy E. Barnett, Restoring the Lost Constitution: The Presumption of Liberty 92 (2004).

52 Law's Abnegation, *supra* note 10, at 45.

53 *Id.* at 46.

54 *Id.* at 60.

55 *Id.* at 59.

56 *Id.*

57 *Id.* at 60.

58 *Id.*

59 *Id.*

60 *Id.*

61 *Id.* at 67.

62 467 U.S. 837 (1984).

63 533 U.S. 218 (2001).

64 Law's Abnegation, *supra* note 10, at 201.

65 318 U.S. 80 (1943).

66 Law's Abnegation, *supra* note 10, at 196 ("A reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency.").

67 *Id.* at 199.

and empowers "scientists, engineers, and other technical experts, political appointees within agencies, and civil servants," all of which help formulate policy before the fact.[68] *Chenery*, too, is a kind of legal retreat from administrative power, even if it does not initially appear to be.

C. Why Deference is Justified

Even if deference to administrative power fits with our law, it falls to Vermeule to offer a normatively appealing justification for it—as Dworkin put it, to derive from existing legal materials "an overall story worth telling now."[69] According to Vermeule, the synthesis attempted by Hughes in *Crowell* has come undone because the very reasons which drove the synthesis in first place counseled in favor of broader deference to administrative power—and those reasons are *good* reasons.

What are these good reasons? Vermeule writes that "the implicit question [in *Crowell*] is whether judicial review, at the margin, adds net value to the process of institutional decision-making that begins with agency decision-making."[70] Hughes concluded that "judicial review promises little additional benefit and threatens to impose incremental delay and litigation costs that will make the overall system worse, not better."[71] Hughes failed, however, to properly apply this marginalist analysis to certain kinds of factual questions and to questions of law.[72] It fell to subsequent courts to do so, and they concluded that agencies had a comparative advantage in answering questions of law as well as questions of fact. Whereas Hughes "assumed that courts were naturally superior to agencies on questions of law,"[73] it later became clear that it was "impossible to disentangle legal questions from policymaking decisions, at least as to the complex regulatory statutes that predominate in the modern state,"[74] and, thus, that "agencies, at least as compared to courts, were better positioned both to make ultimate value choices relevant to regulatory questions . . . and also to determine facts, causation, and the likely consequences of alternative interpretations."[75]

Vermeuele candidly acknowledges that judicial deference to administrative power carries with it "risks of error and abuse."[76] Yet he urges that "accept[ing] increased risks of official abuse and distorted decision-making" is required "in order to give government officials more power to suppress 'private' abuses, in order to increase the activity level of the government as a whole, and in order to give administrators sufficient information to combat the evils that arise in complex sectors of the economy."[77] Thus, it is all to the good that courts have gradually developed a jurisprudence that does precisely that by following "a predictably and sensibly deferential review of agency policy judgments."[78]

D. Toward a Deferential Future

Vermeule does believe that our administrative jurisprudence can be improved, and he has several suggestions for nudging it in what he believes to be the right direction—that is, toward more deference. Perhaps the most intriguing of these suggestions concerns judicial review of agency actions under Section 706(2)(A) of the APA, which provides that agency actions can be overturned if found to be "arbitrary, capricious, or not in accordance with law."

Vermeule contends that judges should expressly recognize that agencies facing conditions of uncertainty "may have excellent reason to make some decision or other," yet not a particular decision—and that arbitrary-and-capricious review must be sensitive to this reality.[79] Surveying the case law, Vermeule finds that judges evaluating the rationality of agency actions "for the most part"[80] do allow agencies to make what he terms "rationally arbitrary decisions," but that reviewing courts have yet to entirely jettison "a cramped and erroneous conception of rationality" that "requires agencies to do the impossible by giving reasons as to matters where reason has exhausted its powers."[81] While agencies must act on the basis of reasons, Vermeule argues that judges must "recognize[] that limits of time, information, and resources may give agencies good second-order reasons to act inaccurately, nonrationally, or arbitrarily in a first-order sense."[82]

What does a rationally arbitrary decision look like? Vermeule offers the example of a 2007 decision by the Fish and Wildlife Service to delist the Yellowstone grizzly bear as a "threatened" species, despite the potential that a decline in the prevalence of whitebark pine might limit a source of sustenance for grizzlies.[83] The agency rested its decision on the grounds that "grizzlies are notoriously flexible and adaptable about their sources of food . . . bears have proven they can go without [whitebark pine] . . . and other populations of grizzlies have flourished despite the loss of whitebark pine."[84] In 2011, this decision was held "arbitrary" by a panel of the Ninth Circuit on the ground there was no evidence in the record "demonstrating grizzly population stability in the face of whitebark pine declines."[85] Yet, as Vermeule points out,

68 *Id.* at 200.

69 Law's Empire, *supra* note 14, at 227.

70 Law's Abnegation, *supra* note 10, at 13. For a short summary of the marginalist revolution in economic theory, see Steven E. Rhoads, "Marginalism," *in* The Concise Encyclopedia of Economics, *available at* http://www.econlib.org/library/Enc/Marginalism.htm (last visited December 27, 2016).

71 Law's Abnegation, *supra* note 10, at 13.

72 *Id.* at 28.

73 *Id.* at 214.

74 *Id.* at 212.

75 *Id.* at 214.

76 *Id.* at 59.

77 *Id.* at 58.

78 *Id.* at 160.

79 *Id.* at 126.

80 *Id.* at 127.

81 *Id.* at 150.

82 *Id.* at 187.

83 *Id.* at 142.

84 *Id.* at 143.

85 Greater Yellowstone Coalition, Inc. v. Servheen, 665 F.3d 1015, 1030 (9th Cir. 2011).

"there was no information in the record either way . . . and no cost-justified procedure for obtaining such information."[86] The agency had to make *some* decision, and neither pessimism nor optimism concerning grizzly population stability was warranted by the evidence.

Vermeule calls for judges to explicitly and consistently apply a kind of "thin rationality review" that is generally consistent with what they are doing already.[87] Concretely, this means that courts should not impose even a presumptive requirement of quantified cost-benefit analysis on agencies as a measure of rationality,[88] require agencies to conduct comparative policy evaluations,[89] compel agencies to demonstrate the superiority of a chosen policy to past choices, make agencies opt for any particular assumptions (whether pessimistic or optimistic) in the face of uncertainty, demand a "rational connection between the facts found and the choices made,"[90] or require agencies to explain or convey their reasons "to the satisfaction of a panel of generalist judges."[91]

II. Critique

Vermeule's book offers a profound challenge to critics of judicial deference to administrative power. It presents judicial deference as consistent with the Constitution, consistent with the APA, consistent with precedent, normatively desirable, and in some sense inevitable. In what follows, I will challenge Vermeule's case for fit and justification and address his argument that deference is in some sense inevitable.

A. Unfitting

In making his case for fit, Vermeule attaches tremendous significance to what he takes to be the fact that law was not violently "overcome" by administrative power or compromised through "treachery."[92] Rather, judges, acting freely and in "good faith," decided to defer to administrative power for legal reasons that they found convincing.[93] Voluntariness and good faith constitute the foundation of his argument that deference cannot be characterized as "abdication" and that public understanding originalists should not find the result legally objectionable.[94]

One need not reject Vermeule's premises to recognize the weakness of his further argument. To take a key example upon which Hamburger's critique has focused much attention: If in fact Article III's authorization of "[t]he judicial power" imposes upon judges a constitutional duty to exercise independent judgment concerning the meaning of a statute or a regulation, without regard to the beliefs or desires of government officials concerning what the statute or regulation means, voluntarily chosen deference to the latter would amount to a partial relinquishment of the judicial power.[95] Such relinquishment would be the very definition of abdication.[96] Thus, when Vermeule claims that myriad doctrines which Hamburger and Lawson criticize "were developed by judges exercising the intrinsically and quintessentially judicial power for statutory interpretation and judicial review," he begs the question: Were they really exercising that power?[97] Or were they *declining* to exercise power that is delegated to them and *ratifying* power that is not delegated to the executive branch—neither of which they have they have the legal power to do?

Vermeule does not provide a convincing answer to this question. He asserts that Lawson is "*surely* unfaithful to the original public understanding of the Constitution" in claiming that the Constitution bars the kind of delegation that has produced and which perpetuates the administrative state.[98] Yet although Vermeule alludes at various points to his theories of the proper scope of legislative, executive, and judicial power,[99] he does not demonstrate that they are grounded in the Constitution's text, as enriched by the publicly available context at the time of its enactment.[100] His originalist case, such as it is, ultimately rests upon the "liquidating force of the consistent recognition by Congress, President, and Court that capacious delegation of

86 Law's Abnegation, *supra* note 10, at 144.

87 *Id.* at 167.

88 *Id.* Vermeule carefully distinguishes between cost-benefit analysis in the "thin tautological sense in which rationality requires that decision-makers do what is better, as opposed to what is worse" and quantified cost-benefit analysis as a "highly sectarian decision-procedure." *Id.* For an overview of quantified cost-benefit analysis, see Eric Posner & Matthew D. Adler, *Rethinking Cost-Benefit Analysis,* 109 Yale L.J. 165 (1999).

89 Law's Abnegation, *supra* note 10, at 167.

90 As the Supreme Court did in the 1983 case of *Motor Vehicle Mfrs. Assn. of the United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

91 Law's Abnegation, *supra* note 10, at 167.

92 *Id.* at 6.

93 *Id.* at 55.

94 *Id.* at 45.

95 *See* Is Administrative Law Unlawful, *supra* note 8, at 285-322; Philip A. Hamburger, *Chevron Bias*, 84 Geo. Wash. L. Rev. 1187 (2016).

96 *See* Merriam-Webster Online, "abdicate" https://www.merriam-webster.com/dictionary/abdicate (last visited December 27, 2016) (defining "abdicate" as "to cast off" or "to relinquish (as sovereign power) formally").

97 Law's Abnegation, *supra* note 10, at 54.

98 *Id.* at 45 (emphasis added).

99 Vermeule's considered position appears to be that, so long as agencies are acting within the bounds of statutory authorization, they are not in fact exercising legislative power at all but, rather, executive power. *Id.* at 53. Yet his language is not always clear. Thus, he speaks of the "brute fact, which horrifies separation-of-powers traditionalists, that agencies quite often combine the powers to legislate binding rules, to enforce the rules through the prosecution of complaints, and to adjudicate whether the rules have been violated" and refers to the Federal Trade Commission "legislat[ing] rules about unfair competition." *Id.* at 63.

100 *See* Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 Fordham L. Rev. 453, 519 (2013) (explaining that "[t]he basic idea of contextual enrichment is that given the publicly available context of constitutional communication, the text conveys communicative content that is unstated, because, for example, the meaningfulness or sensibility of the text assumes the additional content").

statutory authority is fundamentally legitimate."[101] Vermeule claims that originalists must embrace such delegation because "the founding generation allowed for 'liquidation' of ambiguous written legal rules by practice and precedent."[102] Here, Vermeule begs another key question. Even if the founding generation allowed for the liquidation of ambiguous legal rules through practice and precedent, and even if that allowance was somehow incorporated into the Constitution's original meaning, is it really the case that the written rules in question are ambiguous?[103]

We know from intense Founding-era debates over the wording of constitutional provisions that there was widespread agreement that the Constitution's language ought to be precisely drafted. "Anti-Federalist" opponents of the proposed, unamended 1787 Constitution warned that imprecise grants of federal power would give rise to usurpations and abuses; the Constitution's "Federalist" supporters responded that the Constitution's terms had been drafted as precisely as possible.[104] In such a context, it cannot be assumed that constitutional language is ambiguous—that is, that it can bear two or more distinct meanings, one of which could potentially authorize the power grants that Vermeule believes to be constitutionally legitimate.[105] Lawson, Hamburger, and others have adduced considerable evidence that the subdelegation of legislative power is unambiguously forbidden by the Constitution *and* that many modern congressional grants of power to agencies are unambiguously instances of subdelegation.[106] Vermeule cannot establish an ambiguity against the weight of the evidence—at the very least, he must show that the evidence is in equipoise.

Vermeule does not adduce sufficient evidence to even muddy the waters. He cites Jerry Mashaw's scholarship (which purports to trace administrative power back to the Founding Era),[107] cites a line of cases beginning in the late nineteenth century,[108] and observes that, "with the arguable exception of Justice [Clarence] Thomas, no modern Justice has fundamentally contested the legitimacy of delegation."[109] The Founding-era governmental practices documented by Mashaw are relevant to original public understanding,[110] but, like all such practices, their existence is not dispositive of their own constitutionality, nor is it proof that the relevant text is ambiguous; those responsible for the practices may well have been mistaken about whether their actions were authorized by the Constitution, and Vermeule makes little effort to show that their beliefs were justified. Both Hamburger and Michael Greve have highlighted salient differences between the practices identified by Mashaw (think of the Steamboat Inspection Service, which regulated a single piece of equipment on a single type of vessel) and the kind of delegation that pervades the modern administrative state (think of the Occupational Safety and Health Act, which authorizes the Secretary of Labor to issue standards that are "reasonably necessary or appropriate to provide safe or healthful employment or places of employment"[111] and impose those standards on industries across the nation).[112] Finally, the late nineteenth century cases are obviously not evidence of original public understanding, nor are the opinions of modern Justices.

Originalists who have any interest in staying grounded in reality certainly must acknowledge that Congress, President, and Court have recognized capacious delegation of statutory authority for quite some time. But Vermeule fails to demonstrate that such delegation—however longstanding and widespread—fits with the Constitution's original meaning.[113]

B. Unjustified

Vermeule evidently believes that both the Constitution and the APA are shot through with vagueness[114] and ambiguity.[115] Interpreting the text can thus only get us so far—there will be contexts in which it does not yield a single determinate answer. *Chevron*, *Auer*, and thin rationality review can all be understood as rules of *construction* that are necessary to give legal effect to

101 Law's Abnegation, *supra* note 10, at 45.

102 *Id.*

103 The constitutional status of liquidation is far more controversial among originalists than Vermeule's strident claims might lead one to believe. *See* Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. Chi. L. Rev. 519, 552-3 (2003) (writing that it seems "more plausible" that "present-day originalists are free to consider alternative approaches to the Constitution's indeterminacies" than that "members of the founding generation understood the Constitution itself to require adherence to settled liquidations").

104 *See* Philip A. Hamburger, *The Constitution's Accommodation of Social Change*, 88 Mich. L. Rev. 239, 308 & n.261 (1989) (collecting sources).

105 *See* Solum, *supra* note 100, at 469-70 (2013) (distinguishing between linguistic vagueness and ambiguity).

106 *See, e.g.*, Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327 (2002); Douglas H. Ginsburg & Steven Menashi, *Nondelegation and the Unitary Executive*, 12 U. Pa. J. Const. L. 251 (2010); Is Administrative Law Unlawful?, *supra* note 8, at 377-403.

107 *See* Jerry L. Mashaw, Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law (2013).

108 *See* cases cited at *supra* note 44.

109 Law's Abnegation, *supra* note 10, at 44.

110 *See* John O. McGinnis & Michael B. Rappaport, *Original Interpretative Principles as the Core of Originalism*, 24 Const. Comment. 371 (2009) (explaining how the "expected applications" of constitutional concepts "can be strong evidence of the original meaning" of those concepts).

111 29 U.S.C. § 652(8).

112 *See* Michael S. Greve, *Not Originally Intended*, Claremont Rev. of Books (Summer 2013), *available at* http://www.claremont.org/crb/article/not-originally-intended/ (last visited December 27, 2016) (Mashaw's examples "reflect a far more modest orientation than the New Deal ambition of regulating entire industries, not to mention the modern-day aspiration of improving 'the workplace,' 'highway safety,' or 'the environment' on a global basis."); Is Administrative Law Unlawful?, *supra* note 8, at 83 n.a (arguing that Mashaw's examples of New Deal precursors all involve regulations of executive officers or people who were not subjects of the United States, not members of the public).

113 *See* Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 Va. L. Rev. 1, 13 (2001) (noting that Madison, in discussing liquidation, drew a "sharp distinction between the question of 'whether precedents could expound a Constitution' and the question of 'whether precedents could alter a Constitution'").

114 Law's Abnegation, *supra* note 10, at 68 ("broad and vague delegations, vague constitutional powers").

115 *Id.* at 45 ("ambiguous written legal rules").

vague or ambiguous constitutional and statutory guarantees.[116] Vermeule's justification for all of these constructions is simply stated: agencies have a "comparative advantage" in resolving the questions at stake, and judges add little marginal value to agency decision-making.[117]

Insofar as a normatively desirable but unfitting prescription would lack integrity, Vermeule's justification depends upon the premise that it is fitting for judges to engage in a *particular kind* of marginalist analysis. There is a general sense in which judges, like all fallible human beings who operate under the constraints of time and space, necessarily must decide how to focus their intellectual efforts, and it behooves them to consciously do so with reference to value that they seek to capture. Yet Vermeule has something more specific in mind. Judges, he argues, should understand themselves to be part of a "process of institutional decision-making that begins with agency decision-making," and they ought to judge with an eye to adding something to that process.[118] Is it fitting for judges to engage in *this kind* of marginalist analysis?

Robert Natelson, Guy Seidman, and Gary Lawson have convincingly argued that the Constitution's structure and content reflect its character as a *fiduciary* document—a document that entrusts government officials (the fiduciaries) with discretionary power to act on behalf of members of the public (the beneficiaries) for limited purposes, through specified means.[119] Owing to the vulnerability of beneficiaries, the law imposes a set of stringent duties on private fiduciaries, including the duty to follow the beneficiary's instructions, the duty of utmost good faith (that is, honesty), and the duty to take reasonable care and competently pursue the beneficiaries' interests.[120] With discretionary power in the hands of private fiduciaries, those who entrust them with that discretionary power are correspondingly vulnerable; with discretionary power in the hands of public fiduciaries, the entire citizenry is correspondingly vulnerable.[121] Founding-era writings are replete with references to government officials generally and judges in particular as fiduciaries, whether "agents," "trustees," or "representatives."[122]

It is doubtful that the marginalist analysis commended by Vermeule is compatible with judges' fiduciary duties. Judges' fiduciary duties are centrally concerned with ensuring that officials in the other branches of government adhere to *their* fiduciary duties by making an independent determination of what the law *is* in cases, regardless of whether that helps or hinders the other branches' goals.[123] Vermeule's focus on contributions to decision-making that begins with agencies risks transforming the judicial role in cases involving administrative power from an independent one into a collaborative one.

Even if it is appropriate for judges to engage in marginalist analysis along the lines that Vermeule suggests, any such marginalist analysis must incorporate the very real risks of abuse of administrative power. Vermeule rightly warns of the dangers of relying upon unsupported generalizations about agencies' motivations and judgements.[124] Yet there is no denying that the discretionary power wielded by agencies is susceptible of being abused. There is, for instance, a rich literature on the phenomenon of "regulatory capture," wherein the comparative overrepresentation of regulated private interests in the process of agency decision-making results in agency bias in favor of these interests rather than the public interest.[125] The development of hard-look review of the kind deployed in *Motor Vehicle Mfrs. Assn. of the United States, Inc. v. State Farm Mut. Automobile Ins. Co.*[126] can be understood as being in part the product of judicial

116 For a delineation of the distinction between the interpretation of text and the formulation of rules of construction, see generally Keith E. Whittington, Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review (1999); Randy E. Barnett, *The Interpretation-Construction Distinction*, 34 Harv. J.L. & Pub. Pol'y (2011); Solum, *supra* note 100.

117 Law's Abnegation, *supra* note 10, at 75.

118 *Id.* at 15.

119 *See* Robert G. Natelson, *The Government as Fiduciary: A Practical Demonstration from the Reign of Trajan*, 35 U. Rich. L. Rev. 191, 193 (2001); Robert G. Natelson, *The Constitution and the Public Trust*, 52 Buff. L. Rev. 1077 (2004); Gary Lawson et al., The Origins of the Necessary and Proper Clause 68–70 (2010); Gary Lawson et al., *The Fiduciary Foundations of Federal Equal Protection,* 94 B.U. L. Rev. 415 (2014); Gary Lawson & Guy I. Seidman, *By Any Other Name: Rational Basis Inquiry and the Federal Government's Fiduciary Duty of Care*, Boston Univ. School of Law, Public Law Research Paper No. 16-29 (2016), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2822330 (last visited December 27, 2016); Gary Lawson & Guy I. Seidman, A Great Power of Attorney: Understanding the Fiduciary Constitution (forthcoming 2017).

120 *See* Robert G. Natelson, *Judicial Review of Special Interest Spending: The General Welfare Clause and the Fiduciary Law of the Founders*, 11 Tex. Rev. L. & Pol. 239, 255-62 (2007).

121 *See generally* L.S. Sealy, *Fiduciary Relationships*, 20 Cambridge L.J. 69 (1962); Ernest J. Weinrib, *The Fiduciary Obligation*, 25 U. Toronto L.J. 1 (1975); Paul B. Miller, *A Theory of Fiduciary Liability*, 56 Mcgill L.J. 235 (2011).

122 *See, e.g.*, The Federalist No. 14 (Madison), *supra* note 6, at 63 (in a republic, the people "assemble and administer [their government] by their representatives and agents"); The Federalist No. 46 (Madison), *supra* note 6, at 243 ("agents and trustees of the people"); The Federalist No. 57 (Madison), *supra* note 38, at 295 ("public trust"); The Federalist No. 59 (Hamilton), *supra* note 6, at 310 ("guardianship" and "trust"). For a detailed discussion of judges as fiduciaries, see Ethan J. Leib, David L. David, & Michael Serota, *A Fiduciary Theory of Judging*, 101 Cal. L. Rev. 699 (2013).

123 *See* The Federalist No. 78 (Hamilton), *supra* note 6, 404 (explaining that "the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority . . . the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents"); Law And Judicial Duty, *supra* note 8, at 610 (finding that Founding-era judges "ordinarily assumed that they served the function of enforcing the constitution and protecting liberty by doing their duty—by deciding in accord with the law of the land").

124 Law's Abnegation, *supra* note 10, at 116.

125 *See, e.g.*, Gabriel Kolko, Railroads and Regulation 1887-1916, 34-44 (1965); George J. Stigler, *The Theory of Economic Regulation*, 2 Bell J. Econ. & Mgmt. Sci. 2, 3 (1971); Fred McChesney, *Rent Extraction and Interest-Group Organization in a Coasean Model of Regulation*, 20 J. Legal Stud. 73 (1991); Andrew P. Morriss, Bruce Yandle & Andrew Dorchak, *Choosing How to Regulate,* 29 Harv. Envtl. L. Rev. 214 (2005).

126 463 U.S. 29.

recognition that agencies do not always seek legally legitimate goals.[127]

Now consider the thin rationality review that Vermeule believes to be the *dominant* form of arbitrary-and-capricious review at present and which he urges judges to explicitly embrace: "[A]gencies must act based on reasons, where the set of admissible reasons includes second-order reasons to act inaccurately, nonrationally, or arbitrarily."[128] We can safely predict that agencies will seldom fail to offer such reasons, if they understand that this is all that they have to do before judges will uphold their actions. But how, if at all, can thin rationality review safeguard citizens against the risk that agencies will offer insincere, *pretextual* reasons to conceal their illegitimate ends?

Vermeule points to several methods of "'flushing out' an agency's real motives."[129] These include "mandating that the agency make decisions on a formal record; mandating that the agency respond specifically to comments even if there is no formal record; allowing cross-questioning of agency experts; and checking the fit between the agency's findings and its conclusions."[130] It is striking that Vermeule includes the last method, considering that he elsewhere states that judges should *not* "require agencies to be able to explain or convey their reasons, to the satisfaction of a panel of generalist judges."[131] Judges "checking the fit" between findings and conclusions with any rigor would seem to be requiring agencies to do precisely that. If, on the other hand, by "checking the fit" Vermeule simply means requiring agencies to point to factual findings and to point to a legitimate reason for action without inquiring into the connection between findings and action, the problem of pretext remains.

Officials can also fall short of their legal duties *without* acting in bad faith, that is, without deliberately seeking legally illegitimate ends. Officials may err as a consequence of taking insufficient care in the pursuit of legally legitimate ends.[132] Some well-documented psychological biases that can distort judgment are particularly pronounced amongst experts—these include egocentrism and overconfidence.[133] The impact of such biases can be diminished by the "expectation that one may be called upon to justify one's beliefs, feelings, and actions to others" and will suffer negative consequences if one fails to do so.[134] Judicial review can offer a means of diminishing the impact of psychological biases and thus encouraging care by ensuring accountability, but it cannot do so if it solely requires officials to offer valid reasons for their actions. Officials who pursue legitimate ends but fail to take sufficient care will easily be able to offer valid reasons for their actions and thus escape negative consequences for them.

Finally, Vermeule marshals little evidence to justify his apparent confidence in agency high-mindedness and care. The closest he gets is his citation to other scholars' findings that agencies often go above and beyond the courts' interpretations of their procedural obligations under the APA.[135] This is interesting and encouraging, but—as Vermeule admits—insufficient to support any generalizations.[136] Vermeule also never considers whether agencies might act differently if judges were to explicitly and consistently embrace his deferential counsel. If we accept Vermeule's marginalist terms, it is possible that an increased risk of abuse would be outweighed by the benefits that would be captured, but Vermeule does not sufficiently account for those potential costs in his calculations. Nor, for that matter, does he show that the costs he does acknowledge are or would be outweighed by the benefits of deference along the lines that he urges. Instead, readers are treated to summary assertions that the trade-offs are worth making. Again, if we accept his terms, perhaps they are—but he who asserts must prove, and Vermeule does not prove his marginalist case.[137]

C. Correctable

Some of the most evocative language in Vermeule's book is deployed in the service of his argument that legal resistance to administrative power will prove futile. Were the administrative state "abolished," he predicts that it would "be created again, in a kind of eternal recurrence," with the judiciary's aid.[138] Vermeule reaches all the way back to the seventeenth century in support of this claim, invoking Sir Edward Coke's "maxim" that, "in

127 For accounts of the influence of capture theory, see Richard B. Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1669 (1975); Thomas W. Merrill, *Capture Theory and the Courts: 1967- 1983*, 72 Chi. Kent L. Rev. 1039 (1997).

128 Law's Abnegation, *supra* note 10, at 167.

129 *Id.* at 120.

130 *Id.* at 152.

131 *Id.* at 167.

132 Fiduciaries have a duty to take reasonable care as well as a duty to act with utmost good faith. *See* Lawson & Seidman, *supra* note 119, at *25 (adducing evidence that "eighteenth-century fiduciaries generally, whether attorneys or corporate directors, had a duty of care as a baseline part of their obligations . . . akin to a standard of gross negligence" and contending that "[t]o the extent that the Constitution is a fiduciary instrument, of any plausible kind to which it can be analogized, federal actors must exercise their discretion at least in accordance with this standard").

133 *See* Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 Cornell L. Rev. 486, 496-9 (2002) (internal citation omitted).

134 *Id.* at 508-22.

135 *Id.* at 117 (citing Richard Pierce, Jr. et al., Administrative Law and Process 361 (2008)). *But see* David S. Tatel, *The Administrative Process and the Rule of Environmental Law*, 34 Harv. Envtl. L. Rev. 1, 2 (2010) (recounting that "in both Republican and Democratic administrations, I have too often seen agencies failing to display the kind of careful and lawyerly attention one would expect from those required to obey federal statutes and to follow principles of administrative law," and observing that, "[i]n such cases, it looks for all the world like agencies choose their policy first and then later seek to defend its legality").

136 Law's Abnegation, *supra* note 10, at 117 (noting that it is "very hard to generalize").

137 *See* Michael S. Greve, *Adrian's Abnegation*, Library of Law & Liberty (Dec. 19, 2016), http://www.libertylawsite.org/book-review/adrians-abnegation/ (last visited December 27, 2016) (observing that "what we have here is an abject failure to think on the margin, by a scholar who purports to embrace that mode of thinking").

138 Law's Abnegation, *supra* note 10, at 15.

a doubtful thing, interpretation goes always for the king."[139] Vermeule suggests that Coke was identifying a "baseline tendency" in the law that has "gathered strength over time" as "judges and lawyers come to doubt their own epistemic competence."[140]

The language is memorable, but Vermeule's argument lacks substance. Coke was decrying a "tendency" that was less a product of judicial reflection about "epistemic competence" than of premises concerning royal prerogative power. Royal officials at the time pressured judges to defer to prerogative power that was said to be superior to law.[141] Some judges did give way to such pressure, but Coke did not, and he urged others to follow his example. What Vermeule refers to as Coke's "maxim" was in fact a rueful observation that judges often failed to discharge what Coke believed to be their duty of independent judgment and instead followed the path of deference to royal power.[142] The architects of the administrative state certainly did not believe that judicial deference to administrative power was inevitable—they knew well that they were arguing for a fundamentally different conception of the nature and limits of government than that which was reflected in previous American legal materials.[143] It was because they knew that the judiciary could not be expected to simply embrace their arguments for consolidating government powers that had traditionally been vested in specialized branches that those arguments went hand-in-hand with calls for judicial deference.[144]

There is nothing incoherent about arguing that voluntarily chosen judicial deference, even deference predicated upon *good* legal arguments, should be voluntarily abandoned in the face of *better* legal arguments against deference. American legal history is littered with precedents which rested upon premises that have since become discredited and which are no longer "good law."[145] What critics of judicial deference to administrative power must do is highlight the weaknesses of the legal arguments upon which deference rests and chart an alternative course with sufficient detail to guide judges in resisting assertions of administrative power.

III. Restoring Law's Supremacy

Vermeule's most forceful criticism of opponents of administrative power and judicial deference is that the latter do not have a plan. If administrative power and judicial deference are not deeply rooted in our nation's history and traditions, they have nonetheless been embraced by all three branches of our government for more than a century. Even if Hamburger, Lawson, and others are correct that the administrative state is unconstitutional and the judiciary has abdicated its duty in ratifying it, how should we even begin to repair the damage that has been done?

I share Vermeule's doubts that many judges are likely at present or in the foreseeable future to lead a charge against administrative power in the name of the Constitution or the rule of law. Yet judges are legally and indeed morally bound to maintain the rule of law by giving effect to the "Supreme Law of the Land."[146] It is imperative that they understand their constitutional duties and evaluate assertions of administrative power in a manner that equips them to discharge those duties; so long as they hold judicial office, they must not evade those duties. Further, by focusing specifically on judicial duty, we can avoid presenting judges with a seemingly impossible task.

A. The Letter and the Spirit of the Law

We have seen that Vermeule believes that adjudication in cases involving administrative power ought to be a particular kind of marginalist enterprise. In his view, judicial scrutiny ought to reflect judges' potential contributions to a process that begins with agency decision-making—and it should be deferential because judges have little to contribute.

There is a stark contrast between this conception of the judicial role and that which informed the drafting of Article III. During the Founding Era, judges were not viewed as part of a decision-making process that commenced in the other branches. Rather, judges were understood to have a duty to exercise independent judgment in accordance with the law of the land in cases properly before them, without deference to the beliefs or desires of government officials or members of the general public and without imposing their own extralegal beliefs or desires.[147] It was thought that judges contributed to the proper functioning of the system of government of which they were a part, not by

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139 *Id.* at 211 (quoting Adam Tomkins, Our Republican Constitution 70-71, 74 (2005) (quoting Margaret Judson, The Crisis Of The Constitution: An Essay In Constitutional And Political Thought In England, 1603–1645, at 264 (1949) (quoting Edward Coke, Speech in the House of Commons (July 6, 1628)))). As Hamburger has pointed out, Vermeule is here "quoting a secondary source . . . who is quoting another secondary source . . . who is in turn quoting Edward Coke," and thus the quote is "two steps removed from its context." *Vermeule Unbound*, *supra* note 38, at 226.

140 *Id.*

141 Law and Judicial Duty, *supra* note 8, at 148-56.

142 *See Vermeule Unbound*, *supra* note 38, at 226 (Coke was "merely acknowledging . . . that judges often gave way to pressures from the Crown," and he "elsewhere resolutely insisted that the office of the judges precluded any deference to prerogative interpretation.").

143 *See* Daniel R. Ernst, *Ernst Freund, Felix Frankfurter, and the American Rechtsstaat: A Transatlantic Shipwreck, 1894-1932,* 23 Studies in American Political Development 171 (2009) (tracing the influence of continental jurists and treatises on Progressive theorists); Greve, *supra* note 137 (observing that "Woodrow Wilson, Ernst Freund, Frank Goodnow, and other architects of administrative law and builders of the administrative state" did not cite Founding-era precedents, and that they cast "their project [as] a genuine innovation—a departure from the constitutional framework, not an elaboration of it").

144 *See* Daniel J. Gifford, *The New Deal Regulatory Model: A History of Criticisms and Refinements*, 68 Minn. L. Rev. 299, 306-07 (1983) (describing New-Deal-era calls for deference to agencies' expertise); Mark Tushnet, *Administrative Law in the 1930s: The Supreme Court's Accommodation of Progressive Legal Theory*, 60 Duke L.J. 1565, 1623 (2011) (New Dealers regarded "departure from deference to expert judgment" as a "departure from objective reality").

145 For a partial list of "universally derided" decisions that fall into this category, see Suzanna Sherry, *Why We Need More Judicial Activism* 1, 8-9, Vanderbilt University Law School, Public Law and Legal Theory, Working Paper No. 13-3 (2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id_2213372 (last visited December 27, 2016).

146 U.S. Const. art. VI, cl. 2.

147 *See* Law and Judicial Duty, *supra* note 8, at 507-36.

thinking institutionally, but by focusing on the merits of particular cases.[148] In economic terms, this case-specific focus enabled judges to capitalize upon their comparative advantage, which did not lie in wholesale system design, but in retail evaluation of whether particular government actions were lawful.

What could persuade judges to focus their attention in this way? As Hamburger has shown, more than life tenure or undiminished salaries, a particular conception of judicial duty—and a commitment to fulfilling it—was understood to be essential.[149] That duty was symbolized by and assumed through an oath. The oath initially had religious significance; American judges who often found themselves isolated from their communities[150] in evaluating the lawfulness of legislative enactments steeled themselves to fear not men but only God.[151] As they faced down hostile legislative majorities, judges could take comfort in the fact that they were emulating the divine lawgiver in seeking to arrive at an accurate understanding of the law and to impartially give effect to it.

Judges did not have the luxury of infinite time to spend on getting the right answer in any given case, and they inevitably found themselves interpreting and applying written instruments the text of which was insufficient to produce determinate answers to particular questions. Thus, they were forced to rely upon default rules of construction. The distinction between the linguistic meaning of a provision of a written instrument and that instrument's fundamental purpose or function—whether a contract or a constitution—was expressed through a Christian trope: the distinction between the "letter" and the "spirit."[152] Where interpretation of the letter—the linguistic meaning of the text—did not yield a determinate answer, judges had recourse to the spirit—the original function or purpose of that text.[153]

All of this might seem rather remote from the concerns of contemporary judges. But even in a more secular age, the concept of judicial duty and its association with the oath holds the potential to shape how judges approach cases, and the distinction between the letter and the spirit can be of use in resolving them. In a compelling recent paper, Richard Re has detailed how the oath required of all government officials to "support *this* Constitution"[154] can "give[] rise to personal moral obligations" even today.[155] Re explains that "[n]o hand—either dead or alive—forces individuals to run for office, take the oath, or lead others to think that they will take 'the Constitution' seriously."[156] Once officials do make such a promise, however, they are legally entrusted with power that they would not otherwise possess—power over their fellow citizens, power to ensure that their fellow citizens are not subjected to unlawful exercises of power.[157] The oath thus "functions as a bridge between the document and the duty to obey it"—more specifically, it creates a morally binding promise "to adopt an interpretive theory tethered to the Constitution's text and history."[158]

The distinction between letter and spirit also captures an enduring truth. Written instruments are calculated to serve particular functions, and they would be without value if they did not do so. Having recourse to the function, or spirit, of the law where the letter fails—as it may—can equip judges to give effect to the law as best they can. Discerning the spirit of the law entails investigation into the context in which the law was enacted, with an eye to identifying the function or functions that particular provisions would have reasonably be understood to serve. Judges may not, however, disregard the letter in search of the spirit—to do so would violate the duty of good faith that is imposed upon them qua fiduciaries.[159]

1. Following the Letter: Independent Judgment

What then is a judge who is conscious of and faithful to his or her duty to give effect to the law—both letter and spirit—to do in cases involving administrative power? At least two of the doctrines of deference that Vermeule celebrates are prohibited by the letter of the law—that is, by its text.

Chevron deference and *Auer* deference require judges to defer to agencies' "reasonable" interpretations of statutes or regulations, respectively, upon finding that the relevant language is "ambiguous." To the extent that judges accord such interpretive deference, they cannot be said to exercise independent judgment, which entails an independent effort to ascertain the meaning of the law and give effect to it.[160] Because the duty of independent

148 *See id.* at 112 ("[J]udges ordinarily assumed that they served the function of enforcing the constitution and protecting liberty by doing their duty—by deciding in accord with the law of the land.").

149 *See id.* at 577 ("The ideals of law and judicial duty . . . were presuppositions *about* law rather than doctrines *of* law, and Americans could therefore usually take these ideals for granted in thinking about their constitutions and judges.").

150 The principal threats to individual liberty during the Founding Era came from "legislatures which were probably as equally and fairly representative of the people as any legislatures in history." *See* Gordon S. Wood, The Creation of the American Republic, 1776-1787 404 (2d ed. 1998).

151 *See* Law and Judicial Duty, *supra* note 8, at 106-12.

152 *Id.* at 52-56.

153 *See generally* Robert G. Natelson, *The Founders' Hermeneutic: The Real Original Understanding of Original Intent*, 68 Ohio St. L.J. 1239 (2007) (collecting cases and concluding that reliance upon the spirit "reflected the norm in Anglo-American jurisprudence").

154 U.S. Const. art. VI, cl. 3 (emphasis added).

155 Richard M. Re, *Promising the Constitution*, 110 Nw. U. L. Rev. 299 (2016).

156 *Id.* at 308.

157 *See* Joseph Raz, The Authority of Law 239 (2d ed. 2009) (explaining that "an oath may impose a moral obligation to obey (e.g. when voluntarily undertaken prior to assuming an office of state which one is under no compulsion or great pressure to assume)"); Steve Sheppard, I Do Solemnly Swear: The Moral Obligations of Legal Officials 107 (2009) (discussing how "[t]he oath represents an assurance that invites reliance upon those subject to the official's authority").

158 Re, *supra* note 155, at 323-24.

159 For a comprehensive presentation of the framework for construction sketched here, see Randy E. Barnett & Evan Bernick, *The Letter and the Spirit: A Theory of Good-Faith Constitutional Construction* (forthcoming).

160 *See Chevron Bias*, *supra* note 95, at 1209 ("A judge's central office or duty, and therefore his power and very identity under Article III, is to exercise his own independent judgment in cases in accord with the law. He

judgment is imposed upon them by Article III's authorization of "[t]he judicial power," judges violate Article III in declining to discharge it.[161]

Any argument that judges are merely deferring to the law when they defer to agency interpretations of statutes and regulations is vulnerable to two fatal objections.[162] First and most fundamentally, Congress has no power to dictate how judges exercise their constitutionally delegated power—and independent judgment lies at the core of "[t]he judicial power."[163] Second, the notion that Congress generally intends for courts to defer to agencies is—as Vermeule has pointed out elsewhere—"rankly fictional."[164] As Aditya Bamzai has shown in an important constitutional and statutory critique of *Chevron* deference, the relevant text of the APA, enriched by the context in which it was adopted, is best understood as instructing judges to engage in independent review—consistent with the Hughesian synthesis.[165] The most one can say on behalf of the view that judges are deferring to the law when they accord *Chevron* and *Auer* deference is that is that *Chevron* and *Auer are the law*—but that just sends us back to the initial question about whether *Chevron* and *Auer* were correctly decided.

In addition, due process of law entails—among other things—*impartial* adjudication, free from bias towards either party.[166] Both *Chevron* and *Auer* deference require judges in cases involving assertions of administrative power to favor the legal position held by the most powerful of parties—the government. That the bias is systematic and the product of adherence to a perceived legal principle rather than dependent upon the proclivities of individual judges only makes it more troubling because it makes it more certain to influence judges' deliberations.[167] According *Chevron* and *Auer* deference thus entails violating the Fifth Amendment.

2. Following the Spirit: Judicial Engagement

Although the Supreme Court has maintained that arbitrary-and-capricious review of agency actions is more rigorous than the modern "rational-basis test," which serves as the default standard of review in constitutional cases, the Court has done little to ground that understanding in the letter or the spirit of the APA.[168] The APA does not sketch the contours of hard-look review or even suggest such a framework—nor, for that matter, does it sketch or suggest a different framework. Any approach to arbitrary-and-capricious review is necessarily a matter of construction rather than interpretation. Accordingly, judges must seek out the spirit of Section 706(2)(A); this in turn requires study of the publicly available context in which the APA was enacted into law.

The story of the APA's enactment is one of hard-fought compromise.[169] That compromise was forged between New Deal Democrats with undiluted faith in technocratic administration on the one hand, and Republicans and conservative Democrats who had become increasingly concerned with what Dean Roscoe Pound described as "administrative absolutism"[170] on the other.[171] The former sought the ratification of the New Deal vision of government-by-experts; the latter called for extensive constraints on executive power.[172]

Neither side got everything that it wanted. The APA provides for *some* separation of rulemaking, prosecution, and adjudication, *some* means through which regulated industries can challenge administrative decisions, and *some* judicial review. But it accepts what Vermeule's frequent co-author Cass Sunstein has described as the "enduring legacy of the [New Deal] period": "[the] insulated administrator, immersed in a particular area of

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cannot defer to executive or other administrative judgments about what the law is.").

161 *See* Law and Judicial Duty, *supra note* 8, at 612-620. Hamburger notes that "[w]hen . . . the U.S. Constitution mentioned the law of the land and the judges, it did not need to spell out the nature of legal obligation or the office and duty of judges," as "ideals of law and judicial duty were so deeply ingrained that they could simply be taken for granted." *Id.* at 618. Proposals for a federal council of revision ultimately failed to win the day at the 1787 Constitutional Convention because of concerns that judges would fail to exercise independent judgment if called upon to evaluate legislation which they had a hand in shaping. Thus, Nathaniel Gorham—speaking for what would ultimately be the winning side of the debate—affirmed that "[j]udges ought to carry into the exposition of the laws no prepossessions with regard to them." *See* 2 The Records of the Federal Convention of 1787 79 (Max Farrand ed., rev. ed. 1937).

162 Perhaps the most influential formulation of this argument can be found in Henry P. Monaghan, *"Marbury" and the Administrative State,* 83 Colum. L. Rev. 1 (1983).

163 *See* Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 Const. Comment. 191, 214 (2001) (explaining that because the judiciary possesses "independent judicial power to ascertain, interpret, and apply the relevant law," it follows that "Congress cannot tell courts how to reason any more than it can tell courts how to decide").

164 *'No,' supra* note 9, at 1556. *See also* Antonin Scalia, *Judicial Deference to Administrative Interpretation of Law*, 1989 Duke L.J. 511, 517 ("In the vast majority of cases I expect that Congress . . . didn't think about the matter at all.").

165 Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation,* 126 Yale L.J. ___, *53-62 (forthcoming 2017), *available at* https://ssrn.com/abstract=2649445 (last visited December 27, 2016).

166 *See* Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process,* 95 Yale L.J. 455, 479 (1986) (finding that impartial adjudication "was considered a crucial element of procedural justice by the common law, by those that established the law of the colonies, and . . . by the Framers of the United States Constitution").

167 *See Chevron Bias*, *supra* note 95, at 1211 (arguing that "institutionally declared and thus systematic precommitment in favor of the government" is "more remarkable and worrisome").

168 *See State Farm*, 463 U.S. at 43 n.9.

169 For a lucid history, see generally Daniel R. Ernst, Tocqueville's Nightmare: The Administrative State Emerges in America, 1900-1940 (2014).

170 *See* Report of the Special Committee on Administrative Law, 63 Ann. Rep. A.B.A. 331, 342-45 (1938).

171 Martin Shapiro, *APA: Past, Present, Future*, 72 Va. L. Rev. 447, 452 (1986).

172 *Id.* at 453.

expertise, equipped with broad discretion, and expected to carry out a set of traditionally separated functions."[173]

If we understand the function of the APA generally and Section 706(2)(A) in particular as a means of ensuring that the administrative state can capture the goods that it was created to provide while safeguarding citizens against the abuse of agency discretion, the hard-look review showcased in *State Farm* is well-tailored to accomplish it. As defined and deployed in *State Farm*, hard-look review is a form of judicial engagement that can equip judges to discharge their constitutional duties.[174]

State Farm involved a 1982 decision by President Ronald Reagan's National Highway Traffic Safety Administration (NHTSA) to revoke regulations issued by his predecessor's administration.[175] Those regulations would have required vehicles produced after a certain date to include either airbags or automatic seat belts. The NHTSA determined that manufacturers would voluntarily include seat belts rather than airbags and that the regulation would not sufficiently increase seatbelt usage to justify its costs, given that "so many individuals will detach the mechanism."[176] Deploying a framework with both procedural and substantive dimensions,[177] the Court determined that the agency had erred in failing to consider viable alternatives and in making a policy choice that was unreasonable in light of the evidence in the record. The Court pointed out that the NHTSA's claim that "detachable automatic seat belts cannot be predicted to yield a substantial increase in usage" flew in the face of "empirical evidence on the record, consisting of surveys of drivers of automobiles equipped with passive belts, [which] reveal[ed] more than a doubling of the usage rate experienced with manual belts."[178] It also criticized the agency for failing to consider requiring the installation of airbags, even though the agency had "acknowledged the lifesaving potential of the airbag" and despite the fact that airbags cannot be detached.[179]

The hard-look review showcased in *State Farm* is comparable to the rationality review that served as the default standard of constitutional review prior to the Supreme Court's decision in *Williamson v. Lee Optical*,[180] and which we find today in cases in which the Court applies "rational basis with bite"; while deferential, it is not toothless.[181] It requires an actual, rather than a hypothetical, fit between evidence and action.[182] It requires judges to review the record to determine whether the agency considered the evidence before it in light of contextually relevant factors *prior to making a decision*.[183] And while litigants ultimately bear the burden of rebutting a presumption that the agency is acting lawfully, that presumption *is* rebuttable.[184]

Implementing the *State Farm* model of arbitrary-and-capricious review more consistently would, of course, be costly. Time, information, and other resources are scarce, both for judges and for agency officials, and Vermeule is right that "[d]ollars and lives may be lost" if agencies cannot act quickly in certain contexts.[185] And yet there is ample reason to believe that the benefits of hard-look review outweigh the costs. As Sunstein observed several decades ago, "[t]he requirement of detailed explanation has been a powerful impediment to arbitrary or improperly motivated agency decisions," it and addresses lingering concerns about the "uneasy constitutional position of the administrative agency" by ensuring that agencies will be

173 Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 Harv. L. Rev. 421 (1987).

174 *See supra* note 90. *See* Clark M. Neily III, Terms of Engagement: How Our Courts Should Enforce the Constitution's Promise of Limited Government 35 (2013) (defining judicial engagement as "a genuine search for truth by a neutral adjudicator on the basis of reliable evidence" and explaining that "[a] properly engaged judge . . . seeks to determine the government's true ends" by "consider[ing] the relationship between the government's stated objective and the means chosen to pursue it").

175 The facts and ultimate outcome of *State Farm* serve to illustrate that there is nothing inherently deregulatory about hard-look review. Indeed, hard-look review was chiefly developed by the United States Court of Appeals for the District of Columbia Circuit, which at the time may have been as *pro*-regulation as any appellate court in the nation's history. For an illuminating discussion of the D.C. Circuit's behavior during the 1960s and 1970s, see Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 Sup. Ct. Rev. 345 (1978).

176 *State Farm*, 463 U.S. at 47.

177 *See* Cass R. Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 Sup. Ct. Rev. 177, 210.

178 *State Farm*, 463 U.S. at 53.

179 *Id.* at 47.

180 348 U.S. 483 (1955). *See* Randy E. Barnett, *Judicial Engagement Through the Lens of* Lee Optical, 19 Geo. Mason L. Rev. 845 (2012) (comparing the lower court decision in *Lee Optical* with the Supreme Court's decision a year later in order to illuminate the difference between the then-prevailing approach to rationality review and the modern rational-basis test).

181 The term "rational basis with bite" was coined in Gail R. Pettinga, *Rational Basis With Bite: Intermediate Scrutiny By Any Other Name*, 62 Ind. L.J. 779 (1987). Notable examples of rational-basis-with-bite include Eisenstadt v. Baird, 405 U.S. 438 (1972); Department of Agric. v. Moreno, 413 U.S. 528 (1973); Metropolitan Life Ins. Co. v. Ward, 105 S. Ct. 1676 (1985); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985); Romer v. Evans, 517 U.S. 620 (1996); United States v. Windsor, 133 S. Ct. 2675 (2013).

182 *Compare State Farm*, 463 U.S. 29 *with* FCC v. Beach Communications, Inc., 508 U.S. 307, 315 (1993) (stating that "a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification").

183 *Compare State Farm*, 463 U.S. 29 *with Beach Communications*, 508 U.S. at 315 (stating that "because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature").

184 Taken literally, the presumption of constitutionality articulated in *Lee Optical* and *Beach Communications* would be impossible to rebut. *See* Timothy Sandefur, The Right to Earn a Living 129 (2013) ("Disproving an arbitrary claim is a hopeless task because an arbitrary assertion can simply be reinforced by other arbitrary assertions.").

185 Law's Abnegation, *supra* note 10, at 185.

held accountable for their decisions.[186] It provides a framework for ensuring that agency officials comply with the same fiduciary duties that the Constitution imposes on all government actors. It thereby promotes the actual and perceived legitimacy of administrative power, as the APA was designed to do.

Vermeule's concern that demanding a "rational connection between the facts found and the choice made" demands too much of agencies that must act under conditions of uncertainty is valid. Yet it may be possible to address that concern without doing away with hard-look review entirely. The "rationally arbitrary" decisions that Vermeule regards as critical to the functioning of the administrative state are not arbitrary in the sense of being the product of mere will. They are reality-based, context-sensitive decisions, grounded in the (limited) information available to the decision-makers.[187] Nothing prevents agencies from explaining in detail why they decided as they did, as well as why any other decision would have been more, less, or equally rational. Judges should be aware that they could be misled concerning uncertainty, but if they are convinced that there is uncertainty and that the agency has outlined legally legitimate second-order reasons for its decision, judges could allow the agency to proceed.

B. Legislative and Executive Duty: The Need for Constitutional Engagement

On Vermeule's account, judges arrived at deference because there were and are good legal reasons for them to defer. Were judges to become convinced that there are *better* legal reasons to engage, it stands to reason that the arc of administrative jurisprudence could bend away from judicial deference and toward judicial engagement.

Yet such a change requires that officials in the other branches discharge their own constitutional duties. If Congress continues to enact statutes granting vast and unspecified powers to agencies and agencies continue to argue that they are entitled to deference when their actions are challenged, the judiciary will continue to face enormous pressure to defer. The pressure upon judges to defer will be diminished considerably if the other branches act consistently with their own constitutional duties, neither enacting statutes that purport to subdelegate legislative power nor asking for deference when their actions are challenged in court.

Because the judiciary has acquiesced in broad delegation and itself forged the abovementioned doctrines, relieving this pressure will require legislators and executive officials to articulate and act upon alternative visions of constitutional and statutory meaning. Independent constitutional deliberation by members of branches that are associated with "will" and "force" rather than "merely judgment" may sound quaint and unrealistic, but examples of such deliberation can be found throughout American history.[188] While the judiciary's status as a separate branch of government that neither formulates nor executes policy and its relative insulation from extralegal pressures gives it certain institutional advantages in evaluating the legality (if not the wisdom) of particular actions,[189] nonjudicial actors can and do deliberate independently about the meaning of our law and the principles that undergird it.[190]

Indeed, legislators and executive branch officials are obliged by their oaths to independently interpret the Constitution and construct rules for implementing it in the statutes they enact and execute. Like judges, legislators and executive officials are elevated to public office only through processes authorized by the Constitution and only after taking an oath of fidelity to "this Constitution."[191] Congress is empowered to enact measures that are "necessary and proper"[192] for carrying delegated powers into execution, and to "lay and collect Taxes, Duties, Imposts, and Excises" in order to "provide for the . . . general Welfare"[193]; the President is required to "take Care that the Laws be faithfully executed."[194] All of this language, writes Natelson, sounds in fiduciary law and discloses a "purpose . . . to erect a government in which public officials would be bound by fiduciary duties."[195] Thus, like judges, legislators and executive branch officials are public fiduciaries with corresponding duties, including the duty to follow the letter and the spirit of their constitutional instructions.[196]

IV. Conclusion

Law's Abnegation is the work of a legal scholar of the first rank at the height of his considerable powers. If Vermeule's central thesis is ultimately unconvincing, the problem may lie less with the advocate than with his cause. Broad judicial deference to administrative power may well be the product of serious investigation into extant legal materials and careful reflection upon them in a world very different from that which the Framers knew.

186 *See* Sunstein, *supra* note 173, at 471. *See also* Cass R. Sunstein, *In Defense of the Hard Look: Judicial Activism and Administrative Law*, 7 Harv. J.L. & Pub. Pol'y 51, 53 (1984) (defending hard-look review on the grounds that it "operates as a means of determining whether agencies have disregarded the values chartered in regulatory statutes").

187 *See* Aristotle, Nicomachean Ethics, 1.3, at 4 (Terence Erwin trans., 1985) ("[T]he educated person seeks exactness in each area to the extent that the nature of the subject allows.").

188 The Federalist No. 78 (Hamilton), *supra* note 6, at 402. For a detailed breakdown of several notable examples of constitutional construction by nonjudicial actors, see generally Keith E. Whittington, Constitutional Construction: Divided Powers and Constitutional Meaning (2001).

189 *See* Jonathan R. Siegel, *Judicial Interpretation in the Cost-Benefit Crucible*, 92 Minn. L. Rev. 387, 419-33 (2007).

190 *See* Keith E. Whittington et al., "The Constitution and Congressional Committees, 1971-2000," *in* The Least Examined Branch: The Role of Legislatures in the Constitutional State (Richard Bauman & Tsvi Kahana eds., 2006) (documenting myriad hearings devoted to constitutional issues—but finding that the percentage of hearings raising significant constitutional issues has declined throughout Congress over the last thirty years).

191 U.S. Const. art. VI, cl. 3.

192 U.S. Const. art. I, §8, cl. 18.

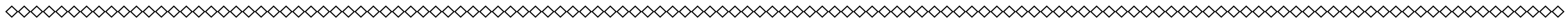
193 U.S. Const. art I, §1, cl. 1.

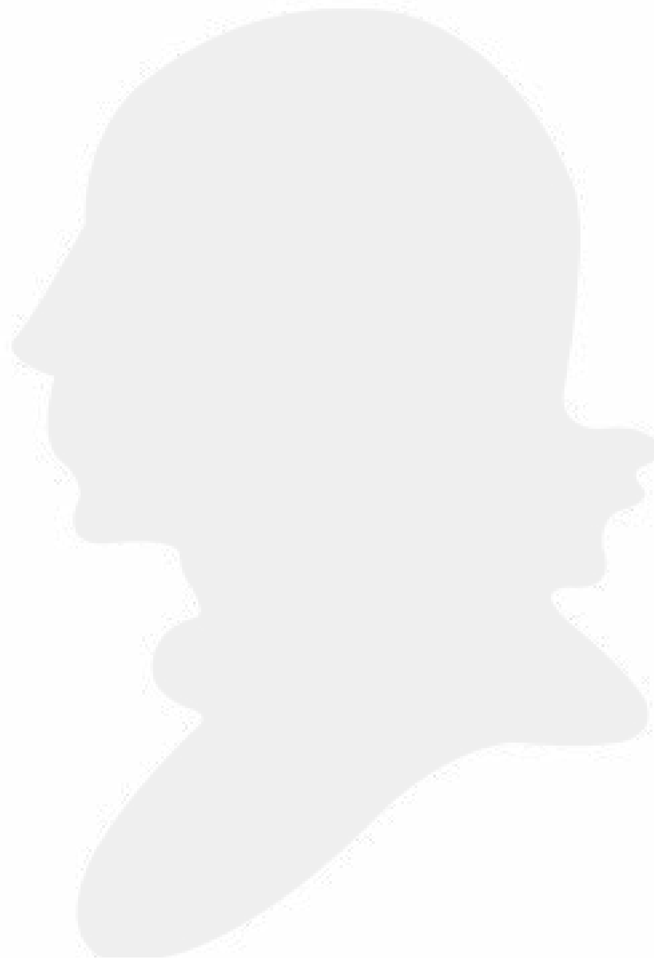
194 U.S. Const. art II, §3.

195 The Origins of the Necessary and Proper Clause, *supra* note 119, at 53.

196 *Id.* at 57.

But even if Vermeule has advanced the best possible argument for deference, reclaiming territory long since abandoned by the courts to administrative power is neither absurd nor unwise. To those who would take up that task, *Law's Abnegation* is not only a challenge, but a potential source of inspiration. Decades' worth of abnegation will not easily be corrected, but our judicial lions have this consolation—that the letter and the spirit of "the Supreme Law of the Land" is on their side.





Professionals, Amateurs, and Rape: How Colleges Are Failing Their Students

by Paul J. Larkin, Jr.

A Review of:
The Campus Rape Frenzy: The Attack on Due Process at America's Universities, by KC Johnson & Stuart Taylor, Jr.

https://www.amazon.com/Campus-Rape-Frenzy-America%C2%92s-Universities/dp/1594038856

Note from the Editor:

The reviewer favorably discusses a new book critiquing universities' approach to handing sexual assault allegations, while providing context for the discussion of such a controversial topic.

The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the authors. Whenever we publish an article that advocates for a particular position, as here, we offer links to other perspectives on the issue, including ones opposed to the position taken in the article. We also invite responses from our readers. To join the debate, please email us at info@fedsoc.org.

• Know Your IX, *In the News*, http://knowyourix.org/know-your-ix-in-the-news-2/.

• Amanda Hess, *To Prevent Rape on College Campuses, Focus on the Rapists, Not the Victims*, Slate XX factor (Oct. 16, 2013), http://www.slate.com/blogs/xx_factor/2013/10/16/it_s_the_rapists_not_the_drinking_to_prevent_sexual_assault_on_college_campuses.html.

• Jonah Newman and Libby Sander, *Promise Unfulfilled?*, The Chronicle of Higher Education (April 30, 2014), http://www.chronicle.com/article/Promise-Unfulfilled-/146299/.

• *The Hunting Ground* (film), http://thehuntinggroundfilm.com/.

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In the interest of full disclosure, one of the authors—Stuart Taylor, Jr.—is a friend of mine, and I discussed the subject of the book with him while he worked on it. See *KC Johnson & Stuart Taylor, Jr., The Campus Rape Frenzy: The Attack on Due Process at America's Universities 277 (2017). I leave it to the reader to decide whether either fact affects my objectivity.*

In their new book *The Campus Rape Frenzy: The Attack on Due Process at America's Universities*, KC Johnson and Stuart Taylor, Jr. address a very controversial subject: sexual assault on American college campuses. They argue that universities, acting (sometimes, it seems, readily) at the behest of the federal government, have overreacted to the problem of campus sexual assault. The authors claim this is so for two reasons: For one thing, the incidence of sexual assault, while greater than anyone would like it to be, is far less than the federal government and universities claim it to be. In addition, colleges have adopted disciplinary procedures that virtually guarantee that even innocent male students[1] will be convicted in order to satisfy the federal government and thereby avoid the risk of losing federal funds.[2]

Society's attitude toward sex offenses has matured over time. Consider popular culture. At the beginning of every episode of the television show *Law & Order: Special Victims Unit*, we are told that sexual offenses are "especially heinous" and that "an elite squad" of the New York City Police Department is responsible for investigating those crimes. The first half of that opening has always been true, but, unfortunately, the second has not.

Rape has been a crime throughout our nation's history and is one of the most heinous offenses on the books.[3] In fact, until recently, it was punishable by death in a considerable number of American jurisdictions.[4] At the same time, it was not too long ago that law enforcement authorities distinguished between "rape" and "real rape."[5] That attitude too often enabled a rapist to escape

1 College sexual assault disciplinary policies are facially neutral with respect to gender, but approximately 99 percent of the accused students are men. KC Johnson & Stuart Taylor, Jr., The Campus Rape Frenzy: The Attack on Due Process at America's Universities 280 n.18 (2017).

2 For other statements of the authors' views, see KC Johnson, *How American College Campuses Have Become Anti-Due Process*, The Heritage Foundation, Backgrounder No. 3113 (Aug. 2, 2016), file:///C:/Users/larkinp/Downloads/BG3113.pdf; KC Johnson & Stuart Taylor, Jr., *Campus sexual assault and the Brown trial*, The Volokh Conspiracy, Wash. Post (Feb. 2, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/02/02/campus-sexual-assault-and-the-brown-trial/?utm_term=.9c372647ad29; KC Johnson & Stuart Taylor, Jr., *Campus due process in the courts*, The Volokh Conspiracy, Wash. Post (Feb. 1, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/02/01/campus-due-process-in-the-courts/?utm_term=.3aa3f6048ae2; KC Johnson & Stuart Taylor, Jr., *The path to Obama's 'Dear Colleague' letter*, The Volokh Conspiracy, Wash. Post (Jan. 31, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/31/the-path-to-obamas-dear-colleague-letter/?utm_term=.d46db22ca045.

3 The Campus Rape Frenzy, *supra* note 1 at 10 ("The mere existence of rape instills fear in its victims and potential victims, especially women, in all segments of society. It inflicts deep psychological, emotional, and physical harms, which can last for a lifetime.") (footnote omitted).

4 *See* Kennedy v. Louisiana, 554 U.S. 407, 422, *modified on denial of rehearing*, 554 U.S. 945 (2008) (noting that fact but holding nonetheless that the death penalty was unconstitutional for the rape of a minor); Coker v. Georgia, 433 U.S. 584, 593-95 (1977) (same, for the rape of an adult).

5 Susan Estrich, *Rape*, 95 Yale L.J. 1087, 1088 (1986) ("I learned, much later, that I had 'really' been raped. Unlike, say, the woman who claimed she'd been raped by a man she actually knew, and was with voluntarily. Unlike, say, women who are 'asking for it,' and get what they deserve. I would listen as seemingly intelligent people explained these distinctions

arrest and conviction for a crime that he committed, in some cases more than once. The result was injustice for the women already victimized by his crime, as well as danger for potential future victims of a rapist still at large.

The criminal justice system has not halted the crime of rape from recurring, but society has now demonstrated a sincere commitment to bringing rapists to justice.[6] Over the last few decades, the nation's law enforcement community has largely abandoned its antediluvian attitudes toward sex crimes and has modernized its approach to the investigation and prosecution of sexual assault cases. Some large metropolitan police departments now even have special sexual assault units. Most small departments do not, but they often provide detectives with the specialized training needed for the investigation of those crimes and the proper ways to help their victims.[7]

If physical sexual assault were not a big enough problem on its own, women today also can suffer psychological sexual assault from the phenomenon known as "revenge porn"—the post-break-up, nonconsensual online posting of intimate photographs by a former husband or boyfriend that were originally given with an implied expectation of confidentiality.[8] Revenge porn has caused its victims a host of injuries, such as "a debilitating loss of self-esteem, crippling feelings of humiliation and shame, discharge from employment, verbal and physical harassment, and even stalking."[9] Some have been driven to attempt or commit suicide.[10] States and the federal government have attempted to quell this phenomenon by strengthening the criminal, civil, and administrative tools available to the government and to victims.[11] Only time will tell how effective those new responses are.

The physical and psychological injuries caused by sexual assaults are genuine and serious problems, and deciding how to prevent the crimes that cause them is a subject that is worthy of honest discussion. Unfortunately, however, our society too often responds to divisive and delicate issues and crises too quickly and swings the pendulum too far in the other direction. The result is to force a proposed solution into a setting where it does not work well or creates more problems than it sought to resolve. The outcome can be unsatisfactory for both the intended beneficiaries and the unintended victims of the new policy.

That dynamic is a virtual certainty when politics becomes involved. In order to obtain media attention and electoral credit for being the one who "solved" a problem, elected officials can wind up competing to adopt the most draconian response to a social ill to show, for example, that they are "tough on crime," without regard to whether their response actually benefits the victims of a crime or tosses aside individuals who are either innocent of any crime or undeserving of the dreadful punishments they receive. Excessive societal responses are a mistake all by themselves; when those excesses become law, however, the harm they generate only multiplies. The Framers made it difficult to enact a federal statute,[12] so once a bill becomes a law, legislators must overcome the same difficulties to revise or repeal it that they earlier bore to pass it.[13] The result is that, while a bad problem might be only transitory, a bad law could last forever (or a very long time). But in a day when instant solutions don't come fast enough for some people, anyone who counsels for caution when considering a political or legal answer to a problem often gets run over by the throng who believe that their answer is correct, that their solution that will work, and that their proposal should be implemented yesterday.[14]

I. Overcorrection and Amateurism on College Campuses

According to *The Campus Rape Frenzy*, American universities have overreacted to allegations that male students

to me, and marvel; later I read about them in books, court opinions, and empirical studies. It is bad enough to be a 'real' rape victim. How terrible to be—what to call it—a 'not real' rape victim."); *see also* Susan Estrich, Real Rape 27-56 (1987).

6 We still can and should do better. *See*, *e.g.*, Stephen J. Schulhofer, Unwanted Sex: The Culture of Intimidation and the Failure of Law 1-16 (1998). In law enforcement's defense, however, society has also not eliminated murder, robbery, burglary, or any of the other crimes that have existed since King Ethelbert drafted the first English criminal code in approximately 600 C.E. The perfect should not be the enemy of the good.

7 *See* The Campus Rape Frenzy, *supra* note 1 at 22-23.

8 *See, e.g.*, Paul J. Larkin, Jr., *Revenge Porn, State Law, and Free Speech*, 48 Loyola L.A. L. Rev. 57 (2015).

9 *Id*. at 65.

10 *Id*. at 66.

11 *Id*. at 66-70; *see also* Paul J. Larkin, Jr., Fighting Back Against "Revenge Porn," The Heritage Foundation, Legal Memorandum No. 199 (Feb. 23, 2017).

12 *See* INS v. Chadha, 462 U.S. 919 (1983).

13 *See* Clinton v. City of New York, 524 U.S. 417 (1998). In fact, statutes generally are *more* difficult to repeal than to pass. Over time, the public also becomes accustomed to the new statute, making it increasingly difficult to generate sufficient interest to repeal it absent some large-scale, adverse event triggered by the law. Plus, once on the books a law benefits one or more interest groups that can and will mobilize their efforts to defend whatever benefit to which they are now legally entitled. *See* Mancur Olson, The Logic of Collective Action (1965). That has happened in the case of campus sexual assault, because a number of companies have arisen to advise colleges how to comply with Title IX.

14 Consider how the federal sentencing laws for the distribution of crack cocaine came into being. The emergence of crack in the nation's African-American communities in the mid-1980s led Congress to react—overreact, in truth—by passing legislation imposing harsh mandatory minimum sentences on the distribution of crack cocaine. The Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified at 21 U.S.C. § 841 (2012)) (amended 2010). The initial proposal was to punish the distribution of crack more severely than that of powdered cocaine because it was seen as more addictive, debilitating, and dangerous. *See*, *e.g*., United States v. Thompson, 27 F.3d 671, 678 & n.3 (D.C. Cir. 1994). Yet members of Congress bid up the sentencing disparity in a real-life version of *Quien Es Mas Macho?* (http://norewardisworththis.tumblr.com/post/64845798933/snl-quien-es-mas-macho-sketch-from-21719) until the amount of crack that triggered lengthy terms of imprisonment was only one percent of the amount of powdered cocaine. *See*, *e.g*., Randall Kennedy, Race, Crime, and the Law 368-74 (1988); Naomi Murakawa, The First Civil Right: How Liberals Built Prison America 124-25 (2014); Paul J. Larkin, Jr., *Crack Cocaine, Congressional Inaction, and Equal Protection*, 37 Harv. J.L. & Pub. Pol'y 241, 241-42 (2014). Congress later recognized that its 1986 legislation was unduly severe and, in 2010, ratcheted down the powder-to-crack ratio from 100:1 to 18:1. The Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (codified at 21 U.S.C. § 841 (2012)). But that revision took more than two decades to

have sexually assaulted female students. As Johnson and Taylor have documented in elaborate detail, over the last six-plus years, colleges have chosen to refer sexual assault allegations to their own school disciplinary procedures rather than to law enforcement—that is, to use amateurs rather than professionals to investigate and adjudicate allegations of serious crimes. That decision is problematic. Amateurs might make acceptable sleuths when a matter is relatively easy to investigate (e.g., When did the student return the book to the library? Did the student plagiarize a term paper?). But amateurs are out of their depth when it comes to the investigation of a complex crime like sexual assault. Yet many colleges are using amateurs to handle these allegations today.

Traditionally, colleges never tried to act as junior varsity police departments. The historic mission of a college or university has been to educate its students, to train their minds so that they can solve society's financial, social, political, or legal ills after graduation (perhaps providing some brief exposure to those problems and their attempted resolution during internships). Members of the faculty have had the two-fold responsibility of teaching students and conducting research. Administrators have made sure that the lights are turned on and the trains run on time. The responsibility to actually solve societal problems or redress their harms has been a task generally reserved for others. Institutions such as the government (e.g., police departments, the courts), private self-governing bodies (e.g., state medical associations), national or local charities (e.g., the American Red Cross), worldwide religious organizations (e.g., United Methodist Committee on Relief), individual churches (e.g., hosts for Alcoholics Anonymous meetings), and others have borne that burden. University faculty who are experts in their field have offered advice on how those other institutions can best address society's problems. But universities themselves have not been the so-called "change agents" because they are not equipped or staffed to handle that chore.

Rape is a problem that colleges are ill equipped to resolve. It is a serious crime requiring the tools that law enforcement institutions can bring to bear in their investigations. Among these tools are the questioning of the victim, witnesses, and any suspects by trained police detectives and rape investigators; acquisition of relevant evidence by the police from the complainant or third parties, either with or without the use of judicial process (e.g., evidence obtained from a physical examination of the complainant, the so-called "rape kit"); reliance on laboratories for scientific analysis of forensic evidence; review of cell phone records such as text messages and email communications; and an impartial analysis of the strength of the proof by an expert in the prosecution of sex crimes. The advantages of specialization in this area are hardly surprising or undesirable. In fact, we ordinarily view specialization as beneficial in an organized but complex society.

Colleges are not exempt from that proposition. Schools may use athletic trainers to handle minor sports injuries, but they turn to orthopedic specialists when surgery might be necessary. Perhaps an even better example is what universities do when they are confronted with legal issues. A university may include a law school among its professional disciplines, but it will turn to an outside law firm, rather than its own law school faculty, to handle difficult legal problems, particularly ones that might involve litigation. Universities do not want law professors who have not been litigators to make their bones at the school's expense.

That outsourcing approach makes particular sense in the case of serious crimes. Colleges would not rely on internal administrative disciplinary procedures were a student to engage in large-scale drug trafficking on campus or commit armed bank robberies off campus. Until recently, colleges have also used that approach for sexual assault, referring allegations that a crime occurred to local law enforcement for investigation and, if justified by the evidence, prosecution. Police departments have the skills and tools to investigate sex offenses, and district attorneys' offices have the learning and experience to make the independent legal judgment whether a crime likely occurred. Colleges don't.

In the abstract, of course, there might be little objection to universities' attempts to intervene in handling sexual assault allegations involving their students. Residential colleges provide their students with a home as well as an education and believe that the college environment should challenge students' minds, not abuse their bodies or ruin their lives. Schools should not have to invoke the cumbersome apparatus of the criminal justice system—or wait until a criminal case becomes final—before learning what happened and deciding whether to administratively punish a guilty student for sexual misconduct. Businesses do not; churches do not; private clubs do not; athletic teams do not;[15] and average individuals do not. So why not allow colleges to make those decisions too? Moreover, juries generally consist of lay members of the community, people untrained and inexperienced in the investigation and prosecution of crimes. If they can be trusted to find the facts carefully in a courtroom in a rape prosecution where the stakes are high (e.g., imprisonment), why not in a classroom in a college disciplinary proceeding where the stakes are far lower (e.g., expulsion)? That seems reasonable.

Unfortunately, as Johnson and Taylor have explained, colleges' responses to sexual assault allegations have made it far too easy to find someone guilty of some type of sexual impropriety. How? To offset their investigative and adjudicatory shortcomings, colleges have adopted overinclusive definitions of "sexual assault" and have rigged the disciplinary procedures so that even amateurs cannot flub them. And the federal government has been their partner in crime.

II. Unjust Procedures

Johnson and Taylor are not the first authors to criticize colleges for adopting an outcome-determinative disciplinary

accomplish and, because it was not made retroactive, it left thousands of offenders imprisoned under the stiff sentences required by the 1986 law that Congress now sees as unjustified. Larkin, *Crack Cocaine*, *supra*, at 243. That omission spurred former President Barack Obama to use his clemency power through his Clemency Project 2014 to reduce what he believed were excessive sentences of imprisonment for some drug offenders. Paul J. Larkin, Jr., *Revitalizing the Clemency Process*, 39 Harv. J.L. & Pub. Pol'y 833, 885-92 (2016).

15 That is, unless your team brings in beaucoup bucks for the university. *See* The Campus Rape Frenzy, *supra* note 1 at 176-79.

system.[16] But no one has documented this phenomenon in the depth they have. *The Campus Rape Frenzy* is an exhaustively researched, elegantly written, detailed analysis of the procedures that colleges have recently adopted to resolve allegations of sexual assault (usually) by women against men across the nation's campuses. Anyone defending those procedures will need to respond to the problems identified in *The Campus Rape Frenzy* because it sets a new standard for criticism of this phenomenon.

Starting with the description of one such case that arose at Amherst and moving on to others at different colleges, Johnson and Taylor discuss approximately 48 different cases, compiling a list of college disciplinary proceedings that have gone seriously awry.[17] Along the way, they also identify a considerable collection of flaws in the procedures that colleges use to adjudicate sexual assault claims, resulting in proceedings that stray far from what most people would expect for a serious charge.[18] For example, a student might be able to file a complaint months or even years after the event at issue.[19] The accused student may have a limited notice of a scheduled hearing. The accused cannot always see the evidence against him, but, if he can, the school might have excised any exculpatory information from the file. The accused student might not be allowed to confront or question his accuser.[20] He could be forced to submit his proposed questions to the board's chair, who is not required to put his suggested questions to the accuser even if her story is filled with contradictions stemming from an alcoholic haze. The accused student is generally not permitted to bring an attorney to the proceeding. And the disciplinary board might consist of administration officials who are biased in favor of a conviction for at least two reasons: they might have been trained to treat almost any evidence as proof of guilt,[21] and they might have a financial stake in seeing a high conviction rate due to their fear that anything else will put at risk their college's federal funding.[22]

At bottom, Johnson and Taylor argue that American colleges have railroaded male students accused of sexual assault by subjecting them to the equivalent of show trials, hearings with a foregone conclusion disguised as fair judicial proceedings. Their tale should be frightening to anyone who believes that, when allegations of serious, life-changing wrongdoing are at stake, colleges—like any other decision-maker—should use procedures that satisfy our notions of fundamental fairness. Put another way, most people believe that colleges should be no more able than the infamous prosecutor Mike Nifong[23] to mock justice by deciding questions of guilt or innocence via hearings that are better described as parodies of justice than as fundamentally fair proceedings.

After you read Johnson and Taylor's account of this problem, step back and ask yourself this question: If you were tasked with the responsibility of crafting a disciplinary system that guaranteed the conviction of 90+ percent of the male students charged with campus sexual offenses while also giving the appearance of affording accused students a fair hearing, wouldn't you come up with precisely the same procedures that Johnson and Taylor have criticized? It is disturbing that the answer to that question will almost always be "Yes." The law permits a decisionmaker to infer that someone intends the natural and probable consequence of his actions. Here, it is an entirely reasonable inference that colleges know what they are doing and intend the outcomes described by Johnson and Taylor.

III. Campus Rape Culture

How did we wind up in this predicament? According to Johnson and Taylor, the story began three decades ago with the writings of feminist authors Andrea Dworkin and Catharine MacKinnon. Dworkin maintained that, in a patriarchal society, the physical, social, political, and legal dominance exercised by men over women infected sexual relationships between the two, often leaving women with little ability to truly consent to sex. MacKinnon took the position that sex could amount to rape if the woman later regretted it. In each case, the author's espoused theory of rape effectively eliminated the possibility of freely given

16 Other authors have expressed many of the same criticisms found in *The Campus Rape Frenzy*, but they have not offered the same level of detail found in Johnson and Taylor's book. *See*, *e.g.*, Katie Roiphe, The Morning After: Sex, Fear, and Feminism (1994) ("'Rape' has become a catchall expression, a word used to define everything that is unpleasant and disturbing about relations between the sexes. Students say things like 'I realize that sexual harassment is a kind of rape.' If we refer to a spectrum of behavior from emotional pressure to sexual harassment as rape, then the idea itself gets diluted.") (footnote omitted); Heather MacDonald, *An Assault on Common Sense*, The Weekly Standard (Nov. 2, 2015), http://www.weeklystandard.com/an-assault-on-common-sense/article/1051200; Heather MacDonald, *The Campus Rape Myth*, City J. (Winter 2008), https://www.city-journal.org/html/campus-rape-myth-13061.html; Katie Roiphe, *Date Rape's Other Victim*, N.Y. Times Mag. (June 13, 1993), http://www.nytimes.com/1993/06/13/magazine/date-rape-s-other-victim.html?pagewanted=all; Ashe Schow, *Campus sexual assault is rarely black and white*, The Examiner (Oct. 1, 2015), https://www.highbeam.com/doc/1P2-38848693.html; Robert Shibley, *Time to Reform the Kangaroo Courts on Campus*, Wall St. J. (Dec. 29, 2016), https://www.wsj.com/articles/time-to-reform-the-kangaroo-courts-on-campus-1482882574.

17 The Campus Rape Frenzy, *supra* note 1 at 11.

18 *See id.* at 147-49 (describing the procedures used at Stanford University).

19 *See id.* at 148.

20 *See id.*

21 *See id.* ("Stanford provided special guilt-presuming training for disciplinary panelists. The 2010-2011 training manual advised that 'act[ing] persuasive and logical' or being 'vague about events and omit[ting] details' should be considered signs of guilt in the accused.").

22 *Cf.* Tumey v. Ohio, 273 U.S. 510, 523 (1927) (holding unconstitutional a state law conditioning a portion of a judge's salary on the number of judgments of conviction he enters, saying "it certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case").

23 The villain of Stuart Taylor, Jr. & KC Johnson, Until Proven Innocent: Political Correctness and the Shameful Injustices of the Duke Lacrosse Rape Case (2008). Johnson and Taylor summarize that book in their new one. The Campus Rape Frenzy, *supra* note 1 at 69-79.

consent. One theory rendered consent impossible; the other allowed it to be retroactively erased.[24]

In the 1980s, those theories were just that—theories. Beginning a decade later, however, they started down the road to becoming law.

In 1991, Antioch College became the first institution to implement such an approach as a disciplinary rule. It adopted a policy that required a male student to obtain consent from a woman on a step-by-step basis from the first to the last physical contact between them. The Antioch policy was criticized, even derided in some quarters, including in a *Saturday Night Live* parody.[25] But its supporters had the last laugh.

On April 4, 2011, the Office of Civil Rights (OCR) in the Obama Administration's Department of Education changed the discussion. OCR circulated an advisory opinion in the form of a "Dear Colleague" letter, in which it set forth its interpretation of how Title IX of the Education Amendments of 1972[26] applied in the case of a college's handling of a female student's sexual assault claim.[27] Colleges deem OCR's views as being of considerable importance because it can decide whether a college receiving federal funds—which virtually all of them do—has complied with Title IX and, if not, whether it should have its federal funds docked in whole or in part. Accordingly, given OCR's minatory presence, the letter effectively directed universities to adopt a variety of procedures that increase the likelihood of conviction: using no more stringent standard of proof than the preponderance standard when determining the truth of an allegation, forbidding cross-examination of the claimant by the accused, allowing accusers to appeal "not guilty" findings, and more.[28] To justify those requirements, the letter rested on two bold premises: 20 percent of college women will be sexually assaulted at some point during their college years, and only a trivial number of sexual assault claims are unfounded.

Johnson and Taylor criticize both the procedures that OCR requires and the grounds OCR uses to justify those procedures. Johnson and Taylor maintain that, as applied by colleges, the OCR procedures are so one-sided as to virtually guarantee a conviction in every case where the complainant does not admit to fabricating her claim or offer statements that are so wildly inconsistent that any reasonable person would question her veracity or sanity. What is more, Johnson and Taylor identify numerous shortcomings in the justifications offered by OCR for its guidance. "The Obama Administration based its radical policy on a dubious set of assumptions regarding sexual violence on college campuses,"[29] all of which, Johnson and Taylor argue, are false.[30] It is not true that (1) one in five women college students will be sexually assaulted, (2) there has been an alarming increase in the number of on-campus rapes, (3) the on-campus environment is more dangerous than the one off-campus, (4) a small number of male college students are sexual predators who commit roughly 90 percent of the campus sexual assaults, or (5) colleges can dispense with needless concern for the accuracy of their judgments because 90-98 percent of the accused students are guilty.[31]

If the figures being used to support advocates' claims of a "campus rape culture" were true, a female Wesleyan undergraduate would be substantially more likely to be a victim of violent crime than a resident of Detroit, Michigan—which, according to the FBI's Uniform Crime Reports, is the nation's most dangerous city.[32] Wesleyan's president, however, has not urged any increase in the presence of law enforcement on campus.[33] That is quite odd. In fact, Johnson and Taylor believe that, far from being a stage on which *The Rape of the Sabine Women* is being played out daily across the nation, America's universities are safer than the locales where you will find women who have graduated from college or who never went there at all.

Oddities like that lead Johnson and Taylor to step back and ask some larger, obvious, but often overlooked questions. If American male college students have sexually assaulted one out of every five women students, why have university trustees and presidents not taken the steps that most people would see as reasonable ways to reduce that crime wave? For example, college presidents could do the following:[34]

- Strictly enforce a ban on the consumption of alcohol on campus and other college property, because alcohol seems to be a major contributing factor to a large majority of

24 *See* The Campus Rape Frenzy, *supra* note 1 at 20-22.

25 *Id.* at 219-20.

26 The Education Amendments of 1972, Tit. IX, Pub. L. No. 92-318, 86 Stat. 235 (1972). Title IX states in part as follows: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

27 *See* The Campus Rape Frenzy, *supra* note 1 at 33-41. A copy of the letter can be found at the OCR website, https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.

28 The Campus Rape Frenzy, *supra* note 1 at 37.

29 *Id.* at 40.

30 *Id.* at 40-41, 43-84.

31 *Id.* at 43-44.

32 *Id.* at 48. The FBI's figures undercount the number of sexual assaults because not all women report them. Robert VerBruggen, *Witch Hunt on Campus*, The American Conservative (Jan. 30, 2017), http://www.theamericanconservative.com/articles/witch-hunt-on-campus/.

33 The Campus Rape Frenzy, *supra* note 1, at 48.

34 Some of these suggestions come from Johnson and Taylor. Some are my own.

situations in which sexual assault allegedly and actually occurs;[35]

- Petition state legislators to make it a crime to sell alcohol within 1,000 feet of a college campus for the same reason;[36]
- Return co-ed dorms to the single-sex status they enjoyed decades ago;
- Use a curfew to prevent men and women from sleeping over at the other sex's dorms;
- Make it easier for victims to report sexual assaults to the local police and provide follow-up counseling when necessary;
- Place cameras throughout the university to obtain evidence of the comings and goings of intoxicated students;
- Urge the local police department to make patrol officers visible in cars, on bicycles, or on foot throughout the campus;
- Ask local law enforcement to permit younger police officers to work undercover and pose as students at parties; and
- Hire retired local detectives to conduct administrative investigations of alleged rapes.

That colleges have not taken any of those steps in the face of a perceived crisis is remarkable. Colleges are certainly aware of the widely cited estimate that 20 percent of college women have been or will be raped. Universities would take such drastic steps if one in five of their students were victims of assault, identity theft, or other forms of blue- or white-collar crime perpetrated by their fellow students. So why have they not done so to prevent sexual assault? Perhaps they have done so and are just being closed-mouth about it. Perhaps they have not in the hope that the problem will go away. Or perhaps, as Johnson and Taylor argue, they know that the 20 percent figure is inflated. For Johnson and Taylor, the failure of colleges to take any of the normal steps that a responsible party would undertake when facing a severe crime wave justifies skepticism that the figures cited by OCR are genuine. That omission, they say, also justifies a suspicion that university presidents are more worried about the damage that could be done to the university's ranking (and their own careers) by public OCR investigations, unfavorable media stories, and vocal faculty protests than about the prospect of ruining a student's life by finding him guilty of an unjustified charge. If Johnson and Taylor are right, achieving the fact and appearance of fairness in college disciplinary proceedings now seems like little more than a quaint custom.

IV. Calming the Frenzy

The last chapter of *The Campus Rape Frenzy* offers some possible solutions to the problems discussed in the book. Johnson and Taylor maintain that colleges should refer every serious case to law enforcement. The breadth of the term "sexual assault" that some colleges use, however, reaches conduct such as an unwanted kiss. That conduct is technically a battery, but it is not the type of crime that district attorneys would generally prosecute. Besides, as Johnson and Taylor showed in their earlier book *Until Proven Innocent: Political Correctness and the Shameful Injustices of the Duke Lacrosse Rape Case*, elected law enforcement officials can be as self-interested and corrupt as the worst college officials.

What about turning the disciplinary process over to students, letting them investigate, prosecute, defend, and adjudicate these cases? The argument would be that students do not have a financial interest in the outcome of a case, they are familiar with the hook-up culture prevalent on college campuses, and they can better enforce the campus mores than administrators and faculty 30 or 40 years their elders. For example, the Duke student body acted far more maturely and fairly than the Duke president and faculty did when three lacrosse players were unjustly accused of entirely fabricated sexual offenses.[37] So why not kick university officials off college tribunals and use students in their place?

At one time, that might have been an attractive option, and it still might work at some schools. But that solution certainly will not work at every university, and perhaps not at many. Things have changed.[38] In the last two years, the most highly publicized college rape case—detailed in a *Rolling Stone* feature story of a woman who said she had been raped by several members of a University of Virginia fraternity on a bed of broken glass—turned out to be a hoax.[39] But even after the story was shown to be false,[40] UVa students continued to support the claimant for her "brave[ry] in coming forward" with her phony allegations.[41] As Johnson and Taylor note, one college student "wrote an essay for *Politico* warning that 'to let fact checking define the narrative would be a huge mistake.'"[42] If a majority of students hold the same view, turning sexual assault cases over to students might actually *worsen*

35 *See* John M. Macdonald, *Alcoholism as a Medicolegal Problem*, 11 Clev.-Marshall L. Rev. 39, 41(1962) ("The conscience has been well defined as that part of the mind which is soluble in alcohol.").

36 The federal controlled substances laws imposed enhanced penalties for the distribution of controlled substances within 1,000 feet of a school. *See* 21 U.S.C. § 860(a) (2012). The Twenty-First Amendment, however, gives the states the authority to regulate the local sale of alcohol.

37 The Campus Rape Frenzy, *supra* note 1 at 249; *see* The Duke Lacrosse Rape Case, *supra* note 23.

38 Bob Dylan, *Things Have Changed* (2000), https://www.youtube.com/watch?v=L9EKqQWPjyo.

39 Sheila Coronel, Steve Coll, Derek Kravitz, *Rolling Stone and UVA: The Columbia University Graduate School of Journalism Report*, Rolling Stone (April 5, 2015), http://www.rollingstone.com/culture/features/a-rape-on-campus-what-went-wrong-20150405 (report on the journalistic failures that led to the publication of the false story).

40 *See* The Campus Rape Frenzy, *supra* note 1 at 239-49.

41 *Id.* at 249.

42 *Id.* at 250 (footnote omitted).

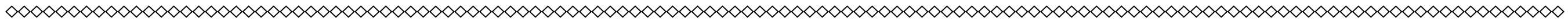
the plight of men wrongfully accused and further corrupt the procedures used to investigate campus sexual assault.

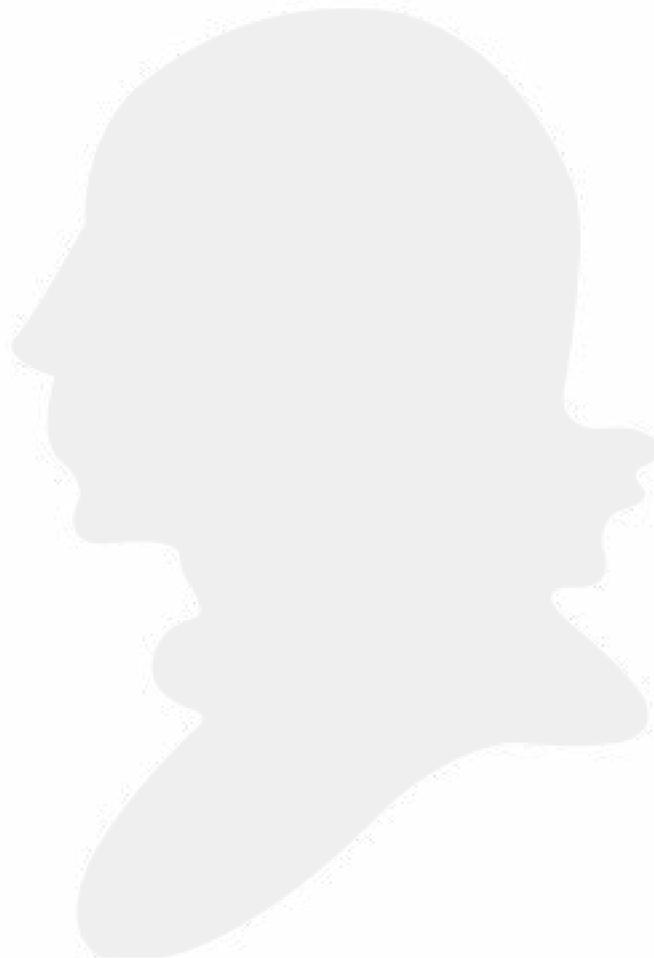
Can we hope for relief from the political process? Politicians generally stay as far away from issues like these as time and space allow. For example, most members of Congress have not spoken out about what is happening on campuses in their states or done anything else to earn their own chapter in a new issue of *Profiles in Courage*. Nonetheless, there may be some hope for reform in this area. The new Secretary of Education Betsy DeVos could rescind the OCR "Dear Colleague" letter. Congress could pass legislation overturning it. Or Congress could invalidate the letter under the Congressional Review Act.[43]

V. Conclusion

The motto on Harvard University's escutcheon is "*Veritas*." Johnson and Taylor (the latter, a Harvard Law School alum) maintain that, with the exception of its law school, Harvard, like numerous other colleges and universities, has abandoned the pursuit of truth in college disciplinary proceedings in sexual assault cases. Instead, colleges have succumbed to the demands made by OCR and radical members of their faculties, staffs, and student bodies, as well as outsiders, that innocent male students must be sacrificed for the sake of encouraging women who truly are the victims of sexual assault to come forward and identify their assailants. There is a better way to deal with these problems. With the help of local law enforcement and the use of college disciplinary procedures that are fair to all concerned, we can do better than the situation that Johnson and Taylor describe.

43 5 U.S.C. §§ 801–08 (2012); *see* Paul J. Larkin, Jr., *The Reach of the Congressional Review Act*, The Heritage Foundation, Legal Memorandum No. 201 (Feb. 8, 2017).





The Decades of Our Discontent: Judge J. Harvie Wilkinson III Reflects on the Sixties and Today

by Danielle R. Sassoon

A Review of:
All Falling Faiths: Reflections on the Promise and Failure of the 1960s, by J. Harvie Wilkinson III

https://www.amazon.com/All-Falling-Faiths-Reflections-Promise/dp/1594038910

Note from the Editor:

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Elegy as genre is alive and well. Nostalgia for bygone times—days of community cohesion and family stability, political courtesy and bipartisan collaboration—is on the rise. Americans of all political persuasions are struggling to diagnose the disease causing civic discourse to degenerate and common social values to atrophy. Judge J. Harvie Wilkinson III's latest book, *All Falling Faiths: Reflections on the Promise & Failure of the 1960s*, is at once another entry in this genre and a more transcendent and intimate work. Part personal reminiscence, part political commentary, Judge Wilkinson's timely memoir traces society's ailments—including what Judge Wilkinson terms the decline of education, the loss of home, and the passing of unity—back to the 1960s, exploring that explosive decade through the eyes of a young man who arrived at Yale after a sheltered upbringing in Richmond, Virginia. Judge Wilkinson's is a voice that rises above the recent chorus bemoaning the decline of American culture, in part by singing a conciliatory and deeply personal tune. Drawing on his experience, while also divulging his regrets, Judge Wilkinson shares his longing for greater national pride and harmony, and reminds us that what unites us is greater than what divides us.

I clerked for Judge Wilkinson on the Fourth Circuit Court of Appeals between 2011 and 2012. As I read *All Falling Faiths*, I recognized the voice of its author—redolent of Southern graciousness and warmth, judicial wisdom and meditation. By delivering his reflections in the form of a memoir, Judge Wilkinson offers more than historical, cultural, or political punditry. At its core, his book is a coming of age story in the tradition of Southern writers like Willie Morris and Thomas Wolfe, and a personal reckoning with the disillusionments that attended growing up in the segregated South. Judge Wilkinson describes an idyllic childhood of privilege in a community anchored by its church, and by a home whose "chief gift was a string of simple words—duty, honor, country, character, courage, trust, and truth."[1] But a cosseted upbringing gives way to revelations about the inescapable hypocrisy of an honor-bound community still premised on segregation and inequality. In frank prose, Judge Wilkinson admits that, "[s]heltered upbringings produce a surpassing obliviousness, and mine was no exception."[2] In his own case, "[i]n the South of the 1950s, that obliviousness extended above all to matters of race. . . . [t]he routines of childhood fended off introspection and induced benign acceptance."[3]

But Wilkinson departs Virginia for Yale as civil rights leaders were making substantial inroads on college campuses. To Wilkinson's father, Yale was unsuitable; in his mind, Princeton was "the northernmost promontory where a Virginian could go and still maintain respectability."[4] New Haven does prove to be a long way from home; it is there that Wilkinson's unquestioned devotion to his origins gives way to ambivalence, and there that he internalizes how "[r]ace was inextricably interwoven with the

1 J. Harvie Wilkinson III, All Falling Faiths: Reflections on the Promise & Failure of the 1960s 97-98 (2017).

2 *Id.* at 102.

3 *Id.*

4 *Id.* at 6.

venerable South."[5] His first instinct is to mask his Southern roots and resolve "never to look back."[6] But like many other Southern exiles before him, Wilkinson ultimately returns to Virginia, no longer the boy he was when he left. He does so with eyes open and with a professional outlook shaped by his educational experience, forgoing opportunities for wealth in favor of a career dedicated to civic engagement and public service, including as a law professor, journalist, and Justice Department lawyer, and finally as a federal judge.[7]

Wilkinson returns to the South prepared to grapple with her failings, while also yearning for the virtues that he was taught to revere—duty, honor, country, character, courage, trust, and truth—virtues he posits might still be reclaimed as national values without the tarnish of racial inequality. On this front, Judge Wilkinson professes to part ways with his college contemporaries, lamenting that for 1960s activists and their progeny, only an all-inclusive denunciation of his past would suffice. As Judge Wilkinson puts it, "[t]o find good in the past was to brand oneself reactionary."[8] But here he grasps the nettle, and probes whether the indisputable benefits of 1960s activism could have been achieved without giving way to political puritanism and more destructive methods of protest.

"At what cost," is a refrain that punctuates Judge Wilkinson's narrative, and by his measure, lamentable (and lasting) damage was done to political debate as the 1960s progressed. As he puts it:

> One can respect the real accomplishments of the Sixties and still know that the decade's sum of campus rancor was nothing less than tragic. . . . When we survey the harsh, mistrustful culture that destroys the remnants of our sense of community, it is impossible not to see the seeds of incivility that were planted in the 1960s.[9]

Judge Wilkinson's account of the escalating intolerance for the expression of conflicting viewpoints and the efforts to silence controversial (and sometimes outright distasteful) speakers is eerily familiar. He observes that the "irony was that those who rightly challenged the assumptions of others became slowly more indignant at any challenge to their own. . . . [S]chools of thought that turn intolerant rarely start that way."[10]

The rise of censorship on Yale's 1960s campus is a cautionary tale for those concerned today about student groups empowered by their universities to police the boundaries of acceptable campus debate. The protestors of the 1960s undoubtedly had ample cause to disagree with the targets they put in the crosshairs—the segregationist Alabama governor George Wallace, for example.[11] But a dangerous precedent was set in fortifying Yale's campus against the entry of a sitting Governor, rather than trying to win hearts and minds through pointed questions and incisive critique. For Judge Wilkinson, as with so many others, the enduring value of his education included exposing him to perspectives he was denied in a cloistered, homogeneous upbringing. Judge Wilkinson urges us to ponder what is lost if a university campus is refashioned to mimic the homogeneity of one's political community, and students are never taught to engage substantively with countervailing, and even offensive, ideas.

The malady of insularity now pervades more than the college campus. In *Coming Apart*, Charles Murray describes the increasing fragmentation of American society along socioeconomic lines—with Americans of different means divided along financial lines, but also living in separate neighborhoods and guided by disparate norms when it comes to religion, work ethic, and family values.[12] The book presaged what the past presidential election revealed—many Americans were shocked by the election results, in part because they were tone deaf to the concerns of their fellow citizens, or unable to comprehend the possibility of good faith disagreement on fundamental policy questions.[13] Echoing Murray, Judge Wilkinson concludes that as "sub-cultures begin to predominate . . . the power of our unifying symbols fades."[14]

Particularly now, Murray's book has much to commend it, and it is valuable fodder for those interested in how to narrow the seemingly unbridgeable divides plaguing our segmented country. But instead, Murray himself is the latest target of campus censorship. Violent protests broke out at Middlebury College this March when he was slated to speak, primarily because of his controversial 1994 book *The Bell Curve*. The student protestors successfully shuttered the event and physically injured a professor in the process.[15] Murray is hardly the only conservative scholar to come under attack by campus groups in the past few years. He shares that distinction with, among others, former Secretary of State Condoleezza Rice, who was pressured to back out of a commencement address at Rutgers University due to threatened protests.

You do not have to admire either of these speakers to favor their participation in campus debate. Liberal columnists like Frank Bruni are warning students of the "intellectual impoverishment" that comes from "purg[ing] their world of perspectives offensive to them."[16] When Nicholas Kristof wrote a column last May disapproving of liberal intolerance of ideological diversity on

5 *Id.* at 122.

6 *Id.* at 123.

7 *Id.* at 17.

8 *Id.* at 3.

9 *Id.* at 34.

10 *Id.* at 6.

11 *Id.* at 22-23.

12 Charles Murray, Coming Apart: The State of White America, 1960-2010 (2012).

13 *See* Nicholas Kristof, *The Dangers of Echo Chambers on Campus*, N.Y. Times, Dec. 10, 2016, https://www.nytimes.com/2016/12/10/opinion/sunday/the-dangers-of-echo-chambers-on-campus.html.

14 Wilkinson, *supra* note 1, at 161.

15 For Murray's account of the event, see Charles Murray, *Reflection on the Revolution in Middlebury*, AEIdeas, March 5, 2017, https://www.aei.org/publication/reflections-on-the-revolution-in-middlebury/.

16 Frank Bruni, *The Dangerous Safety of College*, N.Y. Times, March 11, 2017, *available at* https://www.nytimes.com/2017/03/11/opinion/sunday/the-dangerous-safety-of-college.html.

campuses,[17] the backlash he received from his readers was so severe he felt compelled to write a second column about the "liberal blind spot" to defend his concerns.[18] "As I see it," he wrote, "we are hypocritical: We welcome people who don't look like us, as long as they think like us."[19] Judge Wilkinson could easily be describing today's political climate when he states that the "pseudo-education that preached but one right and moral view was quick to brand all others as not just incorrect but illegitimate, which brings listening to an end."[20]

The problem has only been exacerbated as political orthodoxy on college campuses has hardened; the academy, while it has always leaned left, is increasingly ideologically uniform.[21] In 2015, a group of university professors of diverse political orientations formed the "Heterodox Academy," devoted to the ideal that "university life requires that people with diverse viewpoints and perspectives encounter each other in an environment where they feel free to speak up and challenge each other."[22] One would think we could all agree on this goal—the fact that it needs defending is an alarming indication that viewpoint diversity is no longer a foundational premise of higher education. The mission statement of the Heterodox Academy calls to mind the Committee on Freedom of Expression, which was formed by Yale University in the early 1970s and headed by C. Van Woodward to investigate the embattled state of free speech on campus in the wake of the 1960s. The Committee ultimately issued a report advising that the free interchange of ideas must remain a tenet of the university, whose core function of disseminating knowledge cannot be fulfilled without it.[23] As others have pointed out, the report today feels especially "timeless and timely."[24]

Judge Wilkinson does not claim to have a ready solution, but he tells a story from which both conservatives and liberals can learn. Judge Wilkinson describes his enthusiastic involvement in the Yale Political Union, where he got to know future Secretary of State John Kerry. He explains that they both aspired to lead the Union, and that "together we hit upon a coalition ticket as the way to do it."[25] The first year, Kerry would run for president, with Wilkinson on the ticket as vice president. The next year, they would pursue the same strategy, but with Wilkinson running for president. "John would get his Liberal Party behind the ticket, and I would get the Conservative Party backing for it. . . . We each kept our end of the deal and things worked out as planned."[26] The idea that two are stronger than one seems practically quaint, but there is something to emulate. Kerry and Wilkinson never became great friends, but by collaborating with the supposed enemy, they were both better able to advance their goals.

For the absolutists, Judge Wilkinson's self-professed imperfections as a narrator will be disqualifying. He is Protestant, white, and he grew up in a privileged household. (Judge Wilkinson describes how his father gave him a gold watch and $1,000 as inducement not to drink alcohol until age 21. Wilkinson kept his end of the bargain, to the amusement of his friends, and to humorous consequences when he indulged in his first legal bender on his twenty-first birthday).[27] In these admissions, Judge Wilkinson anticipates the critics who will say that he therefore oversteps in finding fault in the Sixties' method of protest. Judge Wilkinson, like his father and his well-intentioned friends (including Justice Lewis Powell, for whom Wilkinson clerked) who championed civil rights in Virginia,[28] had the luxury of patience, while others did not.

But the notion that certain topics are the exclusive province of particular groups is another unfortunate symptom of divisive identity politics. The recent Whitney Biennial art exhibition featured an abstract painting by a white artist, Dana Schutz, of Emmett Till's open casket. Meant to confront viewers with a reminder of a horrific chapter in American history marked by gruesome lynchings like Till's, it instead sparked protest that the subject matter belonged only to African-American artists, and was off limits to Schutz.[29] What a shame that the protestors would prefer to amplify differences, rebuff cross-cultural empathy, and forgo an opportunity to educate the many visitors to the Whitney about Till in order to claim ownership over a historical event and what it represents. As Judge Wilkinson writes, "when 'me' and 'my' transcend 'us' as a country, it is impossible to think that all is well."[30]

In sweeping away the old virtues, the Sixties, Judge Wilkinson writes, left us adrift:

> The values stolen were not the property of any race or party or philosophy or creed. They reside rather at the heart of human nature and at the core of nationhood as well. Without them we today lack personal or national identity,

17 Nicholas Kristof, *A Confession of Liberal Intolerance*, N.Y. Times, May 7, 2016, *available at* https://www.nytimes.com/2016/05/08/opinion/sunday/a-confession-of-liberal-intolerance.html.

18 Nicholas Kristof, *The Liberal Blind Spot*, N.Y. Times, May 28, 2016, https://www.nytimes.com/2016/05/29/opinion/sunday/the-liberal-blind-spot.html?smid=tw-share.

19 *Id.*

20 Wilkinson, *supra* note 1, at 34.

21 *See* Heterodox Academy, *The Problem*, http://heterodoxacademy.org/problems/.

22 Heterodox Academy, *About Us*, http://heterodoxacademy.org/about-us/.

23 The report was recently republished in a pamphlet, which, in addition to the report, includes a preface by George F. Will, an introduction by Nathaniel A.G. Zelinsky, and commentary by Judge Jose Cabranes and Professor Kate Stith. *See* Campus Speech in Crisis: What the Yale Experience Can Teach America (2016).

24 Nathaniel A. G. Zelinsky, *Introduction to the Woodward Report*, in Campus Speech in Crisis, *supra* note 23, at 11.

25 Wilkinson, *supra* note 1, at 13.

26 *Id.*

27 *Id.* at 10-11.

28 *Id.* at 108.

29 Randy Kennedy, *White Artist's Painting of Emmett Till at Whitney Biennial Draws Protest*, N.Y. Times, March 21, 2017, https://www.nytimes.com/2017/03/21/arts/design/painting-of-emmett-till-at-whitney-biennial-draws-protests.html.

30 Wilkinson, *supra* note 1, at 34.

and that's what makes our boats drifting in the Sixties' wake so sad.[31]

Pining for more cohesive nationhood, Judge Wilkinson finds himself in good company. In *The Fractured Republic*, Yuval Levin, with similar candor, urges that even national "[p]rogress comes at a cost, even if it is often worth that cost."[32] And like Judge Wilkinson, Levin quantifies that cost as the "dwindling [of] solidarity, cohesion, stability, authority, and social order," and a "fracturing of consensus . . . [that] grew from the diffusion into polarization—of political views, of incomes, of family patterns and ways of life."[33] For Levin, the answer is not to reclaim the past, but to demystify it, and to "work toward a modernized politics of subsidiarity—that is, of putting power, authority, and significance as close to the level of the interpersonal community as reasonably possible."[34]

But if Levin's politics of subsidiarity is to have any content, courts cannot be the final battleground of the culture wars. In *All Failing Faiths*, Judge Wilkinson implicitly makes the case for judicial restraint (the primary topic of his last book, *Cosmic Constitutional Theory*), and for protecting law from "the consuming fires of zealotry."[35] Since the late 1960s, the law has been Judge Wilkinson's sanctuary. While liberals and conservatives alike might seek to embed certain deeply-held views in our Constitution, Judge Wilkinson warns that politicizing the law risks grave consequences.[36] As Judge Wilkinson explains, "law draws its life from assent, not coercion; from citizens who carry an allegiance to the legal order in their hearts."[37] For him, law is the last refuge that "recognizes that no political creed has any monopoly on truth or wisdom, as much as the pious of every persuasion would have us think otherwise."[38]

Judge Wilkinson refuses to relent or accept the notion of an irretrievably divided society. *All Falling Faiths* is not, however, a scathing polemic. Instead, Judge Wilkinson has the temerity to extend an olive branch of moderation. Compromise might have been a casualty of the drastic measures deemed necessary to eradicate the scourges of American history that lingered into the 1960s and beyond, but it is past time to bind up old wounds. To restore the American spirit, reconciliation is in order. That cannot be done, Wilkinson suggests, without also engaging with American history beyond simply condemning it. We must do as Wilkinson has done: confront our collective past with unsparing honesty, without ignoring its virtues or papering over its vices. And we must face the future as Judge Wilkinson has lived his life—with nuance, civility, and modesty.

31 *Id.* at 178.

32 Yuval Levin, The Fractured Republic: Renewing America's Social Contract in the Age of Individualism 1 (2016).

33 *Id.* at 2-3.

34 *Id.* at 5.

35 Wilkinson, *supra* note 1, at 96.

36 *Id.* at 71.

37 *Id.* at 91.

38 *Id.* at 96

Cyber, Robotic, and Space Weapons in International Conflict

by Vince Vitkowsky

A Review of:
Striking Power: How Cyber, Robots, and Space Weapons Change the Rules for War, by Jeremy Rabkin & John Yoo (Encounter Books 2017)

https://www.amazon.com/Striking-Power-Robots-Weapons-Change/dp/1594038872

Note from the Editor:

The author favorably reviews a new book about cutting edge issues in international law and the law of war.

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- Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977, *available at* https://ihl-databases.icrc.org/ihl/INTRO/470.
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About the Author:

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In this compelling and provocative book, Professors Jeremy Rabkin and John Yoo explain how developments in cyber, robotic, and space weapons can make the world a safer place. But they further explain that, to fulfill this potential, the rules for war will need to accept the legality of attacks directed at civilian objects.

Conflicts are an inevitable feature of international relations. To Rabkin and Yoo, the ultimate policy objective should be to end conflicts as quickly as possible, with as little destruction as possible. They argue that new weapons can support this objective, but only if policymakers have a full range of options. To that end, they write that "we should prefer an attack on civilian infrastructure instead of an attack on military facilities, if the former required less force and presented less chance of serious death and destruction."

Rabkin and Yoo believe the most important use of new weapons may be maintaining the international order. These weapons will "allow nations to communicate their intentions more clearly," and communicate their seriousness (i.e., coerce each other) without inflicting the same levels of casualties and destruction as conventional warfare. They are more precise, can be calibrated to particular circumstances, and can be only temporarily disruptive. Thus, they increase the possibility of a negotiated resolution, and are to be preferred over "more destructive signaling" or "full great power hostilities."

I. Historical Overview

The authors provide a *tour d'horizon* of the history of weapons, the conduct of war, and the rules of warfare. These rules are referred to variously as "War Law," the "Law of Armed Conflict," or "International Humanitarian Law," often depending on one's foundational perspective.

They observe that in the Twelfth Century, the invention of the crossbow, which could penetrate armor, weakened the strategic dominance of knights in Europe. This led to attempts to prohibit its use, including a call for a formal ban by the Second Lateran Council in 1139 and a decree by Holy Roman Emperor Conrad III that its use was a capital crime. The attempts failed because the weapon was simply too effective to give up. Attempts to ban improvements in the design and tactical use of the longbow also failed. And so it has continued, through the pattern of new weapons, calls for bans, and ultimate acceptance, with the arquebus (forerunner of the musket), aviation warfare, and other weapons through World War II and beyond. The only exceptions have been relatively successful bans on chemical weapons and agreed limitations on nuclear weapons.

In a chapter entitled "A Few Things Regarded as Barbarous and Cruel: The Law of War before the 1970s," Rabkin and Yoo review the common historic acceptance of attacks against civilians and their property. To underscore the effectiveness of such attacks, they quote Civil War General Philip Sheridan, who wrote in his memoirs that "reduction to poverty brings prayers for peace more surely and more quickly than does the destruction of human life." The authors could be misinterpreted as callous, but in context they are not. They are descriptive, identifying the absence of prohibitions of a broad range of attacks on civilian infrastructure and property. They note that "editorials in *The New York Times* defended the fire-bombings of Hamburg and Dresden

when they occurred. Even the use of atomic bombs against Japan won broad support in American opinion at the time." Rabkin and Yoo urge that "we should hesitate to conclude that advocates for humanitarian constraint in our era have better principles than the greatest western war leaders of earlier times."

II. The Law of Armed Conflict

History teaches that appeals to international law have not stopped the development and use of increasingly effective weapons. Yet attempting to limit the development and use of robotic, cyber, and space weapons by law constitutes the prevailing approach of mainstream public international law professors and practitioners ("specialists").

Rabkin and Yoo are strong skeptics of the Law of Armed Conflict as understood by most specialists. That Law is comprised of the United Nations Charter, the Geneva Conventions and some of the Additional Protocols, and the statements and actual practice of states (referred to as "customary international law"). Most specialists believe that the U.N. Charter only allows nations to use force in response to an armed attack or in self-defense to preempt an imminent threat. Rabkin and Yoo demonstrate that this interpretation does not reflect the reality of great power practice. They provide examples such as the U.S. blockade during the Cuban Missile Crisis, NATO's intervention in the former Yugoslavia, and the Israeli destruction of Iraq's Osirak reactor.

The authors' main objections are directed to the 1977 Additional Protocol I to the Geneva Conventions ("AP I"), which elevated non-state actors such as independence movements and guerillas to the level of nations and expanded the definition of civilian targets that were not to be attacked. They describe AP I—which the U.S. has not ratified—as instituting a significant break with the history and practice of the Law of Armed Conflict.

A chapter entitled "How the Law of War Was Hijacked" describes the authors' view of the politics behind AP I and subsequent interpretations of the Law of Armed Conflict by the International Committee of the Red Cross and advocacy organizations, and occasionally by international tribunals. Their thesis is that the law "has become an arena for ideological struggle between advanced and developing nations." They describe the hypocrisy of the specialists and the lack of great power acceptance of many prevailing precepts. Although they make their argument in a thorough and reasoned fashion, many serious and distinguished people will thoroughly reject their thesis, reasoning, and conclusions. Those disagreements will not be settled here. For present purposes, it is sufficient to note that, apart from fundamental matters such as genocide, the Law of Armed Conflict rarely has precise and unalterable content. Rather, it is living, evolving, and subject to debate.

Rabkin and Yoo argue that recent efforts to impose restraints on the use of new weapons through purported "codifications" are misguided and do not reflect state practice. As they put it, "the rules of war must evolve to keep pace with technology." Attempts at "rules" must be deferred until new weapons are used and a better understanding of their effects emerges. This is effectively the position of the U.S. Government. For example, Rabkin and Yoo note that the 2015 Department of Defense Law of War Manual states that the existing laws of war *should* apply to cyber operations, but that those rules are "not well settled" and are "likely to continue to develop," and that the Manual does not "preclude the [Defense] Department "from subsequently changing its interpretation of the law."

The authors argue that by limiting the circumstances in which the use of force could have a basis for unequivocal international support, the prevailing interpretation of the U.N. Charter reduces the range of options for coercing other nations. Yet, at times, coercion through limited, targeted force is exactly what is required. The challenges of this century—including terrorism, rogue nations, asymmetric warfare, and regional challengers—demand more frequent use of force, but low-intensity force, delivered with great precision and at lower cost.

Rabkin and Yoo would loosen the purported international law restriction on the use of force in anticipatory self-defense by removing the requirement of "temporal imminence." They say the need to do this is especially acute when the potential danger is greatest, as in attempts to preempt the use or development of weapons of mass destruction. As an example, they cite the Stuxnet cyber exploit, which slowed down the Iranian nuclear program for years, with no direct injury to human beings.

Their more controversial argument is that the Law of Armed Conflict should be understood to permit the use of force through new weapons against civilian targets, as long as the force applied is non-lethal. This is anathema to international law specialists, who believe that the Law of Armed Conflict prohibits attacks on civilian facilities which are not also used for military purposes. Rabkin and Yoo point to examples in which nations have used direct and indirect coercion against civilians, such as trade embargoes and economic sanctions. They note that U.N. Charter authorizes the Security Council to impose such restrictions.

They would go further: political leaders should consider the use of new weapons in a broad range of attacks. They give the example of disabling the electrical supply in a city, which would cause "inconvenience" to a large number of civilians. But they do not address the likelihood that the consequences may be far more than "inconvenient." Rabkin and Yoo state that they are not arguing against *all* limits. Instead, their "purpose is to reclaim space for debate and deliberation, rather than allow restrictive views about the law of war to foreclose opportunities offered by new technologies." They argue that "the most important characteristic of new technologies . . . is the capacity for remarkable degrees of precision." Even if the weapons lower the barriers for the use of force, the "earlier, more precise use of force could prevent threats from metastasizing into far worse dangers." Thus these weapons "may lead to less destructive wars by giving nations more options to resolve their disputes, or, better yet, more information that prevents conflicts from occurring in the first place."

III. Robotic Weapons

Robotic weapons, especially drones, have assumed a prominent role in recent conflicts. The Obama administration's heavy reliance on drone warfare has been met with much criticism. Philip Alston, the U.N. special rapporteur on drones, concluded that U.S. drone practice may violate international law in several respects, including the prohibition against arbitrary deprivation of life. Others argue that these drone attacks are illegal because they

do not take place within the context of an international armed conflict. To Rabkin and Yoo, these criticisms confuse the legality of an armed conflict—its *jus ad bellum*—with how it is waged—its *jus in bello*. They argue that once a nation has decided to use force, it may choose which weapons to use—whether drones, ballistic missiles, commando teams, or anything else—subject only to the traditional considerations of distinction, proportionality, and military necessity. The authors favor drones because they are more precise and produce less collateral damage than other weapons. Although totally avoiding collateral damage is "a level of perfection unattainable in war," drones can more closely approach this goal. As the authors put it, "destroying the Fuhrer's bunker no longer requires leveling central Berlin."

Applying the test of ending conflict as quickly as possible, with as little destruction as possible, the authors would accept attacks on civilian infrastructure or property if they were the most efficient and least destructive course of action. They note that nations have engaged in such attacks for various reasons, including humanitarian intervention. Most prominent are the NATO strikes on power stations, highway bridges, and broadcasting towers in Kosovo and Serbia. Rabkin and Yoo observe that "military lawyers have turned somersaults to justify these attacks." Rather than engage in questionable reasoning, "nations should honestly admit that their militaries are employing force against civilian targets to pressure their enemies." As to the element of proportionality, the authors argue that the standard should simply be whether the costs to civilians of an attack significantly outweigh the benefits of bringing a faster, less destructive end to the conflict.

Looking forward, Rabkin and Yoo argue that concerns about the development of *autonomous* robotic weapons are misplaced. Autonomous weapons are merely another technological advance. Targeting decisions may be made by algorithms, but humans make the decision to deploy, so "command responsibility" would apply, just as it does in other circumstances.

IV. Cyber Weapons

The authors believe dire warnings of a "cyber Pearl Harbor" are vastly overstated. They write that "fervid imagination seems to have outrun physical possibility." They note that the developments of exploits such as Stuxnet are time consuming and expensive; that virus is reported to have taken four or five years to develop and to cost billions of dollars.

The rules of cyber warfare have not been set. There are no specifically applicable treaties. There has never been a declared cyber war, so there is no actual state practice from which states can even begin to set rules of customary international law. The great powers have agreed to no norms. The only point of consensus seems to be that a cyber attack that would have widespread kinetic effects on civilians, similar to the effects of "bullets and bombs," would violate the Law of Armed Conflict.

But the absence of actual law has not dissuaded specialists from proclaiming its precepts. The most prominent effort has been the Tallinn Manual, which contains a set of "rules" composed by academics meeting in Estonia under the aegis of NATO. Now in its second edition, it is advisory in nature; it is not binding on anyone, including NATO members. According to the Manual, "the law of armed conflict applies to cyber operations undertaken in the context of armed conflict." There have also been other efforts at codification that assume that the rules of AP I provide relevant standards. AP I prohibits reprisals against all "civilian objects" and "civilians" in general, and notwithstanding formal reservations by some of the signatories, the Tallinn Manual proclaims that this is now customary international law, binding on all states. Yet this proclamation is based on almost no state practice or public announcements of position. Thus as Rabkin and Yoo observe, "they assume away the most important questions in a field that has just opened." But the specialists do acknowledge that some key questions are unanswered. For example, the Tallinn Manual experts could not reach agreement on how to treat an attack on a major international stock exchange that causes the market to crash, because, as the Manual states, "they were not satisfied that mere financial loss constitutes damage" sufficient to constitute an armed attack.

The key point here is that the most fundamental questions concerning cyber attacks, such as what constitutes an armed attack, what circumstances permit such attacks, and what objects may be attacked, remain open. What *is* known is that states have indeed interfered with civilian websites, computer controls, and access to the internet, even if they have not acknowledged it. Rabkin and Yoo suggest that in some instances "a precisely targeted cyber attack might provide a tactically superior response" to the use of conventional weapons. Exploits can be individually tailored, ratcheted up or dialed down, and limited in duration, to meet particular circumstances. They can be a "more precisely tuned means of coercion between nations," and "might serve the ultimate aims of humanitarian law" by reducing destructive kinetic conflict.

Here, the authors place too much confidence in a state's ability to control and limit the effects of cyber exploits. Once a computer virus is launched "into the wild," it is not uncommon for it to migrate to other computers in the region and around the world. There are several known instances in which this has occurred, including Stuxnet, the 2012 attack on Saudi Aramco, and the WannaCry, Petya, and NotPetya exploits earlier this year. Thus, cyber initiatives and responses implicitly carry a strong risk of unanticipated collateral damage. Rabkin and Yoo would likely respond that the damage would merely be economic or financial, or would only affect property, so in many cases the risks would be acceptable. To which the counter-response is: "that depends."

V. Space Weapons

Space weapons present special challenges. Businesses and people rely on satellites in their day-to-day activities to a remarkable degree. The GPS system is one of the most obvious examples. Furthermore, space weapons have the potential to be especially destructive. For example, the authors describe proposals for space weapons, including "Hypervelocity Rod Bundles," which are tungsten rods about twenty feet long and one foot in diameter that would be dropped from satellites. Accelerating to a speed of 36,000 feet per second, the sheer kinetic energy would give the impact on penetration of nuclear weapons.

For these reasons and others, there have been calls for a ban on the "militarization of space." Rabkin and Yoo, to the contrary, argue against adopting any broad prohibition on the use of force

in space. The current legal structure is set by the 1967 Outer Space Treaty, signed and ratified by the U.S., the U.S.S.R., and other major powers. The treaty created a set of restrictions, the most relevant of which are prohibitions against the "establishment of military bases, the testing of any type of weapons and the conduct of military manoeuvres on celestial bodies," and it prohibited placing weapons of mass destruction in orbit. It declared that space, the moon, and celestial bodies be used "exclusively for peaceful purposes," but this provision has been construed by the U.S. to permit the use of space for self-defense.

To Rabkin and Yoo, the Treaty is significant for what it does *not* prohibit. It does not prohibit sending ballistic missiles *through* space, nor stationing reconnaissance satellites, nor basing conventional weapons in space. It does not prohibit any military operations not involving WMD in orbit or outer space. And it does not address the use of orbital weapons against terrestrial targets, or vice versa. The authors argue the ban on WMD makes it clear that all other weapons remain unregulated. Other specialists and the U.N. General Assembly reject these interpretations. These disputes, too, will not be resolved here. It is sufficient to note that there are viable arguments that existing international law permits a broad range of military activities in space. Importantly, in its 2006 National Space Policy, the U.S. Government stated that it "will oppose the development of a new legal regime or other restrictions that seek to prohibit or limit U.S. access to space."

Rabkin and Yoo argue that the U.S. should use space weapons the same way as robotic and cyber weapons: "as a strategic mechanism to coerce other nations, which will lead to more peaceful resolutions of crises." They add important caveats. They argue that nations should voluntarily limit employment of anti-satellite weapons, because satellites are critical to early-detection systems, and fear of their total destruction would undermine the strategy of deterrence. Similarly, nations should manage first-strike capabilities in a manner which would not destabilize the strategic balance of power. They recognize that the risks of triggering a nuclear exchange far outweigh any coercive benefits.

To Rabkin and Yoo, even though deployment of anti-satellite systems should be limited, nations should be able to target or disable *individual* satellites used for military purposes. Even dual-use satellites could be legitimate targets, "if they present a comparatively less destructive means of coercion." And the authors note that "the absence of human beings in space makes space an even better arena for the use of force than the Earth, as the likelihood of the collateral death of civilians is virtually zero." So again, use of space weapons could promote the "central goal of the laws of war—protecting innocent civilian life."

Finally, the authors endorse another voluntary restriction, arguing that the U.S. should limit development and propose a narrow international ban of space weapons designed to strike ground targets, again because they would destabilize the balance of power.

Rabkin and Yoo acknowledge that most specialists in the field would go much further in arguing for international cooperation, including the prohibition of space-based weapons. But the authors believe any such comprehensive arms control regime simply would not succeed, because no country could have confidence that the agreement would survive. Instead, they argue, limitations will have to be based on deterrence.

VI. A Starting Point for Leaders and Advisers

The authors write with a deft and artful touch, with engaging and persuasive prose. Their key arguments are stated simply and directly. This makes it is possible to be swept along by their arguments, sometimes at the expense of critical engagement.

But there are some key points that the authors could have addressed more thoroughly. Most importantly, they could have addressed the consequences that would befall civilians if the attacks they argue for take place, even the "limited" cyber attacks they describe as causing "inconvenience." For example, an attack disabling a power system almost inevitably will lead to injury and death. Dark traffic lights will cause accidents. Hampered EMTs will fail to save lives. Hospital patients will be at risk. (Coincidentally, as this sentence is being written, infants in hospital intensive care units in Texas are being evacuated in anticipation of Hurricane Harvey, for fear that power outages will cause their respirators to fail.) Shortages of essential supplies could lead to physical altercations and riots. Attributing responsibility for any injury and death to the original attack is not a stretch. In short, as leaders weigh options, the human costs of an exploit often will defy accurate prediction. Similarly, the authors give short shrift to the effects of "mere" economic, financial, or property loss. An attack bringing down a stock exchange would cause utter chaos, with consequences impossible to foretell. They could be as widespread and disruptive as the bombing of a city by conventional means.

These observations do not detract from the importance of the book. *Striking Power* will be regarded by some as controversial, and by others as blasphemous. But it surely is groundbreaking and timely. As nations continue to develop and use new weapons, new concepts in international law *must* emerge. Rabkin and Yoo have provided a useful starting point for deliberations by political leaders and legal advisers charged with making life and death decisions in the real world.

The Principled Scalia: A Liberal Friend on Scalia's Liberal Opinions

by Stephen B. Presser

A Review of:

The Unexpected Scalia: A Conservative Justice's Liberal Opinions, by David M. Dorsen (Cambridge University Press 2017)

https://www.amazon.com/Unexpected-Scalia-Conservative-Justices-Opinions/dp/131663535X

Note from the Editor:

The author favorably reviews a new book about Justice Scalia.

The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. We always invite responses from our readers. To join the debate, please email us at info@fedsoc.org.

About the Author:

Stephen B. Presser is the Raoul Berger Professor of Legal History Emeritus at Northwestern University's Pritzker School of Law. He is the author of Law Professors: Three Centuries of Shaping American Law *(2017).*

In our politically contentious age, when our two political parties now disagree fundamentally over the most basic notions of jurisprudence, it is a true delight to encounter a fair-minded book written by a self-identified liberal atheist about his good friend Antonin Scalia, a conservative Catholic.[1] David Dorsen, an accomplished Washington lawyer,[2] has achieved with this book an act of rare and laudable benevolence. Though relatively short as scholarly monographs go—242 pages of text—this book is, I believe, the finest, most detailed, and best-researched work on Justice Scalia's jurisprudence we are likely to get.

This is not Dorsen's first book. He published a biography of Henry Friendly in 2012, which Richard Posner said was one of the best judicial biographies ever published.[3] Dorsen's talents are on full display in this compact study of Scalia, a man my colleague Steven Calabresi has said was an even greater Justice than the celebrated Chief Justice John Marshall.[4] I suspect Dorsen might not make that claim for his subject, but his admiration for Scalia is clear, even though their views differed.[5] He believes—as do I—that Scalia was the most powerful conservative intellect on the Court in recent years.

Dorsen appears to have read nearly everything ever written by anybody who was anybody in the world of constitutional scholarship in the last few decades—right, left, and center. He does not simply rely on the usual authorities, but has ferreted out some lesser known but wise and incisive scholars, whose depth

1 David M. Dorsen, The Unexpected Scalia: A Conservative Justice's Liberal Opinions xiii (2017).

2 According to the book's jacket, "David Dorsen is Of Counsel with Sedgwick, LLP. He served as an Assistant US Attorney in New York under Robert M. Morgenthau, and later as Assistant Chief Counsel of the Senate Watergate Committee under Senator Sam Ervin. He has taught at Duke University, North Carolina, Georgetown University Law Center, Washington DC, and George Washington University Law School, Washington DC."

3 David Dorsen, Henry Friendly: Greatest Judge of His Era (2012). Richard Posner wrote the forward for the book, and after declaring that he was "on the record as having expressed skepticism about judicial biographies," he acknowledged that Dorsen's book on Friendly allowed the reader to "learn more about the American judiciary at its best than we can learn from any other biography—not only more, but an immense amount." *Id.* at ix, xi. The same thoroughness, depth, and insight that Dorsen displayed in the Friendly biography is present in this book on Scalia.

4 Steven G. Calabresi, *Scalia Towered Over John Marshall: Supreme Court Justice reshaped a misguided legal culture*, USA Today, Feb. 24, 2016, https://www.usatoday.com/story/opinion/2016/02/13/scalia-text-legacy-clerk-steven-calabresi-column/80349810/ (accessed Oct. 14, 2017). Scalia wrote the forward to Calabresi's great contribution to the understanding of originalism. Steven G. Calabresi, ed., Originalism: A Quarter-Century of Debate (2007).

5 Dorsen, *supra* note 1, at xiii (". . . the fact that he was a friend should not be confused with whether we agreed on political and social issues. We rarely did."). Dorsen notes that commentators described Scalia as "divisive, combative, overbearing, intolerant, intemperate, bumptious, nasty, bullying, vain, rude, acerbic, narrow-minded, and, also, charming, funny, brilliant, loyal, candid, conscientious, rigorous, exacting, meticulous, willing to engage on issues, larger than life, and an excellent writing stylist." *Id.* at xii.

of learning and even-handed perspectives rival Dorsen's own.[6] His book is thus not only a penetrating study of Scalia, but is a valuable and wide-ranging introduction for anyone new to the field of constitutional hermeneutics who seeks a comprehensive evaluation of academic and judicial contributions to recent jurisprudence. His footnotes provide a truly fulsome tour of the work of originalists, non-originalists, constitutional and legal historians, and an assortment of jurisprudes past and present, and thus an invaluable roadmap for the next generation of students and scholars seeking to plot the future of constitutional law.

In this book, Dorsen makes a persuasive case for the folly of characterizing Scalia as simply a partisan, as so many commentators in the press and the academy do. As the full title of Dorsen's book suggests, he shows that a quite substantial number of the opinions Scalia wrote as a Supreme Court Justice (both majority opinions and dissents) are best characterized as "liberal" rather than "conservative." By Dorsen's exhaustive count, the "liberal" characterization fits 135 of Scalia's 867 opinions on the merits, and at least twelve opinions on petitions for certiorari, which works out to be a bit more than 15%. In making his argument, Dorsen helpfully defines his key term, labelling as "liberal" anyone who "*generally* supports" twenty-some principles, ranging from "respect for and the primacy of the individual," to "limited or no immunity for wrongful governmental action."[7] Though Scalia's originalism often led him to conservative conclusions, and though he was characterized as a conservative by most Court-watchers, Dorsen shows that when it came to issues regarding free speech, search and seizure, or the rights of criminal defendants, Scalia often found himself agreeing with his liberal colleagues.

Dorsen concludes and exhaustively demonstrates that Scalia's principled commitment to textualism (interpreting statutes and the Constitution according to their plain meaning and without reference to legislative history) and originalism (interpreting the Constitution as it would have been understood by those who framed and ratified it) caused him to reach results that political partisans would characterize as both "liberal" and "conservative." As Dorsen puts it, "more than most Justices, Scalia followed his understanding of originalism and textualism, warts and all, where it took him."[8] In short, Scalia was an intellectually honest man, at least compared to "most Justices," who Dorsen appears to understand often follow their politics rather than their law.[9]

Dorsen's book is not, in spite of his personal closeness with Scalia, a piece of hagiography. He maintains that occasionally Scalia's originalism left something to be desired. For example, in his opinions on the Second Amendment, Scalia probably failed fully to take account of the likelihood that the right to "bear arms" was historically understood to be a collective and not an individual right.[10] Dorsen also excoriates Scalia for his departure from federalism in *Bush v. Gore*,[11] which Dorsen hints may have been made not because of any judicial principles, but rather because of sympathy for the plaintiff.[12] Since I think one can mount a strong argument that *Bush v. Gore* was correctly decided,[13] I found Dorsen less than persuasive on that point, but this was almost the only part of his book that struck a clearly discordant note.[14]

Dorsen succeeds splendidly in making his basic point: the great hero of the right, Justice Scalia, after whom Republican candidates for President have modelled their ideal Supreme Court justices since 2000, ought to be understood as the author of many important opinions which furthered the goals of the progressive and liberal American left. One might quibble a bit with Dorsen's labelling, as I think some of Scalia's "liberal" decisions might

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6 *See, e.g.*, Mark Tushnet, Red, White and Blue: A Critical Analysis of Constitutional Law (1988) (a work by a noted Critical Legal Studies scholar, cited on page 255); Ralph A. Rossum, Understanding Clarence E. Thomas: The Jurisprudence of a Constitutional Restoration (2014) (a book by a thoughtful scholar I would describe as a paleoconservative, cited on page 257); William F. Nelson & John Philip Reid, The Literature of American Legal History (1985) (a distinguished bibiliographical work by two great legal historians I would describe as moderates, cited on page 259); Gary L. McDowell, The Language of Law and the Foundations of American Constitutionalism (2010) (a book by a brilliant conservative Straussian, cited on page 260).

7 Dorsen, *supra* note 1, at 2 (emphasis in original). His list of "liberal" principles includes: "respect for and the primacy of the individual; a broad right to free speech, freedom and protection of the press and freedom of assembly. . .; the right to privacy and to be let alone. . .; broad and enforced antidiscrimination laws; affirmative action for disadvantaged minorities; the removal of barriers based on class, income, nationality, gender and sexual orientation; a secular orientation. . .; representative government with broad voting rights and participation…; one person, one vote…; the rule of law and an independent judiciary; ready access to the courts. . .; pro-plaintiff in civil cases; extensive rights for criminal defendants. . .; abolition of the death penalty; strong gun control; limited power and influence of corporations and the very rich; government transparency. . .; federal, not state, government controlling entitlements; the government . . . exercising regulatory control over businesses and property; protection of the environment. . .; limited or no immunity for wrongful government actions." *Id.* Of course, not all of these positions are inconsistent with a "conservative" perspective.

8 *Id.* at 239.

9 *See generally* Stephen B. Presser, Law Professors: Three Centuries of Shaping American Law (2017). *See also* Stephen B. Presser, Recapturing the Constitution: Race, Religion and Abortion Reconsidered (1994).

10 Dorsen, *supra* note 1, at 31-32 (discussing *District of Columbia v. Heller*, 554 U.S. 570 (2008)).

11 531 U.S. 98 (2000).

12 Dorsen, *supra* note 1, at xiii ("Leaving to one side Scalia's vote in the dismaying *Bush v. Gore* (2000) (about which I have no special knowledge) I believe that Scalia, was principled . . .") (footnotes omitted).

13 Stephen Presser, *Some Dare Call It Justice*, Chronicles: A Magazine of American Culture (Nov. 1, 2001). I believe that the Florida Supreme Court, in the decisions under review in *Bush v. Gore*, egregiously departed from Florida election law.

14 I also disagree with the rather disparaging assessment of Justice Thomas as a "silent sphinx" who has chosen to "opt out" of participation in oral arguments. Dorsen, *supra* note 1, at 242. I think Justice Thomas, who probably believes that much of what happens at oral argument is showboating by the Justices, has a principled position. I also think that Dorsen's suggestion that there is a "threat" from originalism*, Id.*, is overstated, since originalism, as Dorsen shows in the work of Scalia, can certainly be an interpretive strategy that reduces judicial discretion and reinforces the rule of law. *See also* Originalism, *supra* note 4.

also be described as "libertarian,"[15] or even "classically liberal" in the Burkean sense.[16] Scalia, like Burke, generally eschewed abstract theory and emphasized adherence to tradition, the rule of law, morality, and religion.[17] And if Scalia was a champion of American liberty, tradition, and the rule of law, as Dorsen cogently demonstrates that he was, then his opinions ought to reflect the inherent tensions and antinomies in American culture itself. We are, after all, a people simultaneously committed to popular sovereignty, resistance to arbitrary power, economic progress, social mobility, and individual freedom, goals that often conflict with each other.[18]

It is no surprise, then, that Scalia, who sought to be faithful most of all to tradition, could move along different paths, both liberal and conservative, in his jurisprudence. Perhaps any true American conservative will, like Scalia, be pulled in different directions. The Federalist Society itself is a group devoted to maintaining originalist Madisonian principles of the separation of powers and dual sovereignty, and it includes within its ranks both libertarians and social conservatives, people of fundamentally differing jurisprudential and philosophical temperament.[19] At this point in our political and judicial history, characterized by deep division and grave doubts about even the rule of law itself,[20] Dorsen's book might perform a signal service in showing us that both liberals and conservatives have a common heritage and work towards many of the same ends. Thus *The Unexpected Scalia*, though perhaps unexpected, is certainly welcome.

15 By this I mean to suggest that rather than favoring the program of those who would seek to expand the power of the central government to engage in redistribution of resources from the wealthy to the formerly powerless—as would many of today's "liberals" or "progressives"—Scalia had a healthy commitment to the preservation of individual freedom against the state, and a healthy fear of arbitrary government in any form. On what it means to be a "libertarian," see, e.g., Charles Murray, What it Means to be a Libertarian: A Personal Interpretation (1997).

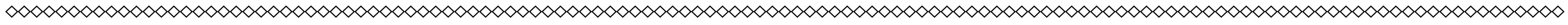
16 Edmund Burke (1729-1797), widely regarded as the greatest of the modern conservatives, was a champion of resistance to arbitrary power, especially the English monarch and Parliament, and thus a champion of the rights of the individual against government. *See generally* Conor Cruise O'Brien, The Great Melody: A Thematic Biography and Commented Anthology of Edmund Burke (1993), and Russell Kirk, Edmund Burke: A Genius Reconsidered (2d ed. 2009).

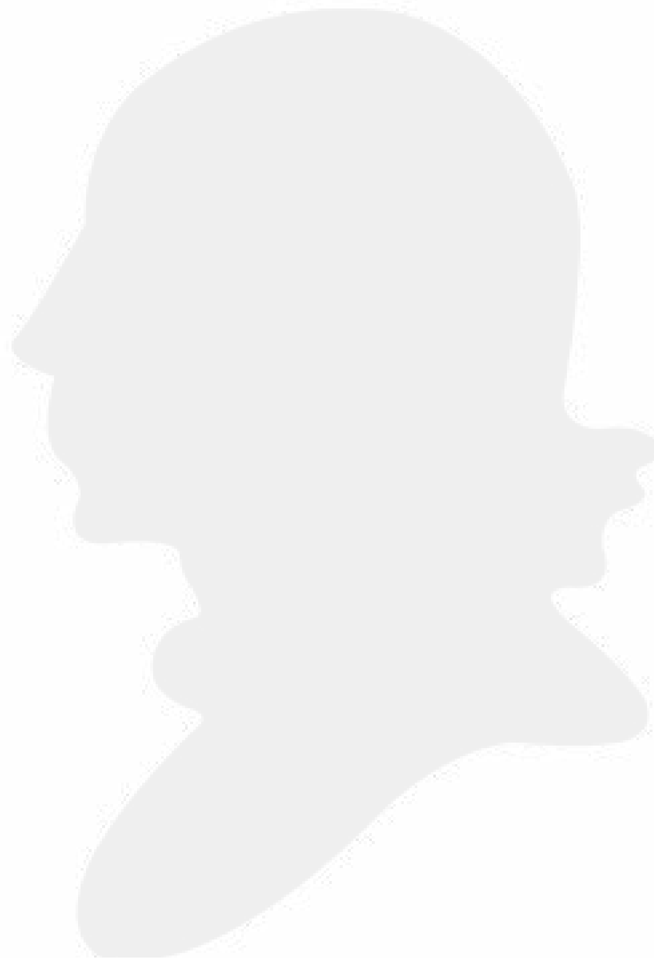
17 *See generally* Edmund Burke, Reflections on the Revolution in France (Conor Cruise O'Brien ed., 1982). While the *Reflections* is Burke's best-known work, his thought is so subtle that the great English stylist William Hazlett actually suggested "that the only fair specimen of Burke's writing is all that he wrote, because each new work shows additional evidence of his power in thought and brilliance in expression." Peter J. Stanlis, The Best of Burke: Selected Writings and Speeches of Edmund Burke vii (1963). Perhaps Dorsen ought to be read as making the same suggestion about Scalia.

18 Jamil Zainaldin and I have sought to explore the way these tensions have worked out over the course of American legal history in our law school casebook. Stephen B. Presser & Jamil S. Zainaldin, Law and Jurisprudence in American History (8th ed. 2013).

19 On the formation and influence of the Federalist Society, which Justice Scalia played an important role in launching, see, e.g., Amanda Hollis-Brusky, Ideas with Consequences: The Federalist Society and the Conservative Counterrevolution (2015).

20 *See generally* Law Professors, *supra* note 9.





Commentary

A Modest Proposal for the Reduction of the Size of the Federal Judiciary by Two-Thirds

by Brian M. Cogan

Note from the Editor:

This is the first article in a new *Commentary* section in the *Federalist Society Review*. In this section, we will feature interesting ideas and provocative proposals related to the legal profession. Here, a federal district judge tells us from his point of view of a few simple things Congress could do to dramatically reduce federal judges' caseloads—largely by moving more state-law-based cases into state court.

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

About the Author:

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It is a melancholy object to those who walk through the great federal courthouses of this country, when they see the courtrooms, the corridors, and clerks' offices, crowded with litigants, followed by three, four, or five lawyers, many in business casual dress, perhaps with ties in their pockets on the off-chance that they may see a federal judge, forced to undertake work under state law for want of substantial federal questions, who, as their practice matures, never learn the intricacies of trying a case under federal law before a federal judge.

—Jonathan Swift
(what he might have written had he been an observer of today's federal courts)

Federalism has become fashionable again. Kimberly Strassel of the Wall Street Journal, commenting recently on Scott Pruitt's nomination to head the EPA, summarized his career as "trying to stuff federal agencies back into their legal boxes," perhaps presaging a new era where the individual states are allowed to exercise their own prerogatives over environmental, health care, labor, and entitlement policy and reform. "Say hello to the federalist revival," she concluded. If this is going to happen, part of it is going to have to be getting the federal district courts out of the state law business.

Most non-lawyers would be surprised to learn the amount of time that federal district judges like me spend on a daily basis figuring out what to do with state law claims or state law issues that have been "federalized," perhaps out of a myopic assessment of efficiency, or out of a historical concern—which may no longer be valid but is never tested—that state courts cannot be trusted with important claims. The fact is that "making a federal case out of it" doesn't mean what it used to mean. Many state legislatures have sought to surpass the federal government in protecting their citizens' rights in civil cases, whether as members of a protected group, employees, consumers, the disabled, or just about any other classification that a state legislature feels might be in need of protection. Yet because of various overlapping jurisdictional rules, a sizeable proportion of those state law claims come to federal court.

Don't get me wrong. I'm not complaining at all. The federalism issues that require balancing competing federal and state law interests are a fascinating aspect of my job, and from a personal perspective, I have no interest in changing that. (Of course, I try to evenhandedly apply whatever statute the parties before me present.) But just as I suspect Jonathan Swift had plenty to eat when he wrote his *Modest Proposal*, I recognize that there may be larger interests at stake than my own intellectual stimulation. And with 80% of the cases in federal court consisting of civil disputes, and so many of those having state law issues that either overshadow, duplicate, drive, or affect the federal law claims that brought them to federal court in the first place, the question needs to be asked: are the marginal number of judges, courtrooms, staff, and resources, with their accompanying cost,

part of the necessary allocation of sovereign authority between the federal and state governments?

The doctrines that often transform federal courts into state courts are well known to any law student—principally, concurrent jurisdiction, supplemental jurisdiction, and diversity jurisdiction. Yet with a few deft jurisdictional flicks of its wrist, Congress can restore the balance of judicial federalism that the Founders intended. It could also further Justice Brandeis' conception of the states as laboratories of social experimentation, rather than, as often happens now, placing the application of state law in the hands of federal judges who are unaccountable to the voters who elected the state legislators to pass such laws.

Let's look at just four of the innumerable examples, comprising about half of my docket, where a strong argument can be made that the federal courts should have a greatly curtailed role.

I. Wage Litigation

As one plaintiff's lawyer quipped to me recently, "the minimum wage is all the rage." The federal statute, the Fair Labor Standards Act, known as the FLSA, has been the single greatest driver of the increase in federal district court caseloads in the last decade. It requires most employers to pay most employees a set minimum wage and overtime. It comprises the largest single component of cases on my docket. This was a great and overdue statute when Congress passed it in 1938. It was first proposed by Hugo Black when he was a Senator in 1932, in the midst of the Great Depression, obviously a time of the most significant labor market distortion in the last century.

What does it do today? Not so much. I am not saying it serves no function, but in my federal district court, and I suspect in many others, its main use is as a vehicle to get state law wage claims into federal court. State law often allows much better recoveries for underpaid workers. Twenty states raised their minimum wage as of January 1st of this year; all of them are higher than the $7.25 required by the federal statute, some of them much higher—New York is moving from the current $9 per hour to $15 per hour phased in through 2018. And those are just the ones who have raised it. Currently, only seven states have their minimum wage raised by the federal rate, although some others are tied to it.

Aside from the superior wages required under many state laws, many of these state statutes have vastly superior benefits for workers as compared to the federal statute. The FLSA, for example, allows underpaid employees to reach back for, at most, three years of unpaid minimum wages and overtime. The New York Labor Law allows six years. The New York Labor Law allows class actions, a big fee incentive for plaintiffs' lawyers; the FLSA does not (it has a unique vehicle called a "collective action," but it is a cumbersome and poor cousin to a class action). The FLSA has nothing like the New York Labor Law's "spread of hours" premium, which requires an extra hour's pay, without regard to overtime, if the spread between the beginning and end of the work day exceeds 10 hours. These are just a few of the many ways that state law, responding to local concerns and local pressures, can better protect workers than the depression-era FLSA.

Although I could write separately on the factors that lead plaintiffs' attorneys to sue under the FLSA in federal court and, in those few FLSA cases brought in state court, defense attorneys to remove them, the important fact is that I am flooded with FLSA cases, and virtually all of them include a parallel claim under the New York Labor Law. This is the result of the doctrine of supplemental jurisdiction, which essentially posits that it is more efficient to have one case in one court than two cases arising out of the same facts in two different courts, and therefore permits state claims to be brought alongside federal claims in federal court. That sounds fine until you give it a moment's thought—few plaintiffs would want to bring two cases, and thus, if called on to make a choice, plaintiffs would usually pick the law and court that gives them more relief. The irony is that the doctrine of supplemental jurisdiction, designed to create efficiency, often achieves little more in the real world than supplying a federal jurisdictional hook for claims that are ultimately determined as a matter of state law. It thus imposes a significant burden on the federal court with, in many cases, no demonstrable benefit to efficient administration.

In practice, the way this works is that in the vast majority of my FLSA cases, I have to put the FLSA on the shelf. Settlement or trial is based on the employer's much larger exposure under the New York Labor Law. In the end, I am left presiding over what is essentially a New York state law case, just as would a New York state court judge, with the federal law essentially eclipsed.

How to put things back in their place? The fix is simple. All that Congress has to do is amend either the FLSA or the supplemental jurisdiction statute to provide that if a district court determines that state law and the state courts of the district in which it sits provide an equal or superior remedy to the plaintiff, then the federal court is required to abstain from hearing the case, forcing the plaintiff to pursue the claims in state court. To those who would protest—"satellite litigation!"—I submit that such litigation would be brief. The Courts of Appeals would quickly establish which states within their circuits do and do not provide superior remedies, with the occasional revisit; but in many cases, like New York, the answer will be obvious.

Net effect on my New York docket: a caseload reduction of about 10%. Even if my docket does not proportionately reflect the national docket, even half or a third of that number would still mean a substantial savings in federal resources with no sacrifice of employee rights, as well as empowering state courts to lead the way in enforcing their own state laws.

II. False Arrest/Malicious Prosecution

Competing with the FLSA to produce the largest federal jurisdictional hook for state law claims on my docket is the Civil Rights Act of 1871, under which plaintiffs make claims against public authorities and the police officers they employ. Of course, not even a Modest Proposal would suggest that the federal courts surrender their unique role in addressing racial discrimination and racially-based police misconduct. But frankly, I see very little of that—maybe one out of 20 cases—in the multitude that I have on my docket. Instead, most of what I see is based on the Supreme Court's 1961 holding in *Monroe v. Pape* that if a police officer falsely arrests or causes the malicious prosecution of an individual, he has violated that individual's rights under the 14th Amendment, regardless of race, and the claim can be brought in federal court—or, importantly, at plaintiff's option, in state court—under the 1871 Act. Of course, in most states, the police

officer was already liable for false arrest and malicious prosecution under the common law, but in 1961, the Supreme Court was not confident in the willingness or ability of some states to neutrally apply the common law in this area.

Let's fast forward 56 years. Although the common law would cover the vast majority of false arrest, malicious prosecution, and excessive force cases that are before me just fine, I end up deciding these cases on constitutional grounds, that is, determining if there was a violation of the plaintiff's rights under the 14th Amendment, not under the common law, even though plaintiffs invariably assert common law claims through my supplemental jurisdiction. The doctrine of constitutional avoidance, which requires federal courts to avoid applying the Constitution if the case can be decided on state law grounds, has been turned on its head in this area. Federal courts avoid state law that in most cases would be fully adequate to address these torts in favor of applying the U.S. Constitution.

I don't think the Supreme Court in 1961 really had in mind some of the cases that appear on my docket; if it did, perhaps it's time to ask whether things have changed. In one case, for example, the police wrote a summons to a white circus performer who was riding his unicycle on the sidewalk through a high-crime neighborhood at 3 a.m. When the unicyclist had the summons dismissed in New York Criminal Court because the New York City ordinance prohibited only two and three-wheeled cycles on the sidewalk, not unicycles, he sued in my court for false arrest and malicious prosecution under the 1871 Act. Of course, he included supplemental jurisdiction claims for false arrest and malicious prosecution under the common law.

Or there is the case where an African-American man went on to a subway platform and turned his large, portable radio up to full volume, loud enough to actually drown out the train announcements. He refused to turn it down when a police officer asked him to, and so he was issued a summons for disorderly conduct. He brought the same kind of suit before me, with state law supplemental claims but no claims based on his race, and the defendants settled it for nuisance value. He had brought similar cases many times before; the "serial plaintiff" who deliberately or quasi-deliberately gets arrested to bring a nuisance-value suit is something many judges see in this area.

These cases are not outliers among those on my docket.

Of course there are some very serious cases brought under the 1871 Act, even if they are non-racial. Many judges, myself included, have presided over cases where an individual was wrongly imprisoned for decades as a result of false evidence, not because of race, but because of police incompetence to the point of recklessness or even malice. In those cases, the municipality ends up paying millions of dollars in settlement.

But no one is asking whether, in this day and age, enough confidence has been restored to the states, or at least some of them, that the common law antecedents for these federal rights might serve just as well. In New York, I think they would. I see no indication that the state courts in New York, and particularly state court juries, which are usually drawn from similar pools to those in federal courts, are particularly pro-police. In fact, on those few occasions when a plaintiff's lawyer commences the action in state court under the 1871 Act, as Congress has authorized him to do, together with the common law antecedents of their constitutional claims, the City and police defendants invariably remove the case to federal court (which federal law, under the doctrine of concurrent jurisdiction, permits them to do because of the presence of the claims under the 1871 Act). It seems like both sides, for reasons having nothing to do with the neutrality of the forum, prefer to be in federal court.

The fix could be similar to that suggested above for FLSA cases: Congress should restrict federal court enforcement of the 1871 Act to civil rights claims with a racial component—at least in states where state constitutional, statutory, or common law claims, as well as the state judicial system to enforce them, are shown to be adequate. Or give federal courts at least an option, if not a mandate, to abstain in such cases if they determine that the state court can handle it. Perhaps there is even a role for the Civil Rights Division of the United States Department of Justice in making that determination on a state-by-state basis.

Net effect on my New York docket: another 10% reduction.

III. Diversity Jurisdiction

This jurisdictional grant allows a citizen of one state to sue in federal court if he is suing a citizen of another state, as long as the amount in controversy exceeds $75,000. Diversity jurisdiction is authorized by the Constitution, and it requires the federal court to apply state law, usually the law of the state in which it presides. The reason for the grant of diversity jurisdiction in the Constitution seems obvious—in creating a union of separate sovereign states, state citizens were concerned, probably with some justification, that they might suffer prejudice before a local judge and jurors if sued in some other state. Federal jurisdiction was the device the Founders selected to ameliorate this potential local bias.

Today, the greatest use of diversity jurisdiction in my court—probably over 80% of two- and three-party cases—is traffic accident and other personal injury cases between citizens of different states. In these cases, only state law applies. But I frankly don't think it matters at all whether a New Jersey citizen injured in a traffic accident on the Brooklyn-Queens Expressway brings his claim against the New York driver in New York state court or my federal court. I don't believe New York state judges are prejudiced against people from New Jersey (or Georgia, or California, or France). They try to neutrally apply the law, and, as noted above, the jury pools for state and federal court don't seem distinct enough to make a difference.

There are exceptions where there is a perception of local bias. Most recently, Congress passed the Class Action Fairness Act (CAFA) in response to certain state courts, usually in rural areas, acting as "magnet" courts for plaintiffs' lawyers. Some local state courts did this by liberally construing their state class action laws to permit nationwide class actions against out-of-state corporations despite limited contacts between the state and the out-of-state defendant. The perceived bias of the judge and local jurors in favor of the local plaintiff forced many corporations to settle those class actions for huge amounts. Congress loosened the rules of diversity jurisdiction to permit such cases to be removed from state to federal court in an effort to limit the practice, but in doing so, it imposed strict criteria to ensure that truly national

interests are at stake, including a $5 million minimum amount in controversy requirement.

Numerous solutions to the over-availability of diversity jurisdiction have been brought forward, but the $5 million minimum in CAFA suggests an easy one, and one that Congress has used before. It last increased the jurisdictional minimum for ordinary diversity cases to $75,000 twenty years ago. Seventy-five thousand dollars is a lot less today than it was then; a first-year lawyer, fresh out of law school, at a large New York law firm will earn more than double that amount. The Commercial Division of the New York State Supreme Court in Manhattan has a $500,000 jurisdictional minimum. There probably aren't too many lawyers in urban centers that would want to bring a case worth anywhere near a mere $75,000. Raising the jurisdictional minimum to $1 million in federal court, coupled with a requirement that a plaintiff must make a reasonable showing that there is that much in controversy (unlike current law, which is very indulgent of the plaintiff's valuation), would eliminate many cases from the federal docket in which federal judges apply state law to claims that belong in state court. In fact, I believe a floating, five-year index that ties the jurisdictional amount to the cost of living would help ensure that only appropriately significant diversity cases wind up in federal court.

There are numerous other possible solutions. For example, Congress could apply the "local defendant rule" to all diversity cases. Under current law, when a case is commenced in state court and the litigants are diverse, the defendant cannot remove it to federal court if he resides in the state where the case is commenced. This is simply because that defendant cannot complain of local bias in his own state. But current law allows a local resident to sue an out-of-state defendant in federal court based on diversity. The same rule that applies to prevent removal by local defendants should apply to plaintiffs' initial filings, for the local plaintiff cannot be afraid of local prejudice. If he wants to sue a defendant in his (the plaintiff's) home state, there is no reason he cannot do it in state court.

And then there is, again, the abstention solution. Federal courts siting in bankruptcy, for example, are required to abstain from exercising jurisdiction over state law claims if, among other things, an action can be timely adjudicated in state court. There is no reason that federal district courts should not have the same mandate in diversity cases, perhaps with the addition that the federal court must find that there is no federal policy interest that would be compromised by abstention.

That's another 10% of the cases off my docket. I'm getting to direct more and more attention to questions of federal law.

IV. Title VII

Title VII of the Civil Rights Act of 1964 is on everyone's list of the most significant congressional enactments of the 20th Century. This is not only because of the direct effect that judicial decisions under the statute have had in promoting racial and gender equality in the workplace; it is also because the very existence of the statute and the development of caselaw under it have helped incentivize major national companies to develop internal human resources policies to promote equality among workers. Depending on your viewpoint, it has either led or accompanied market forces in establishing the need for equal opportunity in the workplace as part of the American work ethic.

But more than 50 years after its enactment, I am not seeing it used for these noble purposes. A surprising number of the Title VII cases brought before me, perhaps as many as half, are brought against City agencies or non-profit public service companies that perform strictly local functions. Because the requirement that the employer engage in "interstate commerce" is so liberally construed (in this statute and most others), and the threshold employment level is so low, the statute covers many businesses that are almost entirely local in nature—if a coffee shop buys its napkins from an out-of-state vendor, it is probably covered. It's not that employees of such companies aren't entitled to the same protections as their counterparts in large, private sector companies. But where the employer, public or private, is local, the question should be asked: is there a federal interest that can only be protected by a federal court?

As to a number of different kinds of employment discrimination, the answer is no. Both the New York Legislature and the New York City Council have enacted their own employment discrimination statutes that are in many ways more protective than Title VII. Unlike Title VII, the New York State Human Rights Law covers all of the grounds in Title VII plus sexual orientation (an open question under Title VII), marital status, domestic violence victim status, criminal record, and "criminal predisposition." Fewer employees are required to trigger the state statute than Title VII. At the administrative level, cases are investigated and resolved much faster by the State Division of Human Rights than they are by the Equal Employment Opportunity Commission. Individual managers can be sued under the state law, which increases a plaintiff's settlement leverage; under Title VII, only the employer is a proper defendant. And while the state statute does not expressly allow attorneys' fees in some kinds of discrimination cases, a clever plaintiff's lawyer will almost always be able to get an employer to pay attorneys' fees voluntarily if he prevails on his state law claim.

The New York City Human Rights Law is even more protective of the employee. It has all of the advantages of the state law, and an easier standard of proof. Under Title VII, an employee must prove that her protected status (for example, race or gender) was a substantial factor in the employer's wrongful decision or practice. Under the New York City law, the employee only needs to show that she was treated differently because of her status.

This gets a bit dicey before a jury, and it turns me into a state court judge applying the City law. Since the City standard is easier to prove, and gets the plaintiff all the relief she wants, I don't have to bother instructing the jury on the Title VII claim. If I put the City claim to the jury and the jury finds in favor of the defendant, that resolves the Title VII claim, because if the

plaintiff could not meet the easier burden of proof, we know she could not meet the harder one.

Net effect on my docket: another 10% reduction, and I can now focus on applying Title VII to claims that are substantial and important enough to warrant resolution in federal court.

V. Conclusion

I have only given four examples above. But the fact is that I could take virtually any federal statute designed to protect consumers, employees, or individual citizens and apply a similar analysis. As I've noted above, I readily concede that this Modest Proposal is based on my own experience as a federal judge in New York City—they don't let us out much—but there may be opportunities in other federal courts for similarly adjusting the situations in which a federal court must consider state law or where state law would make it unnecessary to apply federal law. Like any national policy, the broad grants of federal law and jurisdiction don't leave much room for fine-tuning at the local level to accommodate federalism concerns. But it wouldn't take many statutory amendments to help restore a proper balance and get federal courts and federal law out of the state law business when federalism and the interests of justice would be served.

The only objection I've heard to reducing the federal courts' involvement in state law came from a retired New York Appellate Division judge when I presented some of these ideas at a bar association meeting. She said, "My God, if the federal courts actually make the state courts the near-exclusive tribunal for state law claims, the state courts will never have the resources to determine so many cases." That may be. But I see nothing in the Constitution creating a role for the federal courts as a safety valve for inadequately funded state courts. If aspects of this Modest Proposal cause state legislators to think about allocating more resources to their courts to accommodate the legislation that they're passing, I see that as healthy, not problematic.

Of course, most readers will recognize that, by calling this challenge a Modest Proposal, I have granted myself some liberties in describing what is achievable or even desirable for the purpose of directing attention to an issue. The goal of provoking discussion is more important to me than the specific examples set forth above. Nevertheless, putting aside the reduced role (and size) that federal courts would have under my proposal, wouldn't it be grand if federal courts could hew closer to the role envisioned for them by the Founders, and have the bulk of their dockets comprised of cases in admiralty, patent, bankruptcy, truly national statutory mandates, and those important issues of our great Constitution that should only be decided by federal courts?