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THE 30-YEAR HISTORY OF DILUTING ERISA'S FIDUCIARY DUTY*

PAUL WATKINS & KATHLEEN BARCELEAU**

Under the Employee Retirement Income Security Act of 1974 (ERISA), fiduciaries have a strict duty of loyalty—to act "*solely* in the interest of participants and beneficiaries" and "for the *exclusive purpose*" of providing financial benefits to them.[1] Over the years, however, this exacting standard has been watered down by contra-textual interpretations published by the Department of Labor (DOL), which administers the fiduciary provisions of Title I of ERISA.[2] This article explains the history of the dilution of the ERISA duty of loyalty that has led to a status quo in which fiduciaries, in making investment decisions involving retirees' savings, may consider factors apart from ensuring and maximizing financial benefits to participants.

DOL's watered-down version of the ERISA duty of loyalty allows a fiduciary to consider interests other than providing pensioners a secure retirement income, so long as they do "*not subordinate*" the pensioners' financial interests to the other objectives. This administrative gloss on ERISA's sole interest and exclusive purpose standard has proved to be very malleable. The "not subordinate" language has been used to justify back-and-forth guidance issued by the DOL over the past thirty years. Interpretive Bulletins issued under the Clinton, Bush, and Obama Administrations oscillated between approving of

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

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[1] 29 U.S.C. § 1104(a)(1) (emphases added). *See* Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409, 420-21 (2014) ("Read in the context of ERISA as a whole, the term 'benefits' . . . must be understood to refer to the sort of *financial* benefits (such as retirement income) that trustees who manage investments typically seek to secure for the trust's beneficiaries.").

[2] U.S. Department of Labor, *History of EBSA and ERISA*, https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/history-of-ebsa-and-erisa.

and cautioning against fiduciaries' use of collateral considerations in making investment decisions and exercising shareholder rights on behalf of ERISA plans. Under the Trump and Biden Administrations, this has advanced into notice-and-comment rulemaking on applying environmental, social, and governance (ESG) factors to an ERISA fiduciary's obligations.

The fraught history of the "not-subordinate" interpretation suggests a return to the traditional, more objective "sole interest" standard would be better policy. Leaving any room for considerations other than the participants' financial interests in their retirement income opens fiduciaries up to a barrage of social and political concerns, whether personal or raised by others. Experience shows that mixed motives with investing leads to poor judgment and, as a result, financial loss. The best way to ensure that fiduciaries protect Americans' retirement income is to require them to focus entirely on that goal—as Congress did when it crafted the statutory language of ERISA.

I. ERISA'S DUTY OF LOYALTY & EARLY DOL INTERPRETATIONS

Under Title I of ERISA, "a fiduciary shall discharge his duties with respect to a plan *solely* in the interest of the participants and beneficiaries and . . . for the *exclusive purpose* of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan."[3] This fiduciary duty is derived from the law of trusts and codifies the common law sole interest standard as applied to retirement plans.[4] As the words "sole" and "exclusive" suggest, the statute requires undivided loyalty.[5] It means that "the trustee has a duty to the beneficiaries not to be influenced by the interest of any third person or by motives other than the accomplishment of the purposes of the trust."[6] "Acting with mixed motives triggers 'an irrebuttable presumption of wrongdoing,' full stop."[7] Courts have articulated this duty in the

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[3] 29 U.S.C. § 1104(a)(1) (emphases added).

[4] *See* Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc., 472 U.S. 559, 570 (1985) (Section 1104(a)(1) imposes "strict standards of trustee conduct . . . derived from the common law of trusts."); Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 STAN. L. REV. 381, 403 (2020).

[5] *See* RESTATEMENT (THIRD) OF TRUSTS § 78(1) cmt. a (2007) (explaining that the sole interest standard "states the trust law's fundamental principle of undivided loyalty").

[6] Schanzenbach & Sitkoff, *supra* note 4, at 403 (quoting RESTATEMENT (THIRD) OF TRUSTS § 78(1) cmt. f.).

[7] *Id.* at 401 (citations omitted).

ERISA context as requiring a "single-minded devotion" or an "eye single to the interest of the participants and beneficiaries."[8]

A. Economically Targeted Investments

During the Clinton Administration, the DOL subtly redefined this standard. In a 1994 Interpretive Bulletin (IB 94-1), it interpreted "the requirements that a fiduciary act solely in the interest of, and for the exclusive purpose of providing benefits to, participants and beneficiaries as prohibiting a fiduciary from *subordinating the interests* of participants and beneficiaries in their retirement income to unrelated objectives."[9] This guidance marked a significant change from the traditional duty of loyalty codified in ERISA. Fiduciaries no longer were required to have an "eye single" to the financial interests of participants and beneficiaries in their retirement. Fiduciaries could now consider "unrelated objectives"—so long as they did *not subordinate* participants' financial interests in their retirement income to those other objectives. This became known as the "all things being equal" test.[10]

IB 94-1 dealt with "economically targeted investments" (ETIs), which were essentially a rebranding of the socially responsible investment (SRI) movement of the 1970s and '80s, also known as "social investing."[11] The DOL defined ETIs as investments selected "for the economic benefits they create in addition to" or "apart from" the investment return for the beneficiaries of the retirement plan.[12] While pure social investing openly subordinated financial returns to social objectives, ETIs were framed as not

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[8] Morris v. Winnebago Indus., 936 F. Supp. 1509, 1522 (N.D. Iowa 1996) (quoting Adams v. Avondale Indus., 905 F.2d 943, 946 (6th Cir. 1990)); State St. Bank & Trust Co. v. Salovaara, 326 F.3d 130, 136 (2d Cir. 2003) (citing Donovan v. Bierwirth, 680 F.2d 263, 271 (2d Cir. 1982)).

[9] Interpretive Bulletin Relating to the Fiduciary Standard Under ERISA in Considering Economically Targeted Investments, 59 Fed. Reg. 32,606, 32,607 (June 23, 1994) (emphasis added).

[10] Economically Targeted Investments (ETIs) and Investment Strategies that Consider Environmental, Social and Governance (ESG) Factors, Employee Benefits Security Administration (Oct. 22, 2015), https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/etis-and-investment-strategies-that-consider-esg-factors.pdf?source=post_page----------.

[11] *See* Alvin D. Lurie, *ETIs: A Scheme for the Rescue of City and Country with Pension Funds*, 5 CORNELL J.L. & PUB. POL'Y 315, 323 (1996) ("What is new . . . is the repudiation of the term 'social investing' in favor of the politically correct (if governmentese-laden) term 'economically targeted investing.'"); *see also* Schanzenbach & Sitkoff, *supra* note 4, at 392-93 (describing early social investment screens to avoid morally questionable investments in, for example, defense companies during the Vietnam War or firms doing business in apartheid South Africa).

[12] Interpretive Bulletin Relating to the Fiduciary Standard Under ERISA in Considering Economically Targeted Investments, 59 Fed. Reg. 32,606, 32,606-07 (June 23, 1994).

sacrificing financial returns for retirees but having additional "economic" benefits.[13] This paved the way for consideration of environmental and social benefits through ESG factors.[14]

B. Collateral Benefits for Union Members

In the years before it issued IB 94-1, the DOL had used this "not subordinate" language in less formal settings, including in several private opinions issued under various administrations. Many of these interpretations arose in the context of fiduciaries seeking advisory opinions from the DOL regarding whether it was permissible to invest plan assets for the purpose of providing collateral benefits specifically to union members. Although the DOL had informed trustees that "any arrangement whereby plan funds are used for any other purpose, such as reimbursement of expenses incurred by a union," could violate ERISA's sole interest and exclusive purpose requirements,[15] it approved of various less direct ways of promoting union interests with plan assets.

For example, the DOL allowed agreements between automobile manufacturers and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) related to how retirement plan benefits should be invested. The DOL advised Chrysler's Pension Fund that its agreement with the UAW to receive recommendations about how trustees could invest a certain percent of plan assets to provide collateral benefits to union members' communities did not violate ERISA.[16] Similarly, the DOL approved of General Motors' agreement to receive UAW recommendations to invest a certain percent of pension plan assets in residential mortgages in communities with substantial numbers of UAW members, as well as in debt instruments of specific UAW-recommended non-profits.[17]

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[13] Edward A. Zelinsky, *ETI, Phone the Department of Labor: Economically Targeted Investments, IB 94-1 and the Reincarnation of Industrial Policy*, 16 BERKELEY J. EMP. & LAB. L. 333, 336 (1995).

[14] *See* Schanzenbach & Sitkoff, *supra* note 4, at 388 n.23 ("The Department of Labor, for example, has shifted from 'economically targeted investments' in earlier bulletins to 'ESG' in more recent bulletins.").

[15] Letter from Alan D. Lebowitz, Ass't Admin., Office of Fiduciary Standards, Pension and Welfare Benefits Admin., U.S. Dep't of Labor, to Mr. George M. Cox, Cox, Castle & Nicholson (July 16, 1979), 1979 WL 169909.

[16] *See* DOL Advisory Ops. 80-33A (June 3, 1980), 1980 WL 8934, and 88-16A (Dec. 19, 1988), 1988 WL 222716.

[17] *See* Letter from Mark A. Greenstein, Acting Chief, Div. of Fiduciary Interp., Office of Reg. and Interp., U.S. Dep't of Labor, to Mr. Stuart Cohen, Legal Staff, General Motors Corp. (May 14, 1993), 1993 WL 1370527.

The DOL had also approved of trustees investing plan assets to support union labor projects. In a 1982 advisory opinion, the DOL explained with regard to investing in a "Union Construction Fund" that "a decision to make an investment may not be influenced . . . by a desire to stimulate the construction industry and generate employment"; that is, "unless the investment, when judged solely on the basis of its economic value to the plan, would be equal or superior to alternative investments available to the fund."[18] Then, in a 1988 letter, the DOL approved of fiduciaries investing in an account "designed . . . incidentally to help support the unionized sector of the building and construction industry."[19] It opined that the use of a "union labor condition" did not violate ERISA so long as the loans were made at prevailing market terms.[20]

These rulings approved of ERISA fiduciaries pursuing collateral benefits for union members using the assets of retirement plans. Through them, the DOL endorsed the idea underlying ETIs: that investments may be both in the financial interests of plan participants and provide an additional benefit. Employee retirement plan fiduciaries could look beyond merely achieving the best investment return for participants and beneficiaries to also promote union labor projects or community interests, provided they did not increase risk or sacrifice financial returns expected from the relevant asset class.

C. Political Criticism

When the DOL issued its guidance on ETIs, Republicans criticized it as the Clinton Administration's attempt to circumvent the democratic process to fund social programs using private pension funds.[21] Supporters of the DOL interpretation admitted that ETIs were "basically a scheme for using the funds of both public and private pensions to invest in . . . community projects."[22] Before and after he was elected president, Bill Clinton promoted ETIs and policies incentivizing pension funds to finance public works and environmental projects.[23] Likewise, "at least three of [his] Cabinet appointees

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[18] DOL Advisory Op. 82-52A (Sept. 28, 1992), 1982 WL 21235.

[19] Letter from Robert J. Doyle, Acting Dir. of Reg. and Interp., U.S. Dep't of Labor, to Mr. James S. Ray, Connerton, Ray & Simon (July 8, 1988), 1988 WL 897710.

[20] *Id.*

[21] *See, e.g.*, Joint Economic Committee Republicans, *Economically Targeted Investments (ETIs)* (June 7, 1995), *available at* https://www.jec.senate.gov/public/_cache/files/40c6425b-59ae-432c-ad1c-aa60606c0370/economically-targeted-investments-etis-june-7-1995.pdf.

[22] *See* Lurie, *supra* note 11, at 315.

[23] *Id.* at 319, 322.

into HUD, Labor, and Transportation in their confirmation hearings also endorsed tapping pension funds for 'the public interest.'"[24]

The Joint Economic Committee Republicans strongly opposed what they called "the Clinton Pension Grab."[25] Vice Chairman Jim Saxton worried that the "ultimate objective [was] to mandate social investing through compulsory ETI quotas, similar to lending quotas now imposed on financial institutions by the Clinton Administration."[26] Speaker Newt Gingrich saw this as a "classic example of pro-big government, of tax-and-spend liberals trying to achieve through the back door what they can't do through the front door."[27] Republicans proposed a law to undo IB 94-1, but it failed.[28]

Secretary of Labor Robert Reich defended the guidance and actively promoted ETIs. Under his leadership, the DOL spent over $1 million creating an ETI clearinghouse, which would "gather[] information about ETIs' investment performance and attributes and make it available to those in the pension community to aid investment decisions."[29] Some worried that this clearinghouse was a tool for government regulators to direct pension plans where to invest their beneficiaries' savings.[30] They were concerned that Secretary Reich was trying revive the doctrine of industrial policy, with the government playing a greater role in allocating capital and directing market forces.[31]

D. Expansion of the "Not Subordinate" Interpretation to Exercise of Shareholder Rights

In addition to the guidance on ETIs, the Clinton DOL issued guidance about the exercise of shareholder rights connected to ERISA plans.[32] The DOL had first stated in a 1988 opinion letter to Avon Products, Inc. (known

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[24] *Id.* at 319.

[25] Joint Economic Committee Republicans, *Stopping the Clinton Pension Grab* (June 7, 1995), *available at* https://www.jec.senate.gov/public/_cache/files/c1a0057a-8284-430f-a887-a6897f2026ec/stopping-the-clinton-pension-grab---june-7-1995.pdf.

[26] Letter from Jim Saxton (May 24, 1995), attached in H.R. Rep. No. 104-238, at 33.

[27] JEC Republicans, *Stopping the Clinton Pension Grab*, *supra* note 25, at 1.

[28] Pension Protection Act of 1995, H.R. 1594, 104th Cong.

[29] Letter from Barbara D. Bovbjerg, Assoc. Dir., Income Security Issues, U.S. General Accounting Office, to Jim Saxton, Chairman, Joint Economic Committee, at 1-2 (Feb. 27, 1998), *available at* https://www.gao.gov/assets/hehs-98-99r.pdf.

[30] *See, e.g.*, Zelinsky, *supra* note 13, at 334-36; H.R. Rep. No. 104-238, at 5.

[31] Zelinsky, *supra* note 13, at 353-54.

[32] Interpretive Bulletin Relating to Written Statements of Investment Policy, Including Proxy Voting Policy or Guidelines, 59 Fed. Reg. 38,863 (July 29, 1994).

as the "Avon Letter") that a fiduciary's duty to manage plan assets that are shares of corporate stock includes the responsibility to vote the proxies appurtenant to those shares of stock.[33] Interpretive Bulletin 94-2 (IB 94-2) further explained that voting proxies appurtenant to plan assets fell under ERISA's fiduciary duty standards and required that, "in voting proxies, the responsible fiduciary consider those factors that may affect the value of the plan's investment and *not subordinate* the interests of the participants and beneficiaries in their retirement income to unrelated objectives."[34] The guidance also approved of ERISA fiduciaries engaging in "activities intended to monitor or influence the management of corporations in which the plan owns stock" when there was a "reasonable expectation" it was "likely to enhance the value of the plan's investment in the corporation."[35] IB 94-2 went a step further in naming examples of permissible topics for shareholder activism, including corporate governance, workplace practices, and "financial and non-financial measures of corporate performance."[36]

II. OSCILLATING SUB-REGULATORY GUIDANCE

With these actions, the Clinton Administration initiated more than twenty-five years of pendulum-swinging sub-regulatory guidance on whether and how to assess ETIs and, relatedly, the appropriate level of attention for fiduciaries to give proxy voting. During the Bush Administration, the DOL revisited the Clinton-era guidance on ETIs and the exercise of shareholder rights. It issued Interpretive Bulletins 2008-1 (IB 08-1) and 2008-2 (IB 08-2) to replace IB 94-1 and IB 94-2. While restating in slightly different wording the "not subordinate" formulation of ERISA's duty of loyalty from the previous guidance, the new bulletins reversed course on the permissibility of considering collateral interests.

First, in IB 08-1, the DOL interpreted the sole interest and exclusive purpose language in ERISA to mean that "fiduciaries may *never subordinate* the economic interests of the plan to unrelated objectives, and may not select investments on the basis of any factor outside the economic interest of the

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[33] Letter from Alan D. Lebowitz, Deputy Ass't Sec'y, Pension and Welfare Benefits Admin., U.S. Dep't of Labor, to Helmuth Fandl, Chairman of Ret. Bd., Avon Products, Inc. (Feb. 23, 1988), 1988 WL 897696.

[34] Interpretive Bulletin Relating to Written Statements of Investment Policy, Including Proxy Voting Policy or Guidelines, 59 Fed. Reg. at 38,863 (emphasis added).

[35] *Id.* at 38,864.

[36] *Id.*

plan except in very limited circumstances."[37] Under this stricter guidance, a fiduciary could not choose an ETI unless he "concluded that the alternative options are truly equal, taking into account a quantitative and qualitative analysis of the economic impact on the plan."[38] Previously, the DOL had approved of various scenarios of fiduciaries investing plan assets to support union members and their communities. Here, the DOL gave examples that showed how a fiduciary's consideration of collateral benefits, such as creating local jobs, financing affordable housing, promoting environmental goals, and using union labor, "should be rare" and should be carefully documented.[39]

IB 08-1's tone indicated skepticism that ERISA fiduciaries could consider these goals without violating the duty of loyalty. As explained by its examples, a plan that prefers to invest in local construction projects could incur extra risk due to its lack of diversification.[40] Financing a local affordable housing project may mean reduced liquidity compared to other bonds.[41] A fund that invests based on environmental or union labor criteria must consider alternative investments.[42] If relying on non-economic criteria for a decision, fiduciaries should "justify their investment choice by recording their analysis in writing" showing that their choice is economically "equal or superior" to the alternatives, "provid[ing] equal or better returns at the same or lower risks" while "play[ing] the same role in the plan's portfolio."[43]

Likewise, in IB 08-2, the DOL reiterated the "not subordinate" language while walking back IB 94-2's guidance.[44] The new guidance emphasized that in deciding whether or how to vote a proxy, fiduciaries could only consider factors related to the economic value of the plan's investment. They could not consider "objectives, considerations, and economic effects unrelated to the plan's economic interests."[45] IB 08-2 also added explicit warnings related to "socially-directed" exercises of shareholder rights. It stated that fiduciaries "shall not use an investment policy to promote myriad public policy

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[37] Interpretive Bulletin Relating to Investing in Economically Targeted Investments, 73 Fed. Reg. 61,734, 61,735 (Oct. 17, 2008) (emphasis added).

[38] *Id.*

[39] *Id.* at 61,734, 61,736.

[40] *Id.* at 61,736.

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] Interpretive Bulletin Relating to the Exercise of Shareholder Rights and Written Statements of Investment Policy, Including Proxy Voting Policies or Guidelines, 73 Fed. Reg. 61,732 (Oct. 17, 2008).

[45] *Id.*

preferences" and cautioned that they "risk violating the exclusive purpose rule when they exercise their fiduciary authority in an attempt to further legislative, regulatory or public policy issues through the proxy process."[46] The DOL opined that spending plan assets on proxy votes not sufficiently tied to the economic value of its investment would run afoul of ERISA's fiduciary duty.[47]

Seven years later, under the Obama Administration, the DOL again changed its guidance, issuing Interpretive Bulletin 2015-1 (IB 15-1) to replace IB 08-1.[48] This guidance reiterated the language from IB 94-1: "The Department has construed the requirements that a fiduciary act solely in the interest of, and for the exclusive purpose of providing benefits to, participants and beneficiaries as prohibiting a fiduciary from *subordinating the interests* of participants and beneficiaries in their retirement income to unrelated objectives."[49] The guidance went on to say that "fiduciary standards applicable to ETIs are no different than the standards applicable to plan investments generally."[50] Read in light of the background section, which expressed concerns that IB 08-1 had "unduly discouraged fiduciaries from considering ETIs and ESG factors,"[51] this marked another flip in policy.

The Obama-era DOL also withdrew the prior guidance on proxy voting and shareholder rights. It issued Interpretive Bulletin 16-1 to correct the effect IB 08-2 had of discouraging shareholder engagement, especially on ESG issues.[52] The new guidance expressly condoned the incorporation of ESG considerations into investment policies and voting guidelines. It gave examples of appropriate shareholder issues on which plan fiduciaries should engage, such as board composition, business plans on climate change, and workforce diversity.[53]

Then in 2018, during the Trump Administration, the DOL issued a Field Assistance Bulletin marking yet another switch in rhetoric about considering collateral benefits. The bulletin warned ERISA fiduciaries against "too readily

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[46] *Id.* at 61,734.

[47] *Id.*

[48] Interpretive Bulletin Relating to the Fiduciary Standard Under ERISA in Considering Economically Targeted Investments, 80 Fed. Reg. 65,135 (Oct. 26, 2015).

[49] *Id.* at 65,137 (emphasis added).

[50] *Id.*

[51] *Id.* at 65,136.

[52] Interpretive Bulletin Relating to the Exercise of Shareholder Rights and Written Statements of Investment Policy, Including Proxy Voting Policies or Guidelines, 81 Fed. Reg. 95,879, 95,880 (Dec. 29, 2016).

[53] *Id.* at 95,884.

treat[ing] ESG factors as economically relevant."[54] It focused on fiduciaries' duty to "always put first the economic interests of the plan in providing retirement benefits" and evaluate investments based on "financial factors."[55] With respect to exercising shareholder rights, it stated that "routine or substantial expenditure of plan assets to actively engage with management on environmental or social factors" should be backed up by a documented cost-benefit analysis.[56]

III. ESG RULEMAKING

In 2020, after more than two decades of sub-regulatory about-faces, the DOL under the Trump Administration conducted regulatory notice-and-comment rulemakings to address ESG practices in connection with ERISA plans. The Trump DOL promulgated two final rules on the topic, each modifying a portion of the investment duties regulation at 29 C.F.R. § 2550.404a-1. The first rule, "Financial Factors in Selecting Plan Investments," addressed fiduciaries' general obligations in considering investments or investment courses of action for employee benefit plans. The second, "Fiduciary Duties Regarding Proxy Voting and Shareholder Rights," addressed fiduciaries' obligations with respect to proxy voting. Both retained some form of the "not subordinate" phrase in interpreting the fiduciary duty of loyalty. DOL further found that strict regulations are necessary to protect participants from "shortcomings in the rigor of the prudence and loyalty analysis by some participating in the ESG investment marketplace."[57]

The Financial Factors rule required fiduciaries to evaluate investments "based only on pecuniary factors," which the rule stated should be weighed according to their "impact on risk-return."[58] The regulatory text of the proposed rule published on June 30, 2020, specified that ESG considerations were pecuniary factors if they present material economic risks or opportunities, and it described how such factors should be assessed and evaluated in

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[54] Department of Labor, Field Assistance Bulletin 2018-01 (Apr. 23, 2018), https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2018-01.

[55] *Id.*

[56] *Id.*

[57] Financial Factors in Selecting Plan Investments, 85 Fed. Reg. 72,846, 72,847, 72,850 (Nov. 13, 2020); Fiduciary Duties Regarding Proxy Voting and Shareholder Rights, 85 Fed. Reg. 81,658, 81678 (Dec. 16, 2020).

[58] Financial Factors in Selecting Plan Investments, 85 Fed. Reg. at 72,884.

considering ESG-oriented investment alternatives.[59] After DOL considered over 8,700 public comments, the final rule focused on a fiduciary's obligations overall in selecting investment alternatives, omitting specific reference to ESG factors in the regulatory text and instead reiterating that "[a] fiduciary may *not subordinate* the interests of the participants and beneficiaries in their retirement income or financial benefits under the plan to other objectives," and prohibiting "sacrific[ing] investment return or tak[ing] on additional investment risk to promote non-pecuniary benefits or goals."[60] The rule permitted adding investment alternatives that promoted non-pecuniary goals to a menu of individual account plan options, provided the investment alternative satisfied a due diligence review based on pecuniary factors, but it prohibited including an investment fund that considered or used non-pecuniary factors in a qualified default investment alternative (QDIA). The rule included the Clinton-era "all things being equal" provision in permitting consideration of non-pecuniary factors as tiebreakers, but only when choosing among indistinguishable investment alternatives (which presumably would rarely occur). And if used as a tiebreaker, analysis of the investment had to be documented. This safeguard was "intended to prevent fiduciaries from improperly finding economic equivalence."[61]

The Proxy Voting rule established parameters around when a fiduciary should or should not engage in proxy voting, and it imposed oversight obligations on fiduciaries who engage proxy advisors.[62] In the preamble to the proposed rule, DOL leadership noted changes in the investment landscape that had occurred since the DOL released the Avon Letter, and it commented particularly on the rise of proxy advisory firms (namely, ISS Analytics and Glass Lewis) that fiduciaries often retain to advise on the increasingly complex issues that may be considered in assessing a company's governance practices. The DOL aimed to clarify a fiduciary's obligation in voting proxies in light of those changes and recent SEC guidance. It sought to allay a perception that ERISA fiduciaries must vote every proxy and to provide efficient parameters for fiduciaries to use to determine the proper shareholder activities in which to engage, restricting them from focusing on non-pecuniary initiatives. This rule, like Financial Factors rule, used the "not subordinate" phrase, articulating with respect to proxy voting that fiduciaries must not "promote

[59] *Id.* at 72,849.
[60] *Id.* at 72,884 (emphasis added).
[61] *Id.* at 72,849.
[62] Fiduciary Duties Regarding Proxy Voting and Shareholder Rights, 85 Fed. Reg. at 81,658.

non-pecuniary benefits or goals unrelated to th[e] financial interests of the plan's participants and beneficiaries."[63] Notably, the DOL specifically stated in response to commenters that it did not mean for the rule to condone activities "with the goal of advancing non-pecuniary goals unrelated to the financial interests of the plan's participants and beneficiaries."[64]

Shortly after the final rules were promulgated, President Biden took office, and the DOL announced that it would not enforce the Trump-era rules.[65] The DOL acknowledged that "[d]ifferences in the tone and tenor in different Administration's [sic] iterations of sub-regulatory guidance" had "created confusion about these investment issues."[66] It issued a Notice of Proposed Rulemaking in October 2021 to replace the 2020 Final Rules,[67] and it promulgated a new final rule at the end of 2022, which took effect on January 30, 2023.[68] The DOL stated that its changes were intended to address the "chilling effect" stakeholders had experienced in considering ESG factors in investment decisions and in exercising shareholder rights following the 2020 Final Rules.[69]

The current rule expresses the duty of loyalty as follows:

> A fiduciary may *not subordinate* the interests of the participants and beneficiaries in their retirement income or financial benefits under the plan to other objectives, and may *not sacrifice investment return or take on additional investment risk* to promote benefits or goals unrelated to interests of the participants and beneficiaries in their retirement income or financial benefits under the plan.[70]

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[63] *Id.* at 81,694.

[64] *Id.* at 81,667.

[65] U.S. Department of Labor Statement Regarding Enforcement of Its Final Rules on ESG Investments and Proxy Voting by Employee Benefit Plans (Mar. 10, 2021), *available at* https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/laws/erisa/statement-on-enforcement-of-final-rules-on-esg-investments-and-proxy-voting.pdf.

[66] Notice of Proposed Rulemaking on Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, Dep't of Labor (Oct. 13, 2021), https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/fact-sheets/notice-of-proposed-rulemaking-on-prudence-and-loyalty-in-selecting-plan-investments-and-exercising-shareholder-rights.pdf.

[67] Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 86 Fed. Reg. 57,272 (proposed Oct. 14, 2021).

[68] 29 C.F.R. § 2550.404a-1 (2023).

[69] *See* Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 87 Fed. Reg. 73,826 (Dec. 1, 2022).

[70] 29 C.F.R. § 2550.404a-1(c)(1)(emphasis added).

This language removes references here and throughout to the "pecuniary" and "non-pecuniary" distinctions utilized in the Supreme Court's decision in *Fifth Third Bancorp v. Dudenhoeffer* and codified in the 2020 Final Rules.[71] This rule change thus removed a clear restatement of law, even though DOL had previously found that "shortcomings in the rigor of the prudence and loyalty analysis by some participating in the ESG investment marketplace" risked harm to participants.[72] In addition, the rule removes the requirement of specific documentation when considering investment alternatives based on collateral benefits as a tiebreaker. It also eliminates the "economically indistinguishable" requirement of the 2020 tiebreaker provision, replacing it with the more subjective and difficult to challenge threshold that allows a fiduciary to choose an investment based on collateral benefits if "competing investments . . . equally serve the financial interests of the plan over the appropriate time horizon."[73] The rule also removes the restriction against including ESG investments or other investments with non-pecuniary objectives in QDIAs.

Moreover, the DOL amended a fiduciary's prudence obligations to state that a fiduciary's analysis of an investment's relevant risk and return "may include the economic effects of climate change and other environmental, social, or governance factors."[74] The preamble to the rule explains this language through examples of factors potentially relevant to a fiduciary's risk-return analysis, including "exposure to the physical and transitional risks of climate change," board composition, and "the corporation's progress on workforce diversity, inclusion, and other drivers of employee hiring, promotion, and retention."[75]

In early 2023, Congress passed a joint resolution with bipartisan support nullifying the new DOL rule,[76] but President Biden vetoed the resolution,[77] and Congress failed to override the veto.[78] A coalition of 26 states, along with private plaintiffs, challenged the rule in federal court under the

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[71] *See* 573 U.S. at 420-21.

[72] 85 Fed. Reg. at 72,847, 72,850; 85 Fed. Reg. at 81,678.

[73] 29 C.F.R. § 2550.404a-1(c)(2).

[74] 29 C.F.R. § 2550.404a-1(b)(4).

[75] Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 87 Fed. Reg. 73,832.

[76] H.R.J. Res. 30, 118th Cong. (2023).

[77] Joseph R. Biden Jr., Message to the House of Representatives — President's Veto of H.J. Res 30 (Mar. 20, 2023), https://www.whitehouse.gov/briefing-room/presidential-actions/2023/03/20/message-to-the-house-of-representatives-presidents-veto-of-h-j-res-30/.

[78] *See* Actions Overview, H.J. Res. 30 — 118th Cong. (2023-2024), https://www.congress.gov/bill/118th-congress/house-joint-resolution/30/actions.

Administrative Procedure Act.[79] The district court upheld the rule "after affording DOL the deference it is presently due under *Chevron*."[80] The decision has been appealed to the Fifth Circuit.[81] The outcome of the litigation may depend on the Supreme Court's treatment of *Chevron* in *Relentless, Inc. v. Department of Commerce* and *Loper Bright Enterprises v. Raimondo*, which will be argued in January.

IV. THE "NOT SUBORDINATE" STANDARD IS BAD POLICY

The dilution of the sole interest standard to merely require that fiduciaries not subordinate pensioners' financial interests in their retirement income is bad policy, both within and outside of the ERISA context. When DOL released the proposed 2020 Financial Factors rule, then-Secretary of Labor Eugene Scalia pointed out that "[a] fiduciary's duty is to retirees alone, because under Erisa one 'social' goal trumps all others—retirement security for American workers."[82] Furthermore, as congressional Republicans argued back in the 1990s, "[o]nce an investment manager ceases to focus exclusively on maximizing the return for beneficiaries, it is very difficult to avoid social or even political considerations."[83] Any consideration of collateral benefits opens pension-fund fiduciaries up to pressures from public officials and private interest groups, and away from their primary duty of maximizing retirement income for participants and beneficiaries.

Permitting consideration of collateral benefits—from favoring UAW neighborhoods and union labor projects to allowing environmental activists to influence investment policy—removes the political insulation pension-fund fiduciaries need if they are to act in investors' best interest. Numerous historical examples show how the consideration of collateral benefits clouds fiduciaries' vision and impairs their judgment. State retirement funds lost tens of millions of dollars in the 1980s and '90s through the failures of ETIs that aimed to promote in-state jobs or companies.[84] Kansas lost at least $138 million on defaulted loans from in-state investments, Connecticut lost $25

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[79] *See* Utah v. Walsh, No. 23-016, 2023 WL 6205926 (N.D. Tex. Sept. 21, 2023).

[80] *Id.* at *5.

[81] Notice of Appeal, Utah v. Walsh, No. 23-016 (N.D. Tex. Oct. 26, 2023).

[82] Eugene Scalia, Opinion, *Retirees' Security Trumps Other Social Goals*, WALL ST. J. (June 23, 2020), https://www.wsj.com/articles/retirees-security-trumps-other-social-goals-11592953329.

[83] JEC Republicans, *ETIs*, *supra* note 21, at 3.

[84] M. Wayne Marr, John R. Nofsinger, & John L. Trimble, *Economically Targeted and Social Investments: Investment Management and Pension Fund Performance*, RSCH. FOUND. INST. CHARTERED FIN. ANALYSTS, at 5-6 (1995).

million by investing in a local manufacturing company, and Pennsylvania lost $40 million by financing an in-state auto plant.[85] Alaska lost millions of dollars through its $250 million investment in unguaranteed home mortgages, many of which were in-state, when over a third of the loans became delinquent.[86] More recently, the California Public Employees' Retirement System lost over $3.5 billion by divesting from tobacco.[87] Numerous other plans that have divested from fossil fuel holdings to pursue environmentally friendly investment alternatives have presumably lost significant sums in recent years due to reduced diversification and losing out on recent gains from historic fuel price increases.[88]

Even if collateral benefits are only used as a tiebreaker between equal investment opportunities, fiduciaries considering them are forced to weigh the value of social goals to third parties in addition to the financial returns they must secure for retirees. Any consideration of "other benefits" complicates what should be a straightforward duty of assessing objective and quantifiable risk and return. With the permissibility of tiebreaking, "groups expecting to benefit from ETIs have strong incentives to compel . . . trustees to declare ties."[89]

Moreover, social investing, even when rebranded as ETIs or ESG, is based on flawed economic assumptions. Mixed motives in investment decision making negatively impact financial returns. Choosing investments based on nonfinancial goals means accepting greater risk, lower returns, or both. The idea of tiebreaking between financially equal but socially unequal investments is not a solution either. "[I]f two investments in fact have identical risk and return attributes, textbook financial economics teaches that, liquidity constraints and transaction costs to the side, the investor should invest in both on diversification grounds."[90] And if an investment has competitive rates of

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[85] *Id.*

[86] U.S. Gen. Accounting Office, GAO/PEMD-95-13, *Public Pension Plans: Evaluation of Economically Targeted Investment Programs*, at 23 (1995).

[87] Randy Diamond, *CalPERS Decision to Divest from Tobacco Is Costly*, CHIEF INV. OFFICER (Dec. 12, 2018), https://www.ai-cio.com/news/calpers-decision-divest-tobacco-costly/.

[88] *See* Patrick Temple-West & Kristen Talman, *ESG Shares Underperform Oil and Gas in 2021*, FIN. TIMES (Dec. 30, 2021), https://www.ft.com/content/70984a9e-ab65-4905-a2fa-83202e3db68b; Alicia McElhaney, *Investors Dropped Oil Due to Underperformance and ESG Concerns. Now They're Reconsidering.*, INSTITUTIONAL INV. (Apr. 5, 2022), https://www.institutionalinvestor.com/article/2bstolqfnrubgolhso54w/portfolio/investors-dropped-oil-due-to-underperformance-and-esg-concerns-now-theyre-reconsidering.

[89] Zelinsky, *supra* note 13, at 348.

[90] Schanzenbach & Sitkoff, *supra* note 4, at 409.

return, it will attract capital by normal market forces without needing to rely on its collateral benefits.[91]

Finally, some worry that *permitting* the consideration of ESG goals in investing pension funds may pave the way for government *mandates* to do so.[92] The vast amount of wealth held by pension funds remains a tempting source of funding for politicians and others seeking to advance their idea of the common good from a position of control rather than through republican governance or free market mechanisms. The thrust of the modern ESG movement, like its predecessors, threatens to divert more private capital to the government to decide how best to allocate it. A sole interest fiduciary standard, without the malleable "not subordinate" gloss, provides protection against that possibility and permits capital to flow to investments that produce the best economic returns.

Other Views:

- Max M. Schanzenbach & Robert H. Sitkoff, *ESG Investing After the DOL Rule on "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights,"* HARV. L. SCH. FORUM ON CORP. GOV. (Feb. 2, 2023), https://corpgov.law.harvard.edu/2023/02/02/esg-investing-after-the-dol-rule-on-prudence-and-loyalty-in-selecting-plan-investments-and-exercising-shareholder-rights/.
- David H. Webber, *New Department of Labor Investment Rules Could Be Big Win for Everyone but Labor*, CLS BLUE SKY BLOG (Mar. 28, 2022), https://clsbluesky.law.columbia.edu/2022/03/28/new-department-of-labor-investment-rules-could-be-big-win-for-everyone-but-labor/.
- Martin Lipton, *ESG, Stakeholder Governance, and the Duty of the Corporation*, HARV. L. SCH. FORUM ON CORP. GOV. (Sept. 18, 2022), https://corpgov.law.harvard.edu/2022/09/18/esg-stakeholder-governance-and-the-duty-of-the-corporation/.

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[91] Zelinsky, *supra* note 13, at 336.

[92] Comments on the DOL's 2021 Proposed Rule express such fears. *See, e.g.*, National Center for Public Policy Research, Comment Letter on Proposed Rule Regarding Prudence and Loyalty (Dec. 10, 2021), at 2, https://www.regulations.gov/comment/EBSA-2021-0013-0323 (arguing that the proposed rule would "effectively coerce pension managers into investing in and voting for overtly political [ESG] shareholder resolutions"); U.S. Senate Ranking Members, Comment Letter on Proposed Rule Regarding Prudence and Loyalty (Dec. 10, 2021), at 1, https://www.regulations.gov/comment/EBSA-2021-0013-0318 ("[T]he proposal effectively mandates consideration of climate change and ESG factors in all investment and proxy voting decisions.").

THE LANDMARK CASE OF *SHAARE TEFILA V. COBB*[*]

KENNETH L. MARCUS[**]

A review of ANNALISE E. GLAUZ-TODRANK, JUDGING JEWISH IDENTITY IN THE UNITED STATES (Lexington Books 2023)

On September 28, 2023, eight federal cabinet-level agencies formally clarified, for the first time, that Title VI of the Civil Rights of 1964[1] prohibits ethnic and ancestral discrimination against Jewish Americans and members of various other ethno-religious groups.[2] This move, and its underlying concept, dispelled any remaining doubt that Title VI—which prohibits discrimination on the basis of race, color, or national origin, but not religion—applies to ethnic groups that share a common religion. The White House announced that this move was taken to advance President Joseph Biden's National Strategy to Combat Anti-Semitism.[3] In fact, the action was the culmination of a twenty-year effort, begun during the George W. Bush

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

[**] Founder and Chairman, The Louis D. Brandeis Center for Human Rights Under Law; Distinguished Senior Fellow, Center for Liberty and Law, George Mason University Scalia School of Law; Professorial Lecturer in Law, George Washington University School of Law. Mark Goldfeder and Diane Kunz's comments are gratefully acknowledged, as is Eliott Dosetareh's research support, while any remaining errors remain the author's.

[1] 42 U.S.C. §§ 2000d - 2000d-7 (Title VI).

[2] *Biden administration to take new actions against antisemitism*, REUTERS, Sept. 28, 2023, https://www.reuters.com/article/usa-biden-antisemitism/biden-administration-to-take-new-actions-against-antisemitism-idUSKBN30Y1F3. The eight agencies are the Departments of Agriculture, Health and Human Services, Homeland Security, Housing and Urban Development, Interior, Labor, Treasury, and Transportation. The Departments of Justice and Education had already long since issued similar statements.

[3] White House Fact Sheet: Biden-Harris Administration Takes Landmark Step to Counter Antisemitism, Sept. 28, 2023, https://www.whitehouse.gov/briefing-room/statements-releases/2023/09/28/fact-sheet-biden-harris-administration-takes-landmark-step-to-counter-antisemitism/.

administration, to ensure that federal officials would extend uniform protections to such populations in a manner consistent with the U.S. Supreme Court's unanimous decision in the case of *Shaare Tefila v. Cobb*.[4] Full disclosure: I have been a principal player in these efforts. Indeed, the notion that Title VI protects ethno-religious groups from discrimination based on ethnic or ancestral characteristics has been variously described as the "Marcus Policy"[5] or "Marcus Doctrine"[6] (although I will describe it below as the 2004 Policy).

By coincidence, *Shaare Tefila v. Cobb* has just received its first book-length treatment in Annalise E. Glauz-Todrank's new volume on *Judging Jewish Identity in the United States*. Glauz-Todrank, a religion scholar, devoted fifteen extraordinary years of her life—beginning with her doctoral dissertation, continuing through a bout with cancer that left her temporarily blind, and continuing into her professorial career at Wake Forest—to telling the story of *Shaare Tefila*. Despite this laudable dedication, Glauz-Todrank modestly claims that the object of her tireless efforts is "*not* a landmark case," although she finds it interesting for how it "situates Jewishness at the interface of 'religion' and 'race' . . . "[7]

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[4] 481 U.S. 615 (1987).

[5] *See, e.g.*, Mark G. Goldfeder, *The Biden Administration National Strategy to Counter Antisemitism Reaffirms its Use of the IHRA Definition*, JEWISH J. (Oct. 4, 2023), https://jewishjournal.com/commentary/opinion/363459/the-biden-administration-national-strategy-to-counter-antisemitism-reaffirms-its-use-of-the-ihra-definition/ ("Last Thursday the Biden Administration announced that as part of implementing its National Strategy to Counter Antisemitism, eight more federal agencies have now officially adopted the Marcus Policy under Title VI of the Civil Rights Act."); Lesley Klaff, *Fighting Back Against Campus Anti-Semitism*, 3 J. FOR THE STUDY OF ANTISEMITISM 747, 758 (2011) ("Known as the 'Marcus Policy" or the '2004 Policy,' it announced that discrimination on the basis of ancestral or ethic characteristics is no less permissible against groups that also have religious attributes than against those that do not."). Numerous student government resolutions have referenced the "Marcus Policy." *See, e.g.*, Associated Students of San Diego State University, *A Resolution to Condemn Anti-Semitism*, https://as.sdsu.edu/govt/resources/legislation/?legis=139 ("Under the Marcus Policy initiated in 2004, Jewish students are now protected under Title VI, based on their ethnic or ancestral background").

[6] Dion J. Pierre, *"Unfinished Business": Biden Admin's New Actions Against Antisemitism Laudable But Not Enough, Expert Says*, THE ALGEMEINER (Sept. 29, 2023), https://www.algemeiner.com/2023/09/29/unfinished-business-biden-admins-new-actions-against-antisemitism-laudable-but-not-enough-expert-says/ ("The Department of Education became the first agency to declare that Title VI applies to Jewish Americans during the George W. Bush administration, when Marcus served as assistant secretary, in what has become known as the 'Marcus Doctrine.'").

[7] ANNALISE E. GLAUZ-TODRANK, JUDGING JEWISH IDENTITY IN THE UNITED STATES 8 (2023) (emphasis added).

Glauz-Todrank is half-right. *Shaare-Tefila* does indeed provide an important perspective on the relationship between Jewish identity, religion, and race in American law. And yet it is also a landmark case in American civil rights law, not only because of the Biden Administration's action, but also because it has supported a large-scale revision in the way that Jewish Americans and other religious groups are treated under Title VI of the Civil Rights Act of 1964.

While not as widely known as it deserves to be, *Shaare Tefila* should be considered—together with its companion case, *St. Francis College v. Al-Khazraji*—the seminal case on the legal status of ethno-religious groups such as Jews and Sikhs under racial discrimination laws in the United States. *Shaare Tefila* established for the first time that ethno-religious group members could avail themselves of civil rights protections that were established to protect against race discrimination. In other words, ancestral groups that also share a common religion would not be treated differently (i.e., with fewer protections) than those that do not. During the period when Glauz-Todrank was writing her book, *Shaare Tefila* provided crucial legal support for agency guidance regarding the protection of such groups. Glauz-Todrank does not address these developments, but they nevertheless can certainly be better understood in light of her contribution.

I. *SHAARE TEFILA V. COBB*

On November 1, 1982, eight vandals spray-painted the Jewish Conservative Shaare Tefila Congregation in Silver Spring, Maryland, with messages such as "Death to the Jude," "Death to the Jews," and "In, Take a Shower, Jew." Resisting the initial impulse simply to remove the graffiti—so as not to bring additional attention to their misfortune—congregants decided to involve the surrounding community in the process of cleaning their institution. Then they contemplated a more momentous task: the use of litigation, based on statutes that bar racial but not religious discrimination, to set a precedent that could protect Jewish Americans from subsequent civil rights violations.

The idea was initially controversial. Since the Holocaust, Jewish Americans have been understandably reluctant to give credence to the discredited Nazi notion of Jewish racial separateness. In addition, some in the broader Jewish community argued that legal action would bring undesired attention to anti-Jewish violence and possibly attract copy-cat crimes. There were also some who feared that litigation resulting in an adverse precedent would be a

setback for the entire community, leaving them worse off than the status quo. Nevertheless, members of the Shaare Tefila congregation who argued for a forceful legal response prevailed, and the matter was brought in federal court.

To obtain money damages, the congregants sued the vandals under 42 U.S.C. §§ 1981, 1982, and 1985, which derive from the Civil Rights Acts of 1866 and 1871. These statutes provide for monetary relief in response to the denial of certain rights based on race or color. The statutes do not, however, provide for relief in the case of *religiously* motivated hate crimes, so any complaint would need to be based on racial discrimination. The statutes had not previously been used by Jewish Americans to obtain remedies for racially motivated hate crimes, so this would be a case of first impression. However, the congregation's position was not that Jews are in fact a race. Rather, it was that the racist vandals mistakenly attributed racial distinctness to the Jewish people and that this was sufficient to constitute invidious racial discrimination. The goal was to establish that federal law bars crimes that target Jewish Americans and to deter violent actors with the additional threat of civil liability.

In the lower courts, the argument did not fare well. Judges in the district court and Fourth Circuit considered Jews to be "white" and therefore not members of a separate racial group. Neither "race" nor "religion" is a concept well-entrenched in Jewish tradition, but the concept of "race" has had peculiarly odious connotations since Hitler. In American law, Jews had often been understood to be members of a separate "Hebrew" race, especially for immigration purposes, for several decades leading up to World War II. This had led to serious adverse consequences, such as the restriction on Jewish immigration (based on the notion that Jews were "racially undesirable") under the Johnson-Reed Act.[8]

Whether Jews should be considered "white" is a question of intense political debate, not only because some Jewish people are Black, Asian, or Hispanic, but also because of how the popular understandings of both Jewishness and whiteness have evolved over the years.[9] Among white supremacists, Jews have generally been considered nonwhite.[10] Among progressive anti-racists in

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[8] *See generally* Eric S. Fish, *Race, History, and Immigration Crimes*, 107 IOWA L. REV. 1051 (2022).

[9] *See generally* KENNETH L. MARCUS, JEWISH IDENTITY AND CIVIL RIGHTS IN AMERICA (2010).

[10] Kenneth L. Marcus, *Do Jews Count?: Review of 'Jews Don't Count' by David Baddiel*, COMMENTARY, Sept. 2021, https://www.commentary.org/articles/kenneth-marcus/jews-dont-count-david-baddiel/.

recent years, however, Jews have been considered the epitome of whiteness, even hyper-whiteness.[11] One could say that those with racial animosity have tended to perceive Jews to occupy whatever racial status they most disdain.

In Shaare Tefila's case, denying Jews a racial status had the consequence of dismissal of the congregation's claims on the ground that Jews lack the protection of the pertinent statues. The irony was that Jewish Americans had historically suffered, under U.S. law, because of their real or perceived racial separateness, but would now be denied the protection of laws intended to protect against racial discrimination. The synagogue lost in the district court. Judge Norman Park Ramsey professed to being "sympathetic" to the plaintiffs' "outreach" and feeling "sorrow" over the synagogue's desecration, but he nevertheless concluded that Jews do not constitute a "distinct or recognizable 'race' and are not 'commonly identified as such.'"[12]

On appeal to the Fourth Circuit, the synagogue did not fare much better. The appeals court affirmed the lower court's ruling in a decision by Judge Kenneth Hall. Viewing Jews as a religious group only, Hall reasoned that accepting the plaintiffs' claims "would permit charges of racial discrimination to arise out of nothing more than the subjective, irrational perceptions of defendants."[13] Judge Thomas Murnaghan, Jr., concurred, emphasizing that "the law"—by which he meant, presumably, the law's interpretation of Jewish identity—"is grounded on facts, not on misperceptions of fact."[14] After emphasizing his sympathy for the Jewish plaintiffs, and his disapproval of the defendants' "execrable" conduct, Murnaghan objected that "For persons of the ilk which the defendants . . . are revealed to be, to have the power to confer jurisdiction on the federal courts would, in all probability, lead to very regrettable consequences."[15] Since Jews are not a race, in other words, a racist's misperceptions should not be permitted to change the law's view of them.

In dissent, Judge J. Harvie Wilkinson skewered Murnaghan and Hall's opinions, arguing that "*[a]ll* racial prejudice is the result of subjective, irrational perceptions, which drain individuals of their dignity because of their perceived equivalence as members of a racial group."[16] Wilkinson noted that the Civil Rights Acts of 1866 and 1871, on which the plaintiffs' case was

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[11] *Id.*

[12] Shaare Tefila Congregation v. Cobb, 606 F. Supp. 1504, 1508 (D. Md. 1985).

[13] Shaare Tefila Congregation v. Cobb, 785 F.2d 523, 527 (4th Cir. 1986).

[14] *Id.* at 528.

[15] *Id.* (Murnaghan, J., concurring).

[16] *Id.* (Wilkinson, J., dissenting).

based, were passed to "halt the spread of violence and hatred by those motivated by such perceptions."[17] Wilkinson argued that the defendants' "erroneous" but "all too sincere view" of Jewish racial identity should be sufficient to ground Shaare Tefila Congregation's claims under sections 1981, 1982, and 1985. "There is," he concluded, "simply no good reason why we should interpret this statute to protect against some forms of racial animus but not others."[18]

In seeking certiorari before the Supreme Court, the congregation had better fortune, in no small part because the case was considered with a companion case, *St. Francis College v. Al-Khazraji*,[19] which had been brought on behalf of an Iraqi American philosophy professor. In that case, Majid Ghaidan Al-Khazraji argued that St. Francis College had refused to grant him tenure because of its bias against persons of Arab and Muslim background. In his lawsuit, Al-Khazraji relied upon the Civil Rights Act of 1866 to argue for money damages based on racial injuries that he had suffered as an Arab American. Since Al-Khazraji had prevailed before the Third Circuit, the Supreme Court faced a circuit split.

At oral argument, the Justices were lively and engaged. Justice Sandra Day O'Connor observed that the legislative history of the 1866 Act suggested that Congress considered not only Jews and Arabs, but also "Gypsies and Chinese and Germans and so forth" to be covered as members of distinct races.[20] Justice Antonin Scalia suggested that the terms of the statute might be broad enough to cover even discrimination by Germans against Frenchmen.[21]

In a memorable exchange, Justice Thurgood Marshall questioned the widespread notion that race should be equated with skin color. He asked respondents' counsel how she would classify a person who is "part Scandinavian, part Indian, part South African, and part Japanese." Counsel responded that a jury could determine that such a person is "non-white." Marshall then asked how the person might be identified as non-White, and she said that it would be based on "immutable physical characteristics." Justice Marshall interrupted to say, "I would like . . . to have seen you identify my father. He was white with blond hair and blue eyes." Counsel responded, "In that case,

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[17] *Id.*
[18] *Id.* at 529.
[19] 481 U.S. 604 (1987).
[20] Glauz-Todrank, *supra* note 7, at 146.
[21] *Id.* at 142.

sir, I don't think he would have a cause of action for race discrimination." Marshall replied, "Oh, but he did. He was a Negro."[22]

Justice Scalia asked the congregation's lawyer whether it would be appropriate to read the statute and legislative history to say that Congress considers Jews to be a different race and therefore to be covered by it. Appellant's counsel responded that this would not be an error, but that she would urge the Court to make clear that Jews should not be considered today to constitute a distinct racial group. In other words, she argued that the Court should find in favor of the synagogue because the vandals mistakenly *believed* the Jewish people to form a separate race, not because that belief is true. Justice Scalia, however, questioned an interpretation that would cover only the "ill-educated discriminator."

Justice John Paul Stevens pointed out that anti-Semitism is "still prevalent in some areas" and questioned whether all of it could fairly be described as purely "religious" discrimination. He observed that the Jewish people have a "very special culture of their own." Respondents' counsel insisted that anti-Semitism is merely "[p]rejudice that is based on their religion." When Stevens asked whether it is based "entirely on their religion," counsel answered, "That is the characteristic that defines them. There is no racial characteristic that in fact defines people of the Jewish faith. It is a religion." Incredulous, Stevens asked, "Do you think that would be the proper characteristic in Germany when it was so virulent?" Counsel demurred but insisted that this was merely a "deviant perception of a couple of organizations . . . that had run rampant."[23]

Justice Scalia revealed the absurdity of respondents' position, asking, "It didn't extend to Jews who were atheists, nonbelievers? Do you really think that was the case?" When counsel expressed uncertainty, Scalia demanded, somewhat rhetorically "I mean, do you think that the prejudice that existed against Jews in this country was only against believing Jews, and so long as the Jew said, I really no longer believe in the religious tenets of Judaism, the prejudice no longer existed and that person would have been able to get into all sorts of country clubs and whatnot?" Scalia also questioned counsel's argument that religious rather than racial animus could be inferred from the fact that the vandals had chosen to attack a synagogue, which is a religious institution. Scalia noted that the vandals had used the words "White Power"

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[22] *Id.* at 148.

[23] *Id.* at 150.

and had also just spray painted a drug store, which, he observed, is not obviously religious." The courtroom broke into laughter.[24]

On May 18, 1987, the Supreme Court issued a unanimous decision in favor of the congregation. Justice Byron White wrote the Court's opinion, reversing the decision of the court of appeals. White rejected the argument that a case could be brought under Section 1982 only when defendants are motivated by accurate racial animus. Instead, he held that "Jews can state a Section 1982 claim of racial discrimination since they were among the peoples considered to be distinct races and hence within the protection of the statute at the time that it was passed."[25] Pointing to the St. Francis College companion case, Justice White wrote that the Court's "opinion in that case observed that definitions of race when § 1982 was passed were not the same as they are today . . ." and concluded that the section was "intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics."[26]

After the Supreme Court's decision came down, the case was remanded to the district court. Plaintiffs' counsel explained in public interviews that the point of the lawsuit had been to obtain judicial acknowledgement of the fact that anti-Semitism is "a civil rights issue."[27] The congregants requested and received an apology letter from the vandals. Satisfied with this apology, the synagogue waived its request for money damages, except for three hundred dollars that the defendants were asked to repay their insurance company. On December 21, 1988, the congregation released its claims in exchange for a consent injunction that the defendants would not harass any other Jews and that they would stay off the congregation's property.[28]

II. *SHAARE TEFILA*'S DOWNSTREAM EFFECTS

Sixteen years later, in 2004, a Sikh man went to the New York office of the U.S. Department of Education's Office for Civil Rights (OCR) and complained that his son, a New Jersey junior high school student, had been beaten up and called "Osama." He sought relief from OCR under Title VI of the

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[24] *Id.* at 151.
[25] *Shaare Tefila*, 481 U.S. at 617.
[26] *Id.*
[27] Glauz-Todrank, *supra* note 7, at 184-85
[28] *Id.* at 185.

Civil Rights Act of 1964. At the time, OCR's unwritten policy was to dismiss such cases on the grounds that Title VI, which bars discrimination on the basis of race, color, or national origin, but not religion, could not provide the protection being sought. This time, however, OCR's response would be different.

I had recently been appointed acting head of that agency, and I had asked my staff to be on the lookout for such cases. In the wake of September 11, 2001, I was aware of news reports indicating an uptick of discrimination against various Middle Eastern and North African minorities, as well as a surge in anti-Semitism incidents, both globally and also on U.S. college campuses. It was clear that some of these cases might be based on religious animus, but others were more likely related to ethnic or racial attitudes. In this case, there were many possible explanations for why a Sikh American youth might be subjected to such mistreatment, and some of them would clearly fall within the lawful jurisdiction of the agency. While Sikhism is a major religion, for example, members of the Sikh community also share various ethnic or ancestral characteristics, such as distinctive dress, music, culture, and geographic origins. I directed my staff to open an investigation and issued a series of memoranda explaining the basis for my decision.[29]

On September 13, 2004, I issued informal guidance clarifying that discrimination on the basis of Sikh or Jewish identity is no less unlawful than discrimination based on membership in a group that shares ethnic but not religious attributes:

> Groups that face discrimination on the basis of shared ethnic characteristics may not be denied the protection of our civil rights laws on the ground that they also share a common faith. Similarly, the existence of facts indicative of religious discrimination does not divest OCR of jurisdiction to investigate and remedy allegations of race or ethnic discrimination. . . . Thus, for example, OCR aggressively investigates alleged race or ethnic harassment against Arab Muslim, Sikh and Jewish students.[30]

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[29] *See generally* MARCUS, JEWISH IDENTITY, *supra* note 9 (excerpted in Kenneth L. Marcus, *A Blind Eye to Campus Anti-Semitism?*, COMMENTARY (Sept. 2010).

[30] *See* Letter from Kenneth L. Marcus, Deputy Ass't Sec'y for Enforcement, Delegated the Auth. of Ass't Sec'y of Educ. for Civil Rights, U.S. Dep't of Educ., to Colleague, Title VI and Title IX Religious Discrimination in Schools and Colleges (Sept. 13, 2004), *available at* https://www2.ed.gov/about/offices/list/ocr/letters/religious-rights2004.pdf.

In this common-sense formulation, I did not find it necessary to cite *Shaare Tefila*, although I drew some of the language (e.g., "ethnic characteristics") directly from it. I was also aware, as Justices Stevens and Scalia suggested, that Jewishness is more than a religion, while anti-Semitism is more than a religious animus. As one commentator would later write of the 2004 Policy, "The logic behind the clarification is simple: much of the hatred embodied in anti-Semitism (and the same is true for Islamophobia) has nothing to do with specific religious practices, and everything to do with ancestral bias."[31] I have explained in subsequent articles how *Shaare Tefila* provided the basis for the decision.[32]

At the time, I was aware that the 2004 Policy would likely be controversial, simply because it relates in part to the Jewish community, but I was surprised by the vehemence with which it was attacked. After the 2004 presidential election, I left OCR to assume a new appointment as Staff Director at the U.S. Commission on Civil Rights. There, my colleagues and I began to hear murmurs that my successors were not adhering to the 2004 Policy.[33] The policy faced numerous objections. Progressives argued that the civil rights laws should be used for disadvantaged minorities and that Jews had no need for it. Bureaucrats were often change-averse and suspicious that the policy would somehow be used to increase the role of religion in education. Some Jewish officials were reluctant to view Jews as victims. Even some conservatives objected, misunderstanding the legal basis for the policy.

The most serious objection was this: While the Supreme Court had held that Jews are protected by the Civil Rights Act of *1866* on the grounds that Congress at that time considered Jews to be a separate race, no congressmen in *1964* thought of Jews that way; at any rate, the legislative record contains no record of that. Thus, the reasoning supporting the decision in *Shaare Tefila* was inapplicable when later-passed civil rights laws were at issue. This objection is premised on the unworkable notion that terms like "race" and "national origin" have different meanings in each place that they appear in the

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[31] Mark Goldfeder, *Defining Antisemitism*, 52 SETON HALL L. REV. 119, 144 (2021), *available at* https://scholarship.shu.edu/cgi/viewcontent.cgi?article=1808&context=shlr.

[32] *See, e.g.*, Kenneth L. Marcus, *Anti-Zionism as Racism: Campus Anti-Semitism and the Civil Rights Act of 1964*, 15 WM. & MARY BILL RTS. J. 837 (2007), *available at* https://scholarship.law.wm.edu/wmborj/vol15/iss3/4.

[33] *See* Meghan Clyne, *Education Department Backs Away from Anti-Semitism Safeguards*, THE SUN (Mar. 29, 2006), https://www.nysun.com/article/national-education-department-backs-away-from-anti.

U.S. Code, depending on the changing understandings of those terms over the years during which various civil rights laws were passed. Additionally, it ignores the Supreme Court's repeated holding that "race" has the same meaning in the Civil Rights Act of 1964 as in the Fourteenth Amendment and the 19th-century civil rights laws.[34] The basis for this principle is that the Civil Rights Act was not designed to create new rights with respect to race, but rather to create a new system for enforcing rights that had been established a century before.

Nevertheless, despite the clear holding of *Shaare Tefila v. Cobb*, federal officials refused to accept that Jews were protected under a statute that prohibited racial and national origin but not religious discrimination. The Commission, however, supported my view. On April 3, 2006, the Commission sent a shot across OCR's bow, issuing a statement (which I had drafted) that included this affirmation of the 2004 Policy:

> Many college campuses throughout the United States continue to experience incidents of anti-Semitism . . . When severe, persistent, or pervasive, this behavior may constitute a hostile environment for students in violation of Title VI of the Civil Rights Act of 1964.[35]

In other words, the Civil Rights Commission confirmed the 2004 Policy that Title VI applies to some forms of anti-Semitism, even though the statute (like the one at issue in *Shaare Tefila*) does not mention religion. Since then, the 2004 Policy has been confirmed in court with respect to Title VI[36] and also Title VII.[37]

Over the next four years, we received increasing reports that OCR was nevertheless refusing to apply Title VI in anti-Semitism cases. In deposition testimony, OCR officials confirmed that this was the case.[38] Senior OCR leadership privately believed—and later disclosed when questioned under

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[34] *See, e.g.*, Regents of University of California v. Bakke, 438 U.S. 265, 272 (1987). *See also* Gratz v. Bollinger, 539 U.S. 244, 275 (2003).

[35] Findings and Recommendations of the United States Commission on Civil Rights Regarding Campus Anti-Semitism (Aug. 3, 2006), https://www.usccr.gov/files/pubs/docs/081506campusantibrief07.pdf.

[36] T.E. v. Pine Bush Cent. Sch. Dist., 58 F. Supp. 3d 332, 354-55 (S.D.N.Y. 2014). *See generally* Goldfeder, *Defining Antisemitism*, *supra* note 31, at 144-45.

[37] *See, e.g.*, Vill. of Freeport v. Barrella, 814 F.3d 594, 607 (2d Cir. 2016); Doran v. New York State Dep't of Health Off. of Medicaid Inspector Gen., No. 15CV7217PKCSN, 2017 WL 836027, at *12 (S.D.N.Y. Mar. 2, 2017). *But see* Bonadona v. La. Coll., No.18-cv-0224, 2018 WL 4353979, at *4 (W.D. La. July 13, 2018) (rejecting a Jewish Title VII race claim).

[38] MARCUS, JEWISH IDENTITY, *supra* note 9, at 83-95.

oath—that anti-Semitism cases were purely religious matters that should not be handled by their agency.[39] In response, when I left the federal government, I led a coalition of Jewish organizations seeking to convince the Education and Justice Departments that Jews and other ethno-religious groups are indeed covered by the terms of Title VI, just as the Supreme Court had held that they are covered by earlier civil rights legislation. Those two departments responded favorably to our advocacy.

In 2010, Assistant Attorney General Thomas Perez affirmed this interpretation on behalf of the Department of Justice. In response to a request from Assistant Secretary of Education Russlynn Ali, who had succeeded to my position at OCR, Perez quoted the operative paragraph of my September 2004 letter (set forth above) and wrote, "We agree with that analysis."[40] Perez explained the rationale, drawing language from *Shaare Tefila*:

> Although Title VI does not prohibit discrimination on the basis of religion, discrimination against Jews, Muslims, Sikhs, and members of other religious groups violates Title VI when that discrimination is based on the group's actual or perceived shared ancestry or ethnic characteristics, rather than its members' religious practice. Title VI further prohibits discrimination against an individual where it is based on actual or perceived citizenship or residency in a country whose residents share a dominant religion or a distinct religious identity.[41]

OCR reiterated this position in 2010[42] and in subsequent communications.[43] Nevertheless, this extension of *Shaare Tefila* remained a creature only of informal agency guidance until 2019. Various efforts were made, without success, to codify the approach of my 2004 Dear Colleague Letter, but these efforts remained unsuccessful.

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[39] *Id.* at 86.

[40] Thomas E. Perez, Ass't Att'y Gen., Dep't of Justice, to Russlynn H. Ali, Ass't Sec'y of Educ., Office for Civil Rights, U.S. Dep't of Educ., Title VI and Coverage of Religiously Identifiable Groups (Sept. 8, 2010), *available at* https://www.justice.gov/sites/default/files/crt/legacy/2011/05/04/090810_AAG_Perez_Letter_to_Ed_OCR_Title%20VI_and_Religiously_Identifiable_Groups.pdf.

[41] *Id.*

[42] *See* Russlyn H. Ali, Ass't Sec'y of Educ., Office for Civil Rights, U.S. Dep't of Educ., to Colleague (Oct. 26, 2010), *available at* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf (not for reliance for certain purposes immaterial to the topic of this review).

[43] *See, e.g.*, U.S. Department of Education, Office for Civil Rights, Combating Discrimination Against Jewish Students (Jan. 2017), https://www2.ed.gov/about/offices/list/ocr/docs/jewish-fact-sheet-201701.pdf.

On December 11, 2019, President Donald Trump elevated the issue to the level of a government-wide decree. In his Executive Order 13899 on Combating Anti-Semitism, President Trump reiterated the substance and rationale of the 2004 Policy:

> Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. 2000d et seq., prohibits discrimination on the basis of race, color, and national origin in programs and activities receiving Federal financial assistance. While Title VI does not cover discrimination based on religion, individuals who face discrimination on the basis of race, color, or national origin do not lose protection under Title VI for also being a member of a group that shares common religious practices. Discrimination against Jews may give rise to a Title VI violation when the discrimination is based on an individual's race, color, or national origin.[44]

Surprisingly, this extension of the 2004 Policy was initially controversial, largely because of popular misunderstandings based on an early and misleading report by the *New York Times*. Reporters Peter Baker and Maggie Haberman wrote, "The order will effectively interpret Judaism as a race or nationality, not just a religion. . . ."[45] Other outlets amplified this misconstruction, publishing articles with titles like, "Trump signs executive order to define Judaism as a race, ethnicity."[46] Given suspicions about President Trump within the liberal Jewish community, some commentators fretted that the order could "create[] a pretext to accuse Jewish Americans of dual loyalties."[47] Over time, as commentators read the actual order, the initial confusion was largely dispelled.

Although many of his other orders have been rescinded, President Trump's Executive Order 13899 remains in place, as do the 2004, 2010, and 2017 guidance documents. At OCR, the order has been integrated into the

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[44] Donald J. Trump, E.O. 13899, *Combating Anti-Semitism* (Dec. 11, 2019), https://www.govinfo.gov/content/pkg/DCPD-201900859/pdf/DCPD-201900859.pdf. This order is probably best known for its application of the International Holocaust Remembrance Alliance's Working Definition of Anti-Semitism.

[45] Peter Baker & Maggie Haberman, *Trump Targets Anti-Semitism and Israeli Boycotts on College Campuses*, N.Y. TIMES, Dec. 10, 2019, https://www.nytimes.com/2019/12/10/us/politics/trump-antisemitism-executive-order.html.

[46] *See, e.g.*, Ursula Perano, *Trump signs executive order to define Judaism as a race, ethnicity*, AXIOS, Dec. 11, 2019, https://www.axios.com/2019/12/11/trump-jewish-executive-order-kushner-anti-semitism.

[47] Caitlin Dickson, *Trump Executive Order on Anti-Semitism Stirs Confusion*, YAHOO NEWS, Dec. 11, 2019, https://www.yahoo.com/video/trump-executive-order-on-anti-semitism-stirs-confusion-001501249.html.

agency's active policy portal through guidance issued in January 2021.[48] Indeed, President Biden has, if anything, doubled down on the 2004 Policy. In May, the Biden National Anti-Semitism Strategy directed the Assistant Secretary of Education for Civil Rights to remind schools of "their legal obligation under Title VI . . . to address complaints of discrimination . . ."[49] That same document directed eight agencies to produce fact sheets explaining that "Title VI . . . prohibits discrimination based on shared ancestry or ethnic characteristics, including certain forms of antisemitic, Islamophobic, and related forms of discrimination and bias, in federally funded programs and activities."[50] This is precisely the dictate with which these agencies complied on September 28, 2023, an outcome made possible by the legal groundwork a courageous synagogue laid long ago.

III. Conclusion

The nearly twenty-year saga since the passage of the 2004 Policy, which owes much of its vitality to the *Shaare Tefila v. Cobb* case, demonstrates that this litigation has had a profound effect on the trajectory of the fight against anti-Semitism. This case—which can now be much better understood in light of Glauz-Todrank's volume—underlies the once-controversial notion, developed under the George W. Bush, Barack Obama, and Donald Trump administrations, and confirmed yet again under Joseph Biden's, that Jews and other ethno-racial groups must receive equal protection under statutes, like Title VI, that prohibit racial and national origin but not religious discrimination. It may be time to reappraise the importance of the *Shaare Tefila* case, and to recognize it as the landmark decision that it clearly was.

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[48] U.S. Department of Education, Office for Civil Rights, *Questions and Answers on Executive Order 13899 (Combating Anti-Semitism) and OCR's Enforcement of Title VI of the Civil Rights Act of 1964* (Jan. 19, 2021), https://www2.ed.gov/about/offices/list/ocr/docs/qa-titleix-anti-semitism-20210119.pdf.

[49] The White House, *The U.S. National Strategy to Counter Antisemitism* (May 2023), https://www.whitehouse.gov/wp-content/uploads/2023/05/U.S.-National-Strategy-to-Counter-Antisemitism.pdf.

[50] *Id.* at 44.

WHAT KIND OF MONEY IS BEST?: AN INTERESTING NEW INVESTIGATION*

HOWARD B. ADLER**

A review of LAWRENCE H. WHITE, BETTER MONEY: GOLD, FIAT, OR BITCOIN? (Cambridge University Press 2023)

Since the Federalist Society was established forty years ago, its members have debated which aspects of our world and of our economy should be controlled by government and which should be left to the private sector. Perhaps no such aspect has been as hotly debated as money. And now, in this era of endemic inflation, massive budgetary deficits and major Federal Reserve interventions, concerns about our money are particularly important. Should our money be a monopoly of government, or, as the Austrian economist Friedrich Hayek suggested in 1976, should we be free to choose whatever money, government or private, we prefer?

> But why should we not let people choose freely what money they want to use? . . . I have no objection to governments issuing money, but I believe their claim to a *monopoly* or their power to *limit* the kinds of money in which contracts may be concluded within their territory . . . to be wholly harmful. . . . There could be no more effective check against the abuse of money by the government than if people were free to refuse any money they distrusted and to prefer money in which they had confidence.[1]

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

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[1] F.A. Hayek, *Choice in Currency: A Way to Stop Inflation*, *in* NEW STUDIES IN PHILOSOPHY, POLITICS, ECONOMICS, AND THE HISTORY OF IDEAS 218 (1978).

In *Better Money: Gold, Fiat or Bitcoin,* George Mason University economist Lawrence H. White takes Hayek one step further and examines three types of currencies to determine which one would best serve money users, if we were free to choose our money:

1. So-called "fiat" currencies issued by governments and not backed by any commodity or any explicit promise to pay but only implicitly by the strength of the issuing government, like the U.S. dollar;
2. Commodity-based money, using gold as the example; and, finally,
3. Cryptocurrency, using Bitcoin as the example.

Professor White's comparison provides a well-researched, useful, and highly interesting analytical summary of the arguments for and against using each of these types of currencies. He concludes that we ought to remove regulatory barriers to establishing alternative currencies to fiat currencies and let the market decide which currency is best, while noting that established currencies like the fiat dollar have an inherent advantage, which he refers to as a "network effect,"[2] because they are widely accepted and easy to use. He opines that absent double-digit (or worse) inflation of the sort that has driven some Latin American countries to abandon their own fiat currencies and adopt the dollar or an alternative currency like Bitcoin, incumbent fiat currencies are likely to remain the currency of choice.

By laying out the histories of the use of fiat currency, commodity-based currency, and cryptocurrency, and by summarizing the arguments for and against each of these types of money, Professor White provides an interesting and useful addition to the existing literature on the economics of money. But be warned: this is no easy book for the layman with no background in economics. Professor White's use of charts and supply-demand curve graphs requires a reader to have at least a basic familiarity with macroeconomics to fully understand his technical arguments. Yet the effort required of the reader will be well rewarded by the result.

Professor White begins his study by asking the following questions: "Given that our inherited discretionary fiat monetary regimes have performed imperfectly, and lately seem to be getting worse, might an alternative system—a commodity money or a cryptocurrency—do better? If so, which alternative is the most promising?"[3] In determining what makes a type of money "better," he focuses on money users' preferences, which Professor

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[2] LAWRENCE H. WHITE, BETTER MONEY: GOLD, FIAT, OR BITCOIN? 201, 211 (2023).

[3] *Id.* at 2

White defines as "some combination of (a) serving them individually as a convenient and low-cost medium of exchange, which favors non-declining and predictable purchasing power, and (b) the monetary system as a whole having desired properties like avoiding depressions associated with severe monetary disequilibria."[4] In other words, the best money is one that provides stable purchasing power and avoids excessive inflation and financial crises that lead to depressions. We can probably all agree on that.

Before actually comparing the gold standard to fiat currencies and Bitcoin, Professor White, in chapter 1, conducts a historical survey of the origins of money to demonstrate that most forms of currency derived from private markets and not from state action, echoing Hayek's views. Private money, Professor White argues, was prevalent throughout history. He then traces the rise of gold and silver as the most popular early forms of money because they had the qualities that users look for in currency: portability, durability, divisibility, stability in purchasing power throughout the seasons, and uniformity once trustworthy coinage became common.[5] He discusses the competition between private and government mints, the rise in bank notes promising convertibility to gold or silver as a convenient source of money, and the development of an international gold standard as well as the rise of central banks. Central banks, originally designed to help governments finance themselves by holding a monopoly on the issuance of banknotes, were able to pursue expansionary monetary policies to finance wars by simply printing up more money. After World War II, the Bretton Woods System was imposed under which foreign central banks pegged their currencies to the U.S. dollar, settled their debts in dollars, kept dollar assets as reserves, and could exchange their dollar balances at a fixed rate for gold held by the U.S. Treasury. As the United States pursued an expansionist monetary policy, it feared that it could no longer redeem dollars for gold at the fixed price because its gold reserves were dwindling rapidly. In 1971, President Nixon reneged on the commitment to redeem foreign central banks' dollars for gold since that would have required devaluation, which was judged to be politically inexpedient, and the dollar became a pure fiat currency, no longer backed by gold or any other commodity.[6]

In chapter 2, Professor White examines the workings of the gold system in depth, and in chapter 3, he debunks what he describes as "common

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[4] *Id.*

[5] *Id.* at 11-12.

[6] *Id.* at 17-37, 126.

misconceptions about the gold standard."[7] He defines a gold standard as "any monetary system . . . in which a defined mass of gold coin or bullion is the *unit of account* in which prices are posted and accounts kept, and gold coins or bullion are the *medium of redemption* that ordinary currency and bank accounts promise to pay."[8] Thus, under a gold standard, banknotes are denominated in and redeemable for gold. Professor White argues that the international gold standard—in effect from roughly the 1870s until governments abandoned it in 1914 to finance World War I through expansionist monetary policies—had various advantages over fiat currencies, the most important of which was that it resulted in lower inflation.

Echoing Milton Friedman, Professor White believes that inflation is almost always due to expansion in the volume of money; because gold is expensive to mine and refine, the rising marginal cost of gold mining limits its output, thereby restricting increases in the volume of money.[9] This is reinforced by what White describes as the "self-stabilizing character of the purchasing power of gold in response to variations in money demand."[10] Professor White argues that if the demand for gold outpaces its production for a time, this will drive an increase in gold production. But as the purchasing power of gold increases, industrial users will cut back on the amount they require, leading to more gold (the result of increased gold mining) being added to the monetary system. Over time, this added supply will reverse the earlier increase in demand, returning the purchasing power of gold to its norm and limiting the expansion of the money supply, leading to less inflation.[11] This is a very interesting argument and, I believe, an original contribution by Professor White to the literature.

While ostensibly neutral among the gold standard, fiat currency, and Bitcoin, Professor White cannot hide his admiration and intellectual preference for the gold standard. This is apparent from his lengthy third chapter in which he debunks various criticisms of the gold standard. Against those who argue that the gold standard caused deflation in the period after World War I that led to the Great Depression, Professor White attributes the Great Depression to interventions of governments and central banks in pursuit of political goals like full employment and presents data suggesting that the gold

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[7] *Id.* at 76.
[8] *Id.* at 39.
[9] *Id.* at 50.
[10] *Id.* at 51.
[11] *Id.* at 52-53.

standard is not inherently deflationary.[12] He distinguishes the period leading up to the Great Depression from the more economically idyllic period between the 1870s and the first world war when the "classical" gold standard was in effect. He argues that deflation in the period between the first and second world wars is attributable not to the gold standard but rather to efforts by European nations who suspended the gold standard and inflated their currencies to finance the first world war. Then, they attempted to resume the gold standard at pre-war exchange rates without devaluing their national currencies.[13] In Professor White's view, these governments could and should have avoided deflation by devaluing.[14]

Against arguments that the price of gold is too volatile to allow it to be a monetary standard, Professor White offers two responses: first, that volatility in the price of gold is far less than fiat dollar volatility caused by the machinations of central banks; and second, that gold price volatility during the current era of fiat currencies and central banks is due to people buying gold as a hedge against the higher inflation caused by central banks' expansionary monetary policies and is far higher than it was during a period when there was an international gold standard in effect.[15] Similarly, Professor White refutes the contention that the resource cost of mining gold required by adoption of a gold standard is too high by arguing that under a traditional gold standard with reasonable reserve requirements, the resource cost is less than the resource cost attributable to people purchasing gold to hedge against inflation under modern fiat currency regimes.[16]

Professor White is certainly in the minority among modern economists in his support for a gold standard. Remember the fairly recent vilification of Trump Federal Reserve nominee Judith Shelton for having had the temerity to say nice things about the gold standard and to criticize expansionist Federal Reserve policies.[17] This is only the most recent example of a sound, conservative economist being falsely portrayed as a quack by progressive economists and by many in the media. Professor White performs a major service to economic literature by cogently organizing and marshalling empirical evidence

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[12] *Id.* at 76-91

[13] *Id.* at 85-86.

[14] *Id.*

[15] *Id.* at 92-96.

[16] *Id.* at 69-75, 101.

[17] *See, e.g.*, Rich Barlow, *The Gold Standard is a Terrible Idea*, WBUR COGNOSCENTI, June 3, 2019, https://www.wbur.org/cognoscenti/2019/06/03/gold-standard-trump-judy-shelton-fed-rich-barlow.

to support the utility of a gold standard. We should all remember that there are alternatives to having our economic well-being governed by an unelected group of economists sitting as central bank governors. This view is reinforced by Professor White's examination of fiat currencies in chapter 4 of his book.

With respect to fiat currency regimes, Professor White first points out that that they have never arisen through free-market driven evolution, but always through government legislation.[18] A fiat currency provides a government with the economic benefit of being able to borrow and to finance the borrowing by printing currency—a profit that is called "seigniorage."[19] To summarize, a fiat currency regime is what we currently have in the United States with the dollar. The dollar is a medium of exchange that is not backed by a commodity like gold and has no intrinsic value other than its implied backing by the economy of the United States. In describing the origins of fiat currency, Professor White amusingly cites humorist Dave Barry, who wrote, "Over the years, all the governments in the world, having discovered that gold is, like, rare, decided that it would be more convenient to back their money with something that is easier to come by, namely: nothing."[20] A fiat currency is typically managed by a central bank with the authority to manage monetary policy, like the Federal Reserve. One can summarize Professor White's views about modern fiat currency regimes as follows: While in an ideal world a central bank has the power to manage money to achieve whatever prudent targets the central bank deems appropriate for the economy, it almost never works out this way in practice. With fiat money, governments have the ability to finance their political goals by issuing debt and asking the central bank to print up more money to pay for it. This is a great temptation and is what central banks have in fact done. Professor White provides data to support the notion that the adoption of a fiat currency regime usually results in an expansion of the monetary supply and thus in increased inflation. He goes on to point out that all instances of hyperinflation have happened under fiat currency regimes.[21]

While Professor White does not cite this example, the U.S. federal government, in response to the Covid-19 crisis, issued trillions of dollars of debt, and the Federal Reserve printed up money to purchase much of that debt, resulting in the high inflation that the Federal Reserve today is trying to

[18] White, *supra* note 2, at 123-24.
[19] *Id.* at 144-46.
[20] *Id.* at 126.
[21] *Id.* at 145.

reverse. As I will point out later, this type of reaction is an appropriate response to a financial crisis provided that the monetary expansion stops when the crisis ends; unfortunately, this limit on expansion does not always happen, as in the Covid example. High inflation generated by monetary expansion in response to a crisis is exacerbated when a central bank picks an arbitrary inflation target other than zero. Such a target preprograms some level of inflation into the system, as the Federal Reserve has done with its announced target of 2 percent inflation—a target rate that it adopted on its own without any congressional action. The problem with fiat currency-central bank regimes is that even *prudent* monetary policy can be overridden by imprudent *fiscal* policy—as when a government wishes to spend money for programs that exceeds the amount of its tax receipts. Under a fiat money standard, it is just too easy for the central bank as part of the government to print more money to fuel its excesses, and this will always lead to harmful inflation.

The third form of currency that Professor White examines is Bitcoin, as a stand-in for cryptocurrency in general. Bitcoin is an intangible digital asset. It is not issued by a government so is not even implicitly backed by a government's strength or its ability to tax an economy. To take Dave Barry's humorous quip a step further: If fiat currencies are backed by nothing, then Bitcoin is backed by less than nothing. Professor White begins his Bitcoin discussion by providing a useful timeline for the development of Bitcoin.[22] Professor White concludes that Bitcoin has done better as an investment—a store of value—than as a currency.[23] Despite having some advantages over fiat currencies in a modern banking system—namely, greater privacy protection for its users—its price is simply too volatile to serve as a reliable currency.[24] Intraday price swings in Bitcoin can mean that the price of a transaction made in the early part of a day can fluctuate greatly before the transaction is settled later in the day. This type of price change is not suitable for a form of currency. In light of Bitcoin's volatility, one can question whether Professor White should have chosen another cryptocurrency to highlight and evaluate as a form of currency. Stablecoins that are backed by fiat currencies, such as Ethereum, or by commodities like gold are designed to be less volatile in price than Bitcoin and are better suited to be currencies. While not as large in market cap as Bitcoin, Ethereum has enough of a track record as a currency to have made it a better choice for Professor White's analysis. The unsuitability of Bitcoin as

[22] *Id.* at 157-65.
[23] *Id.* at 175.
[24] *Id.* at 170.

a form of money is evidenced by its unpopularity in El Salvador, where it was accepted as legal tender but failed to achieve widespread use as a currency, a phenomenon discussed by Professor White.[25]

Professor White concludes by urging governments to eliminate regulatory constraints on ownership and transfer of non-fiat currencies such as gold and Bitcoin, thus allowing various currencies to compete and enabling consumers to choose the currencies they prefer. This echoes Hayek's 1976 wish, with which I began this review. Professor White concedes that current fiat currency regimes are protected by network effects and that, absent hyperinflation, they are not likely to be replaced. If they were to be replaced, he compares the pluses and minuses of gold or Bitcoin as a replacement. Gold has two advantages over Bitcoin: it is less volatile, and it has a larger ownership base. Bitcoin has two advantages over gold. First, the Bitcoin blockchain has proven to be a reliable way of making payments, while online gold transfer systems are new and unproven. Second, Bitcoin can be self-custodied (although most users use a third-party custodian) and can be transferred user-to-user without the need for a third-party financial intermediary (although, again, many Bitcoin transfers are made through a third party).[26]

Better Money is an extremely interesting and well-written book. At a time when various forms of cryptocurrencies have appeared and created a trillion-dollar market that aspires to compete with the U.S. dollar,[27] it is worthwhile to look at the utility of substitutes for the U.S. dollar. Professor White's defense of the gold standard is lucid and well-supported by data. It is a useful summary and an important addition to economic literature. But there are two reasons why gold and Bitcoin are unlikely to replace fiat currencies.

First, with respect to gold, as indicated earlier, Professor White's views are very much in the minority among modern economists. I will not try to summarize the views of the many economists who are critical of the gold standard but will raise a few questions suggested by Professor White's own analysis. First, intuitively it seems problematic to base a currency on the amount of an underlying commodity that has a physical limitation, such as gold. The same point can be made for Bitcoin, the amount of which is limited, not by

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[25] *Id.* at 203.

[26] *Id.* at 205-06.

[27] For example, when Facebook (now Meta) announced that it would sponsor a stablecoin called Libra that would be available worldwide to its billions of users, many within the U.S. government and in governments worldwide feared its potential to replace the dollar as the world's reserve currency. HOWARD B. ADLER & ALEX J. POLLOCK, SURPRISED AGAIN! THE COVID CRISIS AND THE NEW MARKET BUBBLE 68-78 (2023).

physical limitations, since it is not a physical asset, but by its own governing protocols. This inelasticity in supply necessarily imposes restrictions on the ability to expand the currency. Professor White might say that this is a good thing because permitting currency expansion leads to inflation, and we can all agree that inflation beyond a small amount is a bad thing; it is harmful macroeconomically and to consumers.

There are times, however, when currency expansion is desirable and even necessary. One such time is when a financial crisis occurs and the price of every asset plummets as it has many times in economic history, and most recently during the initial phase of the Covid crisis in 2020. At such times, the tried-and-true government response (which has been proven to work) has been that articulated by the 19th-century English banker and financial sage Walter Bagehot. His rule for central banks to follow in a financial crisis has been stated as follows: "To avert panic, central banks should lend early and freely (i.e., without limit), to solvent firms, against good collateral, and at high rates."[28] The lend freely part of Bagehot's prescription was followed by the Trump administration in 2020 when the Covid health crisis became a financial crisis with the price of every asset plummeting.[29] These actions ended the crisis, reinflating assets to pre-pandemic levels, but doubtless increasing the amount of inflation. The increase in inflation was greatly exacerbated by President Biden's decisions to continue pumping money into the economy after the crisis abated, particularly through the American Rescue Plan, which spent an additional $1.9 trillion (and probably far more), and also in subsequent pro-inflationary spending legislation.[30]

This example illustrates two relevant points. First, without a fiat currency that can be expanded rapidly, Bagehotian financial crisis intervention is not often possible. For this reason, during times when a gold standard was in effect and a financial crisis occurred, governments often suspended the gold standard or took actions that were the functional equivalent. For example, the British government suspended the Peel Act—which required Bank of England notes to be fully backed by gold—three times in the 19th century to deal with financial crises. The suspension of the Peel Act enabled the bank to issue currency not backed by gold, in other words, fiat currency. Professor White would argue, based on his research, that under a gold standard, financial crises arising from the actions of the financial system occur less frequently than they

[28] White, *supra* note 2, at 30.
[29] *Id.* at 13-29.
[30] *Id.* at 128.

do under fiat currency regimes. Even conceding this point, financial crises still occur for reasons that do not have to stem from the financial system itself. For example, one of the times the Bank of England suspended the Peel Act in the 19th century was in response to the financial crisis of 1847.[31] The 1847 crisis was precipitated by the Great Famine in Ireland rather than by activity in the financial system and demonstrates that financial crises can occur even under a gold standard.[32] The Covid crisis is another example. It began as a health crisis and morphed into a financial crisis. Had the United States been on the gold standard, it would have happened anyway. We would have had to suspend the gold standard in 2020 to follow Bagehot's prescription and pump money into the economy. Professor White argues that the Federal Reserve had sufficient gold reserves to follow an expansionist policy to combat the Great Depression without having to suspend the gold standard. But that will not always be the case. The problem is that, under a gold standard, the monetary expansion needed to combat a depression or financial crisis is dependent on the amount of gold reserves, which may or may not be sufficient. Under a fiat system, the central bank can always implement Bagehot's prescription and print money to alleviate the crisis.

Another type of situation in which governments have almost universally chosen to suspend the gold standard is when they are involved in a war where national survival is at stake. At such times, governments are forced to borrow heavily to finance the war. The constraints imposed by a gold standard on a government's ability to print money to fund such debt have led governments to suspend the gold standard and adopt fiat currency at such times. As Professor White notes, this is what European central banks did during World War I (and it is what the U.S. government did during the Civil War). In fact, Professor White attributes the Great Depression in part to the misguided efforts of central banks to reintroduce the gold standard after World War I without devaluing their national currencies.

One might ask, of what use is the gold standard when its built-in limitations will require it to be suspended whenever financial crises occur and during wartime? It is no coincidence that President Nixon jettisoned the gold standard during the Vietnam War. So two major problems with a gold

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[31] *See* Rudiger Dornbusch & Jacob A. Frenkel, *The Gold Standard Crisis of 1847*, 16 J. INT'L ECON. 1 (Feb. 1984).

[32] But financial crises occurred due to financial system breakdowns even under the gold standard. For example, the panics of 1857 and 1866 in England, also leading to suspensions of the Peel Act, resulted from the failure of financial institutions.

standard not addressed by White are that a financial crisis can only be alleviated by a rapid expansion of currency which can in most cases only occur under a fiat system. Secondly, the gold standard does not work when a country is at war and has to finance the massive expenditures that war requires. It is unreasonable to expect that a nation would jeopardize its national survival to keep the gold standard in place. Any nation facing a war of national survival will choose to jettison a monetary system that cannot be expanded easily.

The second issue with Professor White's arguments in favor of private money—whether commodity-based or Bitcoin—is that they ignore the benefits that we Americans receive indirectly through our government as a result of our fiat currency. Ever since Bretton Woods, the U.S. dollar, backed by the strongest economy in the world, has been the world's reserve currency, which means that foreign central banks keep most of their foreign reserves in dollar assets—usually U.S. Treasury debt. This creates a large demand for Treasury debt, which enables the Treasury to borrow more cheaply—a subsidy that benefits the lifestyle of every American. If we had a purely private currency, untethered to government, this "exorbitant privilege" as the French so eloquently called it, would be lost to us, and our economy would no longer be subsidized by foreign central banks. This would have a cost to every American citizen.

So we return to the question presented at the beginning of this review. Should money fall within the government's domain or within that of the private marketplace? Professor White makes a strong case that Hayek was correct and that we should be free to choose our own money. There is no question that central banks have made many mistakes over the years in managing fiat currency regimes—subordinating sound monetary policy to political fiscal policy by funding currency expansions that have resulted in excessive inflation. Our own Federal Reserve has been guilty of this though its ill-conceived quantitative easing policy that resulted in its ginning up its balance sheet to almost $9 trillion by buying government debt and mortgage securities; its purchase of the latter facilitated an inflationary housing bubble.

But, despite these excesses, it is no accident that virtually all monetary systems in the world today are based on fiat currency. Governments derive great benefits from controlling money, and not all of these benefits are bad for the economy. Governments' ability to finance themselves during times of war and financial crisis is only guaranteed by a fiat currency that can be expanded without regard to the existence of an underlying commodity or to size restraints written into the governing rules of a cryptocurrency. Moreover,

in the United States, a fiat currency that is the world's reserve currency provides tangible dollar benefits in lower borrowing costs to the U.S. government, benefits that could be passed on to each American citizen in the form of lower tax rates and other subsidies. I generally regard myself as a free market proponent, but I am not convinced that we ought to follow Hayek on this matter. Like operating an army or navy, the operation of a currency system seems to me one of the very few areas of our world that ought to be controlled by government, despite the many mistakes governments and central banks have made—and will doubtless continue to make—in both monetary and fiscal policy.

Other Views:

- James Pethokoukis, *The Case for the Gold Standard is Really Pretty Awful*, AMER. ENTERPRISE INST. (Sep. 10, 2014), https://www.aei.org/economics/monetary-economics/the-case-for-the-gold-standard-is-really-pretty-awful/.
- Matthew Yglesias, *7 Reasons the Gold Standard is a Terrible Idea*, VOX (Jul. 16. 2014), https://www.vox.com/2014/7/16/5900297/case-against-gold-standard.

THE MYTH OF MASS INCARCERATION REMAINS STRONG—DESPITE ALL EVIDENCE TO THE CONTRARY*

ZACK SMITH**

A review of JEFFREY BELLIN, MASS INCARCERATION NATION: HOW THE UNITED STATES BECAME ADDICTED TO PRISONS AND JAILS AND HOW IT CAN RECOVER (Cambridge University Press 2022)

Jeffrey Bellin's new book is based on a myth. He believes—wrongly—that the United States is addicted to putting people in prison who don't need to be there—hence the title of his book, *Mass Incarceration Nation*. Despite his best efforts to portray his book as a nuanced account of the current state of the U.S. criminal justice system and its supposed ills, it's actually an ideologically driven tome with a pre-determined conclusion: the states and the federal government lock up too many people. In reaching this pre-determined outcome, Bellin leaves out key context, cites inappropriate or misleading data, and contradicts himself. Especially notable are his neglect of the interests of victims and the failure of his attempt to distinguish between the criminal justice system and what he pejoratively calls the criminal legal system. Far from needing to release huge numbers of incarcerated criminals, as Bellin claims, we should instead focus on solving, prosecuting, and punishing crime to protect our communities and to obtain justice for victims. While some of the following criticisms might seem harsh, it is important to forthrightly examine Bellin's ideas, discuss their shortcomings, and understand that even if implemented, they would likely not achieve the goals Bellin seeks.

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

** Senior Legal Fellow and Manager, Supreme Court and Appellate Advocacy Program, The Heritage Foundation. The views expressed in this Article are my own and should not be construed as representing any official position of The Heritage Foundation. I am grateful to Paul J. Larkin and John G. Malcolm for helpful comments on this Article.

I. UNDERINCARCERATION NATION

To see the shortcomings of Bellin's ideas, a reader needs to look no further than the first sentence of Bellin's introduction. There, he makes a bold statement that, "[i]n 2019, the United States locked up almost 2 million people."[1] He then catalogues the number of people in prison for a variety of offenses. This statistic closely echoes what others have claimed. For instance, in a 2016 documentary, Bryan Stevenson, founder of the Equal Justice Initiative and author of *Just Mercy*, claimed that the United States had a prison population of 2.3 million. But it's not true.[2] The Bureau of Justice Statistics shows that in 2019 there were 1,430,800 state and federal prisoners in the United States and 878,900 parolees.[3] And there are millions of people out on probation who would otherwise be serving time in jail or prison, but who shouldn't be counted as "locked up." As criminology professor Barry Latzer points out, "only one-third of criminal defendants in the United States are incarcerated in prison or jail; two-thirds are free on probation and parole."[4]

A little less than halfway through the book, Bellin makes an accurate admission that undercuts his central thesis. He acknowledges that "[m]ost crimes are not reported, most reported crimes aren't solved, and most solved

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[1] JEFFREY BELLIN, MASS INCARCERATION NATION: HOW THE UNITED STATES BECAME ADDICTED TO PRISONS AND JAILS AND HOW IT CAN RECOVER 1 (2023).

[2] ZACK SMITH & CHARLES D. STIMSON, ROGUE PROSECUTORS: HOW RADICAL SOROS LAWYERS ARE DESTROYING AMERICA'S COMMUNITIES 257 (2023).

[3] *See* E. Ann Carson, Bureau Just. Stats., U.S. Dep't of Just., *Prisoners in 2019*, NCJ 255115 (Oct. 2020), https://bjs.ojp.gov/content/pub/pdf/p19.pdf; Barbara Oudekerk & Danielle Kaeble, Bureau Just. Stats., U.S. Dep't of Just., *Probation and Parole in the United States, 2019*, NCJ 256092 (Jul. 2021), https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/ppus19.pdf. Bellin clarifies that his 2 million number includes people behind bars in both prisons and jails. BELLIN, *supra* note 1, at 1. But it is not clear from the context how many people are in prison versus how many are in jail. And to his credit, Bellin does reject the broader definition of incarceration used by decarceration advocates such as Michelle Alexander. *Id.* at 15 (stating that "[w]hen this book discusses incarceration, it is referring to locking people up in prisons and jails"). Still, it is important to disaggregate the *prison* population—those convicted of crimes—from the *jail* population—a mixture of those awaiting trial and those serving very short sentences. Much of Bellin's book focuses on reducing the *prison* population, though this is not often clear throughout the book.

[4] BARRY LATZER, THE MYTH OF OVERPUNISHMENT, A DEFENSE OF THE AMERICAN JUSTICE SYSTEM AND A PROPOSAL TO REDUCE INCARCERATION WHILE PROTECTING THE PUBLIC 88 (2022).

crimes don't result in incarceration."[5] Based on this information, a more accurate title for his book would be *Underincarceration Nation*.

But Bellin doesn't draw this inference. Instead, Bellin clings to his wrongheaded belief that too many people are locked up in the United States. And to him, success in pushing back against this supposed problem means "a return to the incarceration levels that preceded Mass Incarceration"—that is, a return to the incarceration levels of the 1970s. He exclaims that such a move would be "transformative" because it "would mean going from 2 million to 300,000 people locked up," an "85 percent drop."[6] That's astounding!

Bellin's goal of returning to 1970s levels of incarceration has a pollyannaish quality to it. Crime rates today are much, much higher than they were in the 1960s and 1970s. In fact, crime rates began rising drastically in the late 1960s. Increased imprisonment rates lagged slightly so that "from the mid-1970s to the mid-1990s, both crime and incarceration rates escalated in tandem, only diverging distinctly at the start of the twenty-first century."[7] Even Bellin admits that "a connection between rising crime and rising incarceration seems undeniable."[8] When more people commit crimes, more people are (or should be) locked up. But he fails to note that as "the crime rate came down, the imprisonment rate followed. In fact, the 2019 rate [was] the lowest in twenty-four years, dating back to 1995."[9] In 2020, though, "the United States saw more than 21,000 murders, . . . a 30 percent increase over 2019, which is the biggest year-over-year increase on record."[10] Given that the majority (56%) of individuals serving time in state prisons are serving time for committing violent crimes, Bellin's proposal that we reduce incarceration by 85% means not incarcerating some individuals who commit violent crimes and releasing others from prison early.[11] This goal helps no one besides the criminals—and it arguably doesn't even help them—but it does align with

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[5] BELLIN, *supra* note 1, at 74.

[6] *Id. at* 166.

[7] LATZER, *supra* note 4, at 87.

[8] BELLIN, *supra* note 1, at 35.

[9] SMITH & STIMSON, *supra* note 2, at 261.

[10] RAFAEL A. MANGUAL, CRIMINAL [IN]JUSTICE: WHAT THE PUSH FOR DECARCERATION AND DEPOLICING GETS WRONG AND WHO IT HURTS MOST 21 (2022).

[11] SMITH & STIMSON, *supra* note 2, at 265. As Barry Latzer notes, since "federal inmates are only 11 percent of all prisoners," even if you released all federal prisoners, it would not "significantly affect the total U.S. prison population." LATZER, *supra* note 4, at 91.

the goals of Angela Davis and others who have argued that prisons are obsolete and that essentially no one should be incarcerated.[12]

II. WHAT ABOUT CRIME VICTIMS?

One group of individuals that receives scant attention from Bellin in his book is crime victims. In fact, he argues for some policies that would affirmatively harm victims of crime (aside from failing to deter and punish crime by not prosecuting and incarcerating the perpetrators of crime). He says that each incarcerated individual "has an important story to tell" and that "what is of primary importance to researchers, government officials, citizens, and presidents is the large number of these stories."[13] But what about victims? Don't their stories matter too? Apparently not, because Bellin *blames* the focus on victims and their rights as one cause of mass incarceration. He advocates for policies that would make it difficult for victims to navigate the criminal justice system or that would outright deceive them as they attempt to do so. For example, he notes that "the bulk" of a 1982 report from President Reagan's Task Force on Victims of Crime "consists of heartbreaking stories of crime, placing the reader in the victim's shoes and highlighting the speedy return of offenders to the street."[14] He goes on to note that the "Report offers a list of recommendations, including many that would be adopted across the country, such as (1) restricting pretrial release, (2) longer sentences, and (3) the abolition of parole."[15] Bellin, of course, disagrees with these commonsense recommendations.

Instead, he takes issue with the number of people on probation or parole who have their release revoked and are sent to prison. For revocation to happen, an individual would have had to violate a condition of his or her release. Bellin admits that "[o]ne of the most common ways that people violate the terms of probation is to commit a new offense,"[16] that is, the individual committed a new crime while already under supervision in his or her community, likely creating new victims along the way. Unlike Bellin, Latzer notes that incarcerating an offender who breaks the law after having received an opportunity to remain free in the community serves several valid goals such as

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[12] *See* ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? (2003).
[13] BELLIN, *supra* note 1, at 14.
[14] *Id.* at 43.
[15] *Id.*
[16] *Id.* at 147.

"incapacitat[ing] dangerous repeaters, deter[ring] them and others from committing crimes, and increas[ing] the punishment for incorrigibles."[17]

Bellin also oddly takes issue with Truth in Sentencing laws. These laws came about because victims, their families, and others involved in the criminal justice system often became frustrated when a judge handed down a lengthy sentence only to have the convicted criminal serve a much shorter period of incarceration. The goal of these laws, as the name reflects, is to ensure that the amount of time served by a convicted criminal more closely mirrors the sentence imposed by the judge. Along with this change, many states began requiring judges to impose determinate sentences rather than broad, indeterminate ones. Bellin explains:

> This increased the transparency of criminal sentences. Under an indeterminate system, judges could appear tough by imposing a sentence with a high sticker price. A judge could even omit the low part of the range, sentencing the defendant to "twenty years" or "life" in prison, knowing that the real sentence would ultimately be determined by a parole board and would, in all likelihood be much lower, perhaps a third or less. The shift to determinate sentencing eliminated this sleight of hand.[18]

Is this a bad thing? To Bellin, it is. In the penultimate pages of his book, he extols the "subtle genius of indeterminate sentencing" for essentially hiding the ball from the victims and the public who are (Bellin seems to believe) unable to understand what's going on. He describes this non-transparent sentencing as "an antidote to an apparent hallmark of American society: populist penal severity."[19] In his mind, the "genius" of indeterminate sentencing is that "[i]t places the real sentence-length decision in the hands of nonelected actors and allows them to make those decisions well after the offense."[20] He continues that it "allows elected prosecutors and judges to vent community outrage by sending serious offenders 'to the penitentiary.' But it then offers a kind of safety valve that can be used, if needed, to reduce incarceration at a later date."[21] He says that "this delay allows the initial wave of punitive populism to subside, and permits later adjustments toward lenience."[22] He claims that "the past decades have shown why looking tough is preferable to being

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[17] LATZER, *supra* note 4, at 115.
[18] BELLIN, *supra* note 1, at 54.
[19] *Id.* at 191.
[20] *Id.*
[21] *Id.*
[22] *Id.*

tough."[23] How so? Crime rates began coming down after many of the reforms Bellin derides were implemented.[24] And do we really want victims to think they have received some measure of justice, only to have it later yanked away by unaccountable officials? Bellin thinks this is good.

He says that indeterminate sentencing supports the deterrence goals of punishment because "there is little evidence that severe punishments are effective. . . . In the moment when they break a law, people often aren't thinking rationally. . . . Thus, an indeterminate prison sentence, or a one-year sentence can be just as effective a deterrent as a five-, ten- or twenty-year sentence."[25] This is hard to square with Bellin's earlier statement that "the people who regularly commit crimes are as well informed about the low likelihood of arrest and punishment as anyone," which suggests they are in some sense rational.[26] His point, though, is that the likelihood of arrest and conviction is more important than the length of sentence in deterring criminal conduct. But one recent study showed that, at least at the federal level, longer sentences do result in lower recidivism.[27] So at least in some circumstances, sentence length matters in addition to the likelihood of conviction.

Bellin even insists that indeterminate sentencing supports the goal of incapacitating those who commit violent crimes. He wants criminals to be incapacitated only as long as necessary and no longer. Fair enough, but then he claims that "an indeterminate parole-based system makes the most sense, not a determinative 'truth-in-sentencing' system that incarcerates people long after they are likely to reoffend."[28] There's a lot to unpack in that statement, but at least two issues stand out.

First, "[r]epeat offending is a fact of life with criminals. . . ."[29] As Barry Latzer notes, "[a]side from the seriousness of the crime, nothing affects

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[23] *Id.* at 50.

[24] *Oversight Hearing on Police Practices before the H. Comm. on the Judiciary*, 116th Cong. (2019) (written testimony of Heather MacDonald, Fellow, Manhattan Institute), *available at* https://docs.house.gov/meetings/JU/JU00/20190919/109952/HHRG-116-JU00-Wstate-MacDonaldH-20190919.pdf ("Since the 1990s, felony crime in the U.S. has dropped 50%. Tens of thousands of lives, the majority Black and Hispanic, have been saved, closing the life expectancy gap between whites and blacks by 17%."); *see also* LATZER, *supra* note 4, at 82 (delving into the arrest and crime statistics).

[25] BELLIN, *supra* note 1, at 191.

[26] *Id.* at 70.

[27] LENGTH OF INCARCERATION, UNITED STATES SENTENCING COMMISSION (June 2022), https://www.ussc.gov/research/research-reports/length-incarceration-and-recidivism-2022.

[28] BELLIN, *supra* note 1, at 191-92.

[29] LATZER, *supra* note 4, at 114.

sentencing severity more than the criminal history of the defendant."[30] This has led some states, such as California, to pass enhanced habitual offender laws. As Latzer explains:

> A report on the Three Strikes law concluded that it had "a major effect on the make-up of the prison population" in California. From the law's enactment in 1994 to the end of 2004, the state courts sent over 80,000 second strikers and 7,500 third strikers to prison. By December 2004, nearly 43,000 inmates were serving time under Three Strikes, approximately 26 percent of the total prison population.[31]

Bellin groans that laws such as this "are particularly impactful in an era of Mass Incarceration."[32] But guess what? They're effective. As a co-author and I have previously noted:

> Professors Daniel Kessler of Stanford University and Steven Levitt of the University of Chicago tested a research model using California's Proposition 8, which imposed sentence enhancements for a select group of crimes. They found that in "the year following its passage, crimes covered by [three-strikes] fell by more than 10 percent relative to similar crimes not affected by the law, suggesting a large deterrent effect." More strikingly, they found that "three years after the law [came] into effect, eligible crimes have fallen roughly 20-40 percent compared to non-eligible crimes." They concluded that California sentence enhancements had a large deterrent effect and "may be more cost-effective than is generally thought."[33]

Second, if a parole-based system is best, what is supposed to happen to those who violate their parole? Bellin earlier derides parole and probation

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[30] *Id.* at 115.

[31] *Id.* at 116 (citing Brian Brown & Greg Jolivette, *A Primer: Three Strikes—The Impact After More Than a Decade*, California Legislative Analyst's Office (Oct. 2005), *available at* https://www.lao.ca.gov/2005/3_strikes/3_strikes_102005.htm).

[32] BELLIN, *supra* note 1, at 145.

[33] ZACK SMITH & CHARLES D. STIMSON, THE D.C. CITY COUNCIL FAILED AT CRIMINAL JUSTICE REFORM—CONGRESS MUST FIX IT, HERITAGE FDN. LEG. MEM. NO. 337, at 30 (Jul. 12, 2023), https://www.heritage.org/sites/default/files/2023-07/LM337.pdf (citing Daniel Kessler & Steven D. Levitt, *Using Sentence Enhancements to Distinguish Between Deterrence and Incapacitation*, Nat'l Bureau of Econ. Res., Working Paper 6484 (March 1998), https://www.nber.org/papers/w6484). *See also* David S. Abrams, *Estimating the Deterrent Effect of Incarceration Using Sentencing Enhancements*, Inst. for L. & Econ., U. Pa. L. Sch., Research Paper No. 11–13 (Jan. 2011) https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1360&context=faculty_scholarship (taking a "similar methodological approach to Kessler and Levitt" and finding "evidence for a deterrent effect of sentence enhancement in the form of add-on gun laws").

violations as a major driver of mass incarceration, but he gives no attention to alternative consequences. Should parole violators simply receive a stern warning followed by supplicating requests to not break the law? Of course not. But Bellin offers no satisfactory alternative to incarceration.

Bellin also takes issue with police and prosecutors taking certain crimes more seriously than they did in the past. He claims that even as crime rates began coming down, "a punitive response lingered in the form of lots more police and tough new laws and attitudes."[34] Because of this, he claims that police officers focused on arresting for "crimes that were easiest to find and folks that were easiest to punish."[35] He goes on to explain that the "greatest impacts in terms of incarceration occur when police take more interest in a crime that arises frequently and is regularly detected and solved."[36] But this complaint contradicts Bellin's point elsewhere in the book that the certainty of being caught has a larger deterrent effect on criminals than the potential for receiving a lengthy sentence if caught. Does this contradiction reveal that he doesn't really care much about deterrence?

III. A NONSENSICAL DISTINCTION BETWEEN THE CRIMINAL JUSTICE SYSTEM AND THE CRIMINAL LEGAL SYSTEM

Bellin tries to draw a distinction between the criminal justice system and what he calls the criminal legal system. He says that "[i]nvoking the rhetoric of justice, we ratcheted up severity and then, with little thought, applied the increased severity to an expanding catalog of crimes that had little to do with justice."[37] According to him, though the lines between the categories can get blurry, crimes that fall under the criminal *justice* category are ones "that the system has little choice but to forcefully address"[38] and that usually include "grave harm to an identifiable victim."[39] "Criminal legal system offenses (e.g., drug offenses, weapons possession, theft, illegal immigration)," by contrast, "are prosecuted to discourage behaviors and prevent potential harms, rather than to obtain justice on behalf of an identifiable victim."[40] He says that the

[34] BELLIN, *supra* note 1, at 97.
[35] *Id.*
[36] *Id.* at 101.
[37] *Id.* at 7.
[38] *Id.* at 24.
[39] *Id.* at 26.
[40] *Id.* at 27.

expanding scope of criminal law along with the increasing severity of sentences are the major drivers of mass incarceration.

While there is a case to be made that federal law has criminalized too many actions that aren't inherently harmful (think regulatory offenses),[41] those types of offenses inherently differ from the criminal offenses that Bellin argues are part of the criminal *legal* system he decries. Maybe someone doesn't know that they have to obtain a wetlands permit from the EPA to build a house on their own property that contains no water on it—that's a classic regulatory crime.[42] But surely everyone knows that virtually throughout the United States it's illegal for them to possess crack or heroin or fentanyl. And while drug possession doesn't victimize in the same way as murder and other violent crimes, its proliferation has left a trail of bodies and broken lives in its wake. It is not unreasonable or inhumane to weigh these as part of the policy considerations in favor of criminalization. After all, the lives of perpetrators are not the only ones policymakers must consider.

Still, Bellin persists in arguing that there "is no single policy change that has as much potential to scale back Mass Incarceration as drug decriminalization."[43] But even other decarceration advocates, such as Yale Law School's James Forman, Jr., recognize the limits of Bellin's approach. In his book, *Locking up Our Own: Crime and Punishment in Black America*, Forman makes the following observations, which directly undercut Bellin's proclaimed cure. He says:

> Basing criminal justice reform on leniency for nonviolent drug offenders reinforces a deeply problematic narrative. First, consider the numbers. America's incarceration rates for nonviolent drug offenders are unprecedented and morally outrageous, but they are not "the real reason our prison population is so high." Roughly 20 percent of America's prisoners are in prison on drug charges. As a result, even if we decided today to unlock the prison door of every single American behind bars on a drug offense, tomorrow morning we'd wake up to a country that still had the world's largest prison population.
>
> And to be clear, when advocates speak of "nonviolent drug offenders," they are not talking about all, or even most, of the five hundred thousand

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[41] ZACK SMITH & NATHAN PYSNO, WITHOUT INTENT *REVISITED*: ASSESSING THE INTENT REQUIREMENT IN FEDERAL CRIMINAL LAW 10 YEARS LATER, HERITAGE FDN. REPORT (Dec. 2021), http://thf_media.s3.amazonaws.com/2021/Without_Intent_Revisited.pdf.

[42] Sackett v. EPA, 598 U.S. 651 (2023).

[43] BELLIN, *supra* note 1, at 176.

> incarcerated on drug offenses . . . [T]he drug trade—especially during the crack era—was extraordinarily violent. Some of the people involved had no connection to violence, but it wasn't easy—pacifists didn't survive for long. In arguing for mercy and compassion for nonviolent drug offenders, and only for them, advocates are pursuing an approach that excludes not just the majority of prisoners, but even the majority of incarcerated drug offenders.[44]

Yet Bellin argues that we should decriminalize drugs writ-large. He claims this would "generate indirect effects" such as "reducing ancillary crimes" and "policing excesses" that accompany the drug trade.[45] Lest you worry, he makes clear that the government can still seek to combat the drug trade, but he says it should do so by treating drug offenses in essentially the same way it treats traffic or parking violations.[46] And he says that the "logic of drug decriminalization applies more broadly to a host of criminal legal system offenses that are best understood as efforts to reduce harmful behaviors like gun possession, drunk driving, and parole and probation violations."[47] He goes further and says that the "logic arguably extends even to unequivocally abhorrent and harmful behavior like domestic violence."[48]

But he really gives away the ballgame towards the end of his book and undercuts many of his own arguments. He says that the "most effective tactics in the battle against Mass Incarceration include efforts to reduce violent crime, and especially homicide"—presumably meaning that if fewer people commit crimes, fewer people will need to be locked up.[49] He suggests this means more social services, redistributive welfare programs, and other such interventions. But one of the most, if not *the* most, effective ways of combatting crime is to arrest those who break the law, prosecute them, and impose an appropriate punishment—including incarceration—where deserved. Bellin argues against these very tactics throughout his book.[50]

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[44] Paul J. Larkin & GianCarlo Canaparo, *The Fallacy of Systemic Racism in the American Criminal Justice System,* 18 LIB. UNIV. L. REV. (forthcoming 2023) (manuscript at 54-55 n.194) (citing JAMES FORMAN JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 220, 228-29 (2017)).

[45] BELLIN, *supra* note 1, at 176.

[46] *Id.* at 176-77.

[47] *Id.* at 177.

[48] *Id.*

[49] *Id.* at 180.

[50] *Id.* at 5 ("The critical flaw of the last fifty years of 'tough on crime' policies is that this never works.").

Still, there is one interesting aspect to Bellin's book. He rightly gives pushback—albeit very gentle pushback—to the ideas and theories advocated by Michelle Alexander, whose influential book, *The New Jim Crow*, largely assigns the problems attributed to mass incarceration and the racial disparities between black and white prisoners to "the legacy of slavery and ongoing racism."[51] Bellin acknowledges that she "characterizes the criminal justice system as the third incarnation of American efforts to perpetuate a racial caste system, following slavery and Jim Crow."[52] Nonetheless, he declines to adopt her broad definition of mass incarceration that "refers not only to the criminal justice system but also to the web of laws, rules, policies, and customs that control those labeled criminals both in and outside of prison."[53] And he says that Alexander's account "is most convincing as a description of the impact of American law enforcement on certain communities of color, and least convincing as an account of the system's design."[54] He says, in looking at the increased numbers of individuals incarcerated from 1971 to 2001:

> The stunning disproportionate impact on Black people is the first thing that jumps out . . . But it is also notable that in the same period that Alexander highlights ("the turn of the twenty-first century"), more white people had been sent to prison than any other group. This fact does not disprove Alexander's claim that Mass Incarceration is designed to appeal to the "racial resentments of poor and working class whites," but it complicates that thesis.[55]

That's a nice way of saying that Alexander's hyperbolic claims attributing increased incarceration numbers to racism don't hold up—even to those who are sympathetic to her claims.[56]

IV. CONCLUSION

Ask anyone on the street the following simple question: Should someone who commits premeditated first-degree murder be sent to prison? Almost to

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[51] *Id.* at 79.

[52] *Id.*

[53] *Id.* at 15 (quoting MICHELLE ALEXANDER, THE NEW JIM CROW 15 (2020 ed)).

[54] *Id.* at 79.

[55] *Id.* at 80. *See* Zack Smith, *Capitalization Wars Come to Our Courts*, THE DAILY SIGNAL (Feb. 3, 2024), https://www.dailysignal.com/2024/02/03/capitalization-wars-come-to-our-courts/ (explaining why only capitalizing certain races is a pernicious practice that weaponizes language in service of a radical agenda).

[56] *See* Larkin & Canaparo, *The Fallacy of Systemic Racism, supra* note 43.

a man or woman, each person asked will say, "Yes, of course!" You will get the same answer if you ask them what should happen to rapists, robbers, and recidivists. People convicted of these crimes are the individuals who today overwhelmingly fill state and federal prisons in the United States. Yet these are the very individuals Bellin would release from prison to achieve his decarceration goals. Maybe that's the point. He seems to say that the public shouldn't have a say in how we punish certain crimes. But that can't be the way a democratic society operates. It certainly seems obvious that where there is crime, there must also be punishment. If not, more crime and more victims will be the inevitable result.

Other Views:

- Christy Visher & John Eason, *A Better Path Forward for Criminal Justice: Changing Prisons to Help People Change,"* BROOKINGS INST. (Apr. 2021), https://www.brookings.edu/articles/a-better-path-forward-for-criminal-justice-changing-prisons-to-help-people-change/.
- Carrie Pettus, *Smart Decarceration: Guiding Concepts for an Era of Criminal Justice Transformation*, FSU INST. FOR JUSTICE RES. & DEV. (Dec. 23, 2021), https://ijrd.csw.fsu.edu/sites/g/files/upcbnu1766/files/media/images/publication_pdfs/SmartDecarceration_GuidingConcepts_0.pdf.
- Nazgol Ghandnoosh, *Ending 50 Years of Mass Incarceration: Urgent Reform Needed to Protect Future Generations*, THE SENTENCING PROJECT (Feb. 8, 2023), https://www.sentencingproject.org/policy-brief/ending-50-years-of-mass-incarceration-urgent-reform-needed-to-protect-future-generations/.

PUSHING PAUSE ON LIQUEFIED NATURAL GAS EXPORTS: CAN THE DEPARTMENT OF ENERGY HALT LNG EXPORTS TO SAVE THE PLANET?*

JONATHAN BRIGHTBILL, SPENCER CHURCHILL, & MICHAEL J. WOODRUM**

The Biden-Harris Administration recently interrupted the normal, export-friendly operation of the Natural Gas Act, triggering a lawsuit against the administration by fifteen states. The White House announced "a temporary pause on pending decisions on exports of Liquefied Natural Gas (LNG) to non-FTA [non-Free Trade Agreement] countries until the Department of Energy can update the underlying analyses for authorizations."[1] The announcement makes clear from the outset that the pause is motivated by concerns about global climate change, which the Biden Administration has called "the existential threat of our time." This raises a question: Are the new "environmental analyses" of climate change that the administration is expected to propose actually needed to inform the Department of Energy's export authorization decisions?

No. Because the environmental analysis contemplated by the announced "pause" on LNG exports would obtain information beyond the Department of Energy's jurisdiction, that analysis is unnecessary. The Department of Energy lacks statutory authority to consider the putative global climate

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

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[1] Statement, The White House, Fact Sheet: Biden-Harris Administration Announces Temporary Pause on Pending Approvals of Liquefied Natural Gas Exports (Jan. 26, 2024), *available at* https://www.whitehouse.gov/briefing-room/statements-releases/2024/01/26/fact-sheet-biden-harris-administration-announces-temporary-pause-on-pending-approvals-of-liquefied-natural-gas-exports/.

impacts of LNG when determining whether approval of LNG export authorizations to non-Free Trade Agreement countries is in the public interest. In effect, the announcement "pauses" the Department's statutory mission for the purpose of conducting new environmental analyses that are unnecessary to deciding whether to approve or deny export authorizations. While these analyses are being done, the Department of Energy will neglect to discharge its statutory obligations.

To explain, we first provide high-level background on the Natural Gas Act, or NGA, and the history of U.S. LNG imports and exports. Second, we review the recently announced pause of LNG export authorizations to understand what types of analysis are contemplated by the White House. Third, we examine the NGA and the National Environmental Policy Act, or NEPA, to understand what types of analysis were contemplated by Congress. Fourth, we explain that the upstream and downstream environmental impacts on which the White House is focused lie outside DOE's authority under the NGA and therefore need not be evaluated by DOE under the NGA or NEPA. Thus, we conclude that there is no statutory basis for the White House to suspend LNG export authorizations pending evaluation of such environmental impacts.

I. The Natural Gas Act and Exports of LNG

Congress first passed the NGA in 1938, expressly noting that "the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest."[2] From the beginning, the NGA included a presumption in favor of exporting natural gas. The Act stated that the government "shall issue [an order authorizing exportation] upon application, unless, after opportunity for hearing, it finds that the proposed exportation or importation will not be consistent with the public interest."[3] The NGA retains that wording today.[4] The Energy Policy Act of 1992 further solidified the preference for natural gas exportation. It effectively required the government to approve exports to countries with which the United States has a free-trade agreement.[5] In modifying the NGA, Congress expressly stated

[2] Act of June 21, 1938, 52 Stat. 821, § 1(a).
[3] *Id.* at 822, § 3.
[4] 15 U.S.C. § 717b(a).
[5] Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, § 201.

that "natural gas consumers and producers, and the national economy, are best served by a competitive natural gas wellhead market."[6]

Nevertheless, the U.S. oil and gas industry in the late 20th century was in decline.[7] At the turn of the 21st century, the focus was on *importing* natural gas. Companies planned to build LNG "import facilities to cope with the expected shortfall."[8]

Then, in 2003, the "shale gale" came.[9] The efficient application of hydraulic fracturing—or "fracking"—fueled the shale gale.[10] Fracking had existed as a drilling technique since the 1860s, and it first found widespread commercial applications in the 1950s.[11] But in the early 2000s, producers refined fracking techniques, and combined fracking with horizontal drilling, to create ever more efficient production.[12]

U.S. oil and gas—particularly LNG—boomed. "[D]uring the period 2007-2017, natural gas output in the United States grew by more than 40%, in contrast to less than 1% growth during the previous decade."[13] Global demand for LNG increased by over 1,000 billion cubic meters (bcm) from 2005 to 2021.[14] And "in 2017, natural gas accounted for a 'record' 23.4% of global energy consumption."[15] That same year, U.S. natural gas exports surpassed imports for the first time since 1957.[16] Horizontal hydraulic fracking thus revolutionized the market for U.S. LNG and the world's energy market.

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[6] *Id.* § 202.

[7] *See A Brief History of Fracking*, NES FIRCROFT (July 31, 2022), https://www.nesfircroft.com/resources/blog/a-brief-history-of-fracking/.

[8] Robert Rapier, *How the Shale Boom Turned the World Upside Down*, FORBES (Apr. 21, 2017), https://www.forbes.com/sites/rrapier/2017/04/21/how-the-shale-boom-turned-the-world-upside-down/?sh=58f29c3e77d2.

[9] *Id.*; *A Brief History of Fracking*, *supra* note 7.

[10] *A Brief History of Fracking*, *supra* note 7.

[11] *Id.*

[12] Rapier, *supra* note 8.

[13] Scott Linn, *The Shale Gale and the Future of Liquefied Natural Gas*, U. Okla., Price Coll. of Business, Energy Inst., https://www.ou.edu/price/energyinstitute/news/future-of-natural-gas (last accessed Feb. 18, 2024).

[14] International Energy Agency, *Evolution of Global Gas Demand, 2005-2021*, IEA 50 (Apr. 15, 2021), https://www.iea.org/data-and-statistics/charts/evolution-of-global-gas-demand-2005-2021.

[15] Linn, *supra* note 13.

[16] U.S. Energy Info. Admin., *In 2021, Both U.S. Natural Gas Production and Exports Set New Records*, TODAY IN ENERGY (Oct. 21, 2022), https://www.eia.gov/todayinenergy/detail.php?id=54339.

The global growth of LNG has led to reductions in greenhouse gas emissions. In the United States, improvements in LNG production technology have reduced domestic greenhouse gas emissions even as production of natural gas has increased.[17] From 1990 to 2020, annual U.S. methane emissions decreased from over 780 million metric tons to around 650 million metric tons.[18] In that same time period, U.S. natural gas production increased from around 18,000,000 million cubic feet to nearly 35,000,000 million cubic feet.[19] Much of that benefit comes from switching away from higher-carbon coal. "According to [U.S. Energy Information Administration (EIA)] data, coal to gas switching accounted for as much as 61% of the U.S. emissions reductions over the period 2005-2020."[20]

Globally, the effects from switching to U.S.-produced LNG are similar: "Studies consistently show that coal-to-liquefied natural gas (LNG) switching provides net greenhouse gas emissions reductions, usually between 40-50%, meaning the extent of global emissions reductions from coal displacement will be in part determined by how much U.S. liquefied natural gas reaches overseas coal-using nations."[21] Furthermore, "[d]ue to low lifecycle emissions of methane, U.S. liquefied natural gas delivered to China has, on average, at least 30% lower lifecycle greenhouse gas emissions than Chinese coal does, and according to many measures, U.S. LNG has about 50% less or even lower lifecycle emissions than older Chinese coal-fired plants."[22] Some of that benefit goes away, however, when "[l]imiting oil production in the U.S." because LNG production then "shifts . . . to countries who, for the most part, have significantly lower environmental standards."[23]

An increase in global supply of U.S. LNG will likely be necessary to match an increase in the global demand for electricity. Growth in population,

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[17] David W. Kreutzer & Paige Lambermont, *The Environmental Quality Index: Environmental Quality Weighted Oil and Gas Production,* INST. FOR ENERGY RSCH., at 15 (Feb. 2023), *available at* https://www.instituteforenergyresearch.org/wp-content/uploads/2023/02/IER-EQI-2023.pdf.

[18] *Id.*

[19] *Id.* at 15.

[20] Paul Bledsoe, *The Climate Case for Expanding U.S. Natural Gas Exports*, PROGRESSIVE POL'Y INST. (Jan. 19, 2023), https://www.progressivepolicy.org/publication/the-climate-case-for-expanding-us-natural-gas-exports/.

[21] *Id. See also Study: New Lifecycle Analysis of U.S. LNG Exports*, AM. PETROL. INST. (last visited Feb. 18, 2024) (reporting on study "finding that using U.S. liquefied natural gas (LNG) rather than coal for electricity generation produces on average 50.5 percent fewer greenhouse gas (GHG) emissions in all base case scenarios studied").

[22] Bledsoe, *supra* note 20.

[23] Kreutzer & Lambermont, *supra* note 17, at 6.

increased living standards, and the proliferation of computers, smart phones, and electric cars will place increased strain on the electrical grid.[24] The EIA has predicted annual growth rates in electricity demand ranging from "0.5% to 1.6%."[25] That translates to a total growth of "somewhere between 16% and 57% by 2050 compared with 2022."[26]

To be sure, wind and solar have displaced some coal. More efficient electricity storage, when available, may make wind and solar more stable features of electrical grids.[27] But LNG is currently and increasingly a critical component of energy, not just for the United States but also for the world. The EIA predicts that U.S. "annual natural gas production from 2022 through 2050 will grow by 52% on the Gulf Coast and 50% in the Southwest."[28] Consistent with that prediction, Shell recently announced that it expects "the global demand for [LNG] to rise by more than 50% by 2040 as the Chinese industrial sector pivots from coal to gas, and South Asian and Southeast Asian countries use more LNG to support their economic growth."[29] Thus, at least for the foreseeable decades, LNG will remain a critical component of the world's energy supply.

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[24] Laura Sanicola & Stephanie Kelly, *Global Energy Consumption to Increase Through 2050, Outpace Efficiency Gains, EIA Says*, REUTERS (Oct. 11, 2023), https://www.reuters.com/business/energy/global-energy-consumption-increase-through-2050-outpace-efficiency-gains-eia-2023-10-11/ ("Global population growth, increased regional manufacturing and higher living standards will contribute to the increase in [electricity] consumption."); Bledsoe, *supra* note 20 ("Electricity demand will grow significantly, in part due to the electrification of transportation through the adoption of electric vehicles, which could raise U.S. electric power demand alone by as much as 38%.").

[25] Press Release, U.S. Energy Info. Admin., *EIA Projections Indicate Global Energy Consumption Increases Through 2050, Outpacing Efficiency Gains and Driving Continued Emissions Growth* (Oct. 11, 2023), https://www.eia.gov/pressroom/releases/press542.php.

[26] *Id.*

[27] *Id.*; Bledsoe, *supra* note 20.

[28] U.S. Energy Info. Admin., *U.S. Natural Gas Production and LNG Exports will Likely Grow Through 2050 in AEO 2023*, TODAY IN ENERGY (Apr. 27, 2023), https://www.eia.gov/todayinenergy/detail.php?id=56320.

[29] Christian Moess Laursen, *Shell Sees Global LNG Demand UP at Least 50% by 2040*, WALL STREET J. (Feb. 14, 2024), https://www.wsj.com/finance/commodities-futures/shell-sees-global-lng-demand-up-at-least-50-by-2040-f63aa45d.

II. The Environmental Analysis Required by the Biden-Harris Administration

The White House's January 26, 2024, press release makes clear that the pause on LNG export authorizations is motivated by concerns about climate change.[30] It begins by emphasizing the President's view that "climate change is the existential threat of our time—and we must act with the urgency it demands to protect the future for generations to come."[31] It ends by promising, "the Biden-Harris Administration will continue to lead the way in ambitious climate action while ensuring the American economy remains the envy of the world."[32] In its substantive explanation of the reason for requiring DOE to conduct new analyses, the announcement cites "an evolving understanding of . . . the perilous impacts of methane on our planet." The announcement also points to the "risks to the health of our communities, especially frontline communities in the United States who disproportionately shoulder the burden of pollution from new export facilities."[33]

The announcement implies that this pause is necessary. It says that DOE's export authorizations rely on environmental analyses that are "roughly five years old and no longer adequately account for . . . the latest assessment of the impact of greenhouse gas emissions."[34] Though the announcement flags additional issues for consideration—such as "potential energy cost increases for American consumers and manufacturers"—the announcement begins and ends with climate considerations.[35]

Are the potential global effects of climate change an appropriate basis to pause DOE's approval process? Indeed, are these effects relevant to DOE's export authorizations at all? The announcement does not make clear the legal basis for requiring DOE to consider climate impacts that occur upstream (i.e., in the production of LNG and transport to the export facility) or downstream (i.e., in the subsequent distribution and use of LNG following shipment abroad) from the LNG-export process before acting on LNG export

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[30] The White House, *supra* note 1.
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*

applications.[36] As explained below, a sound explanation cannot be provided. Upstream and downstream environmental effects lie outside of DOE's authority from Congress. If DOE wishes to voluntarily assess the global effects of climate change while timely accomplishing its mission, it isn't generally prohibited from doing so. But DOE need not pause and disrupt its congressionally-assigned mission for this extra information.

III. THE PUBLIC INTEREST AND ENVIRONMENTAL ANALYSIS REQUIRED BY THE NGA AND NEPA

An evaluation of the relationship between the pause announced by the Biden administration and the requirements legislated by Congress requires a close look at DOE's relevant statutory rights and obligations. DOE's authority to approve or deny LNG exports to non-FTA countries derives from Section 3 of the Natural Gas Act, which confers on DOE discretionary authority to regulate only the act of exporting LNG to non-FTA countries. The obligation to account for environmental considerations primarily comes from NEPA, which requires an analysis that corresponds to DOE's regulatory authority under the NGA.

A. The NGA: DOE's Narrow Authority to Block Only Non-FTA LNG Exports

The Supreme Court has long emphasized that a principal policy of the NGA is to ensure "development of plentiful supplies of . . . natural gas" for combustion to produce energy.[37] The text of the NGA thus imposes a congressional presumption in favor of all imports and exports of LNG.[38]

Section 3 of the NGA governs the export and import of LNG, including the construction of LNG terminals. Administration of Section 3 is divided between the Federal Energy Regulatory Commission (FERC) and DOE. FERC has "the exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal."[39] The Biden-Harris Administration's announcement does not address FERC's authority.[40]

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[36] *Id.*

[37] NAACP v. Fed. Power Comm'n, 425 U.S. 662, 669–80 (1976).

[38] *See* 15 U.S.C. § 717b(a), (c).

[39] *Id.* § 717b(e).

[40] *See* The White House, *supra* note 1.

DOE administers the portion of NGA Section 3 governing LNG import and export authorizations.[41] The NGA gives DOE very narrow authority to deny Section 3 import/export applications.

Section 3(c) mandates that DOE must approve all imports of LNG.[42] It has no discretion to deny import authorization. Thus, between FERC's construction authority and the mandate to approve imports, DOE's discretionary authority is limited to only the act of export.

The NGA divides the world of LNG exports in two: (1) countries with which the United States has a free trade agreement (FTA countries) and (2) countries with which the United States does not have a free trade agreement (non-FTA countries).[43] DOE's responsibilities vary depending on which part of that world is involved in an application.

DOE cannot deny export applications to FTA countries: Section 3(c) mandates that DOE approve LNG exports to FTA countries.[44] As with imports, DOE has no discretion to refuse authorization for FTA exports.

DOE cannot deny export applications to non-FTA countries unless the authorization is inconsistent with the public interest: Section 3(a) states that DOE must approve exports to non-FTA countries "unless . . . it finds that the proposed exportation . . . will not be consistent with the public interest."[45] Thus DOE's only discretion under Section 3 is with respect to export applications to non-FTA countries.

Because DOE must grant all export authorization to FTA countries, it cannot prevent LNG from being exported from the United States. Its discretion lies in analyzing whether it is not in the public interest for LNG that could be exported to FTA countries to also export to non-FTA countries. Thus, DOE's non-FTA export approvals concern the markets *where* LNG may go, not *whether* it may go at all. For this reason, DOE's analyses have long focused on economic criteria, not environmental factors unaffected by the authorization. Those economic factors include:

> the domestic need for the gas to be exported; whether the proposed exports pose a threat to the security of domestic natural gas supplies; and any other issue determined to be appropriate, including whether the arrangement is consistent with DOE's policy of promoting competition in the marketplace

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[41] 15 U.S.C. § 717b.
[42] *Id.* § 717b(c).
[43] *Id.* § 717b(a), (c).
[44] *Id.*
[45] *Id.* § 717b(a).

> by allowing commercial parties to freely negotiate their own trade arrangements.[46]

DOE "applies the principles described in the Secretary's natural gas import policy guidelines[,] which presume the normal functioning of the competitive market will benefit the public."[47] Under these guidelines, DOE thus examines whether the proposed exports will be conducted on a market-responsive, competitive basis.[48] DOE's export policies were "designed to establish natural gas trade on a market-competitive basis and to provide immediate as well as long-term benefits to the American economy from this trade."[49]

B. NEPA: DOE's Obligation to Consider Only Environmental Impacts It Has Authority to Prevent

Although the White House announcement does not make clear the basis for the DOE pause, the most plausible basis is a purported need to gather additional information for NEPA analyses. NEPA generally requires agencies to consider the environmental effects caused by an agency's action.

NEPA requires a federal agency to prepare an Environmental Impact Statement, or EIS, when it undertakes "major Federal actions significantly affecting the quality of the human environment."[50] The Council of Environmental Quality, or CEQ, "has promulgated regulations to guide federal agencies in determining what actions are subject to that statutory requirement."[51] If the proposed action would not "clearly require the production of an EIS," it may be the subject of a more limited Environmental Analysis, or EA.[52] "If, pursuant to the EA, an agency determines that an EIS is not required under applicable CEQ regulations, it must issue a 'finding of no significant impact,' which briefly presents the reasons why the proposed agency action will not have a significant impact on the human

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[46] *Sabine Pass Liquefication, LLC*, DOE/FE Order No. 2961, FE Docket No. 10-111-LNG (May 20, 2011).

[47] *Phillips Alaska*, Order No. 1473, at 42 (citation omitted).

[48] 49 Fed. Reg. 6684-01 (Feb. 22, 1984) (hereinafter "Policy Guidelines"). DOE has repeatedly reaffirmed the continued applicability of the guidelines and has consistently held that they apply equally to export applications (though written to apply to imports). *Yukon Pacific*, Order No. 350; *Phillips Alaska*, Order No. 1473; *ConocoPhillips Alaska*, Order No. 2500; GR0013 (*Sabine Pass*, Order No. 2961).

[49] Policy Guidelines, *supra* note 48, at 6684.

[50] Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 757 (2004) (quoting 42 U.S.C. § 4332(2)(C)).

[51] *Id.*

[52] *Id.* (citing 40 C.F.R. § 1501.4(a)).

environment."[53] Alternatively, if the proposed action would not "clearly require the production of an EIS," it may be categorically excluded from this requirement.[54]

"In considering whether the effects of *the proposed action* are significant, agencies shall analyze the potentially affected environment and degree of the effects of *the action*."[55] Thus, the appropriate level of NEPA analysis—categorical exclusion, EA, EIS, or nothing—depends on the specific "action" before an agency and the effects that are "caused by" agency action and "reasonably foreseeable."[56]

The causal standard here is analogous to "the 'familiar doctrine of proximate cause from tort law.'"[57] There must be a "reasonably close causal relationship"—beyond mere "but-for" causation—"between the environmental effect and the alleged cause."[58] Thus "the underlying policies or legislative intent [help] draw a manageable line between those causal changes that may make an actor responsible for an effect and those that do not."[59]

When "authorizing exports of domestically produced natural gas to foreign countries [that do not have free trade agreements with the United States]," DOE conducts NEPA environmental reviews.[60] Nevertheless, it is important to note that "NEPA's core focus" is "improving agency decisionmaking," and thus it doesn't require information-gathering that does not bear on decisions within an agency's control.[61] Under the "rule of reason," agencies must scope their NEPA analyses "based on the usefulness of any new potential information to the decisionmaking process."[62] "Where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant

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[53] *Id.* at 757–58.

[54] *Id.* at 757 (citing 40 C.F.R. § 1501.4(a)).

[55] 40 C.F.R. § 1501.3(b) (emphases added).

[56] 40 C.F.R. § 1508.8(b).

[57] *Pub. Citizen*, 541 U.S. at 767 (quoting Metro. Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 774 (1983)).

[58] *Id.*; Sierra Club v. FERC, 827 F.3d 36, 46 (D.C. Cir. 2016) (*Freeport I*).

[59] *Pub. Citizen*, 541 U.S. at 767.

[60] National Environmental Policy Implementing Procedures, 85 Fed. Reg. 78,197, at 78,197 (Dec. 4, 2020) [hereinafter "NEPA Rule"] (citing 42 U.S.C. § 4332(C)).

[61] *Pub. Citizen*, 541 U.S. at 769 n.2.

[62] *Id.* at 754.

'cause' of the effect."[63] The agency "need not consider" such effects under NEPA or the implementing CEQ regulations.[64] As the D.C. Circuit has put it, "a decision over which the [agency] has no regulatory authority" "breaks the NEPA causal chain and absolves the [agency] of responsibility to include in its NEPA analysis considerations that it 'could not act on' and for which it cannot be 'the legally relevant cause.'"[65] Accordingly, the tiered structure of NEPA review does not require agencies to conduct environmental reviews of actions or effects outside the agency's authority. DOE's NEPA obligations extend only as far as its authority under the NGA.

IV. DOE'S ENVIRONMENTAL EVALUATION RESPONSIBILITIES UNDER THE NGA AND NEPA

Because the NGA limits DOE's discretionary authority to regulating the act of exporting LNG to non-FTA countries, DOE's obligation to conduct environmental analyses under NEPA is likewise limited. Accordingly, in notice-and-comment rulemaking, DOE itself interpreted its statutory authority as foreclosing consideration of upstream, downstream, and cumulative environmental effects.[66] The only environmental effect that may be relevant to and within DOE's public interest authority arises from the marine transport of LNG to non-FTA countries. But the pause announcement contemplates far broader environmental analysis, seemingly including the environmental effects due to new export facilities, which are regulated by FERC. The pause announcement therefore suspends DOE's statutory obligations without any statutory need for doing so. The announced pause invites entirely voluntary and legally unnecessary environmental analysis.

A. The NGA Requires DOE to Grant Export Authorizations Regardless of Upstream and Downstream Environmental Impacts

"It is axiomatic" that an agency's power "is limited to the authority delegated by Congress."[67] Congress's mandate to DOE is that the agency "shall" authorize natural gas exports to non-FTA countries "unless . . . it finds

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[63] *Id.* at 770.
[64] *Id.*
[65] *Freeport I*, 827 F.3d at 48 (quoting *Pub. Citizen*, 541 U.S. at 769).
[66] NEPA Rule, *supra* note 60, at 78,198.
[67] *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988).

that the proposed exportation . . . will not be consistent with the public interest."[68] The NGA contains no definition of the "public interest." Nevertheless, the NGA's text, structure, and purpose, as well as DOE's own regulatorily enacted interpretation, confirm that the upstream and downstream environmental effects of export authorizations to non-FTA countries lie outside the scope of the statute's public-interest analysis.

First, the NGA's "principal purpose" is the "development of plentiful supplies of . . . natural gas" for combustion to produce energy.[69] Consistent with its principal purpose, the NGA's text imposes a congressional "presumption" in favor of "proposed exportation" of natural gas.[70] DOE "shall" authorize exports to non-FTA countries "*unless* . . . it finds that the proposed exportation . . . will not be consistent with the public interest."[71] The statute thus starts with a heavy thumb on the scale in favor of the export of natural gas—which Congress knows and contemplates is intended to be combusted for energy or feeder stock for other products.

After first enactment, Congress repeatedly amended the text of the NGA. These amendments furthered Congress's policy to import and export plentiful quantities of natural gas. Congress constrained DOE's discretion to determine whether LNG imports or exports are not consistent with the public interest. Under NGA Section 3(e), FERC "shall have the *exclusive* authority to approve or deny an application for the siting, construction, *expansion, or operation* of an LNG terminal."[72] Thus, the NGA itself facially halts DOE's authority to look upstream and prevents DOE from second-guessing FERC's evaluation of upstream impacts. DOE has only a narrow scope of authority over non-FTA export authorizations.

Second, the NGA provides no textual indication that DOE can allow environmental considerations to override the statute's "primary purpose" when determining what would not be consistent with the public interest. And reading authority to do so into the sliver of discretion that DOE retains over non-FTA export authorizations makes no sense. As DOE recently explained to the D.C. Circuit in defense of export authorizations it approved, such "non-additive" export authorizations "do not increase the total volume of LNG the [LNG producers] may export, but only increase the number of

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[68] 15 U.S.C. § 717b(a).

[69] NAACP v. Fed. Power Comm'n, 425 U.S. 662, 669–80 (1976).

[70] Sierra Club v. FERC, 867 F.3d 1357 (D.C. Cir. 2017) (*Freeport II*).

[71] 15 U.S.C. § 717b(a) (emphasis added).

[72] *Id.* § 717b(e)(1) (emphasis added).

countries to which exports are authorized."[73] Congress has thus by statute already made the policy decision to authorize exports of LNG abroad—whatever the volumes—and thereby to accept the economic benefits of the use of that gas regardless of any global environmental effects.

To be sure, "public interest" is a malleable term. But Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."[74] DOE's discretion to determine what is "not" in the "public interest" cannot logically be stretched to allow consideration of environmental effects of non-additive quantities of LNG that Congress has already authorized for export by statute.

Third, interpretative canons of statutory construction reinforce the conclusion that DOE's authority should be limited. Based on "the principle of constitutional avoidance,"[75] Section 3(a) should be construed in a manner that avoids any nondelegation problem.[76] And a nondelegation problem arises if DOE is allowed to set aside Congress's primary purpose for the NGA and instead prioritize environmental effects with no intelligible principle to guide it. There is also a presumption against the extraterritorial application of federal law.[77] U.S. statutes do not apply in foreign territory unless Congress "clearly expressed" this intention.[78] Conferring on DOE the obligation to consider the downstream *effects* of LNG use implicitly assumes the authority to regulate downstream (and hence foreign) *use* of LNG. But international use of U.S. LNG lies outside of DOE's jurisdiction under the NGA, and the NGA does not authorize DOE to restrict such use as incompatible with global climate goals by refusing authorization. Federal courts "expect Congress to speak clearly" if it wishes to assign to an executive agency a decision "of vast economic and political significance."[79] Allowing DOE to wield expansive power—beyond the largely economic and energy-security

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[73] Brief for Respondent U.S. Dep't of Energy at 23, Sierra Club v. U.S. Dep't of Energy, No. 22-1218 (D.C. Cir. Apr. 20, 2023). In full disclosure, the authors of this article represented an industry intervenor on the side of DOE in this case.

[74] Whitman v. Am. Trucking Ass'n, 531 U.S. 457, 468 (2001).

[75] *See* Nw. Austin Mun. Util. Dist. No. 1 v. Holder, 557 U.S. 193, 206 (2009).

[76] *See* F.C.C. v. Fox Television Stations, Inc., 556 U.S. 502, 536 (2009) ("Congress must 'lay down by legislative act an intelligible principle,' and the agency must follow it." (quoting Mistretta v. United States, 488 U.S. 361, 374 (1989))).

[77] Morrison v. Nat'l Austl. Bank, 561 U.S. 247, 255 (2010).

[78] *Id.*

[79] West Virginia v. EPA, 142 S. Ct. 2587, 2605 (2022).

considerations relevant to the act of export—to potentially deny applications for non-additive exports because of upstream, downstream, or cumulative worldwide environmental effects would do exactly that.

Fourth, even if one assumes that DOE has some discretion to consider certain environmental effects (such as from the marine transport of gas), that authority is limited. DOE's notice-and-comment regulation confirms this.[80] When modifying Categorical Exclusion B5.7 in its regulations, DOE explained that its assessment of environmental impacts under NEPA "is properly focused on potential environmental impacts resulting from the exercise of its NGA section 3 authority."[81] And "[t]he *only* decision *for which DOE has authority* is with respect to the export of the commodity itself."[82] Thus, upstream, downstream, and cumulative environmental effects that are removed from the actual export of LNG are beyond DOE's authority under Section 3(a) and lie within the jurisdiction of other agencies or foreign sovereigns.

B. NEPA Does Not Require DOE to Evaluate Upstream and Downstream Environmental Impacts

Under NEPA, an agency need not consider environmental effects when it "has no regulatory authority."[83] Because upstream, downstream, and cumulative greenhouse gas emissions are beyond DOE's Section 3(a) authority, consideration of such impacts is also outside DOE's NEPA obligations.[84] Furthermore, DOE more than adequately addressed the NEPA requirements for LNG export authorizations to non-FTA countries by promulgating Categorical Exclusion B5.7.

A categorical exclusion is an environmental analysis of a category of agency actions that allows such actions to be exempted from project-specific NEPA review absent "extraordinary circumstances."[85] Categorical Exclusion B5.7 is an environmental analysis of "[a]pprovals or disapprovals of new authorizations or amendments of existing authorizations to export natural gas

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[80] 10 C.F.R. Pt. 1021, Subpt. D, App. B, B5.7; *see also* NEPA Rule, *supra* note 60, at 78,198.
[81] NEPA Rule, *supra* note 60, at 78,198.
[82] *Id.* at 78,199 (emphases added).
[83] *Freeport I*, 827 F.3d at 48 (quoting *Pub. Citizen*, 541 U.S. at 769).
[84] *Id.*
[85] NEPA Rule, *supra* note 60, at 78,199 (citing 40 C.F.R. § 1501.4(b)).

under section 3 of the Natural Gas Act and any associated transportation of natural gas by marine vessel."[86]

Because NEPA analysis should focus on matters within the agency's jurisdiction, DOE determined that it could consider only "potential environmental impacts starting at the point of delivery to the export vessel, and extending to the territorial waters of the receiving country."[87] Based on "some 50 years of experience" and after examining various studies, along with "prior NEPA reviews and . . . technical reports," DOE found that there was "no information to indicate that natural gas export authorizations pose the potential for significant environmental impacts."[88]

In promulgating by rule Categorical Exclusion B5.7, DOE enshrined its regulatory interpretation of the NGA confirming that upstream, downstream, and cumulative greenhouse gas emissions are beyond DOE's statutory authority. In DOE's words:

> NEPA do[es] not include effects that the agency has no authority to prevent. DOE's discretionary authority under Section 3 of the NGA is limited to the authorization of exports of natural gas to non-FTA countries. Therefore, DOE need not review potential environmental impacts associated with the construction or operation of natural gas export facilities because DOE lacks authority to approve the construction or operation of those facilities.[89]

Thus, DOE determined the scope of its authority under the NGA and conducted a thorough analysis of all environmental considerations that it found relevant.

C. The Pause Suspends DOE's Execution of Congress's Directives Without Statutory Authority

The administration's stated justification for pausing DOE's consideration of LNG export applications pending additional environmental analysis does not align with the scope of DOE's limited authority over exports to non-FTA countries.[90] The announcement does not explain how evaluating the impact

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[86] *Id.* at 78,205; 10 C.F.R. Pt. 1021, Subpt. D, App. B, B5.7.
[87] NEPA Rule, *supra* note 60, at 78,199–78,200.
[88] *Id.* at 78,198, 78,201–02.
[89] *Id.* at 78,198.
[90] *Compare* The White House, *supra* note 1, *with* 15 U.S.C. § 717b(a), (c).

of LNG on global greenhouse gas emissions falls within the scope of DOE's authority.

Nor does the announcement address DOE's own interpretation of the NGA as limiting its authority to consider only "potential environmental impacts starting at the point of delivery to the export vessel, and extending to the territorial waters of the receiving country."[91] The announcement also does not suggest that the last three years since the NEPA Rule was promulgated have led to the discovery of significant new problems that demand evaluation.

The announcement's reliance on the "risk to the health of our communities, especially frontline communities in the United States who disproportionately shoulder the burden of pollution from new export facilities" also conflates the authority of FERC and DOE.[92] FERC, not DOE, has "the exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal."[93] Pausing DOE's authority to approve exports to non-FTA countries does not affect FERC's authority to approve construction of "new export facilities."

Nor does DOE's limited authority over LNG exports offer any basis for thinking that DOE could act to reduce the environmental impacts of LNG production, transportation, or use based on the analyses suggested by the administration's announcement. Because the full quantity of American LNG can (and, if the broader world market demands it, will) be exported to FTA countries, the announcement merely pauses direct exports to non-FTA countries. Nothing in the NGA gives DOE authority to examine whether terminals in FTA countries might, in turn, resell natural gas to non-FTA countries. And the demand for LNG in non-FTA countries will remain. Thus, the inability to directly export to non-FTA countries increases the chance that U.S. LNG will be first exported to FTA countries and then relayed on to non-FTA countries. Such indirect export adds length and expense to shipping routes. That's an ironic result because it adds to the environmental impact of marine transport of LNG—the only environmental effect that DOE presently has the authority to regulate.[94]

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[91] *Compare* The White House, *supra* note 1, *with* NEPA Rule, *supra* note 60, at 78,199–78,200.

[92] *Compare* The White House, *supra* note 1, *with* 15 U.S.C. § 717b(a), (c), (e).

[93] *Id.* § 717b(e).

[94] NEPA Rule, *supra* note 60, at 78,205; 10 C.F.R. Pt. 1021, Subpt. D, App. B, B5.7.

V. CONCLUSION

The recent pause to seek unnecessary information is contrary to DOE's statutory duties. There is no identified legal requirement to reassess these environmental issues. DOE has no authority to regulate upstream or downstream environmental effects of LNG use. So the contemplated new environmental analyses are unnecessary. Regardless of the pause and regardless of any new environmental analysis, DOE will continue to be required to approve natural gas exports to FTA countries. And the announcement does not affect FERC's authority to authorize new export facilities. While there may be political and policy reasons for updating DOE's assessments of the environmental effects of natural gas exports, there is no legal need to do so. The pause announcement runs counter to the NGA and to Congress's preference for DOE to ensure plentiful supplies of natural gas.

Other Views:

- Statement, The White House, Fact Sheet: Biden-Harris Administration Announces Temporary Pause on Pending Approvals of Liquefied Natural Gas Exports (Jan. 26, 2024), *available at* https://www.whitehouse.gov/briefing-room/statements-releases/2024/01/26/fact-sheet-biden-harris-administration-announces-temporary-pause-on-pending-approvals-of-liquefied-natural-gas-exports/.
- Dep't of Energy, *Unpacking the misconceptions surrounding the DOE's LNG update* (Feb. 8, 2024), https://www.energy.gov/articles/unpacking-misconceptions-surrounding-does-lng-update.
- Osha Davidson, *Why Biden's pause on new LNG export terminals is a BFD*, YALE CLIMATE CONNECTIONS (Feb. 14, 2024), https://yaleclimateconnections.org/2024/02/why-bidens-pause-on-new-lng-export-terminals-is-a-bfd/.

RACIAL PREFERENCES IN ECONOMIC BENEFITS: FROM WIDELY ACCEPTED TO LEGALLY INDEFENSIBLE*

GEORGE R. LA NOUE**

As the United States began to emerge from its long history of legal segregation and racial discrimination, the question of appropriate remedies for that past became the center of many political and legal controversies. After the Supreme Court found school segregation unconstitutional in 1954,[1] it took decades of litigation to determine what actions local school authorities could or could not take to desegregate.[2] Similarly, applying the 1964 Civil Rights Act provisions barring discrimination in federally subsidized programs (Title VI) and employment (Title VII) has required extensive judicial consideration.

Beginning in the 1970s, American governments began to use racial preferences to distribute economic benefits and public procurements. Race-neutral programs designed to abolish or ameliorate racial inequality were almost always upheld by courts when challenged, but litigation outcomes for race-preferential programs were mixed. The outcomes often depended on the specific legislative context and the resources plaintiffs and defendants could bring to their cases. These ambiguous precedents failed to offer clear-cut guidance to governments considering remedies for racial problems.

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

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[1] Brown v. Board of Education, 347 U.S. 483 (1954).

[2] *See, e.g.*, Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701 (2007).

The award of government contracts, also known as procurement, is an economically important and universally relevant arena in which the battle over race-preferential government benefits has played out. Government entities at the federal, state, and local levels across the country contract with outside firms to provide all sorts of goods and services, from new chairs to new roads.

In 1989, the Supreme Court ruled that racial preferences in government procurement must satisfy strict scrutiny.[3] Subsequent lower court decisions nevertheless varied, with governments and courts latching on to dicta in the Court's *Croson* opinion to use questionable statistical arguments to support racial preferences.[4]

But in recent years, the judiciary has adopted far-reaching rules invalidating race-preferential procurement and economic benefit programs in public and private institutions. This trend predates the Supreme Court's decisions in the *Students for Fair Admissions* cases invalidating racial preferences in college admissions. In 2021, the Biden administration implemented through the American Rescue Plan Act a number of Covid-19 relief programs that were racially targeted. Lower courts halted the programs on equal protection grounds.[5] There are more cases in progress challenging the government's use of racial preferences in awarding contracts or other economic benefits.[6] Given the trend away from allowing such preferences, along with the Supreme Court's reasoning in *SFFA*, the challengers' position is stronger now than it was even a few years ago. Racial preferences in awarding government economic benefits have become very difficult to defend.

I. HOW RACE BECAME A FACTOR IN THE AWARD OF PUBLIC CONTRACTS

Public contracting has proved a critical arena in which the basic standards have been established for judicial review of benefit programs that use race as a decisive factor. Federal, state, and local procurements amount to trillions of dollars and millions of contracts. Though governments historically treated such contracts as opportunities for patronage, modern government procurement processes have become more professionalized by the creation of rules to prevent political interference and other forms of discrimination in contract

[3] *See infra* section II.
[4] *See infra* section III.
[5] *See infra* section IV.
[6] *See infra* section V.

awards. Those rules, however, created a problem for interest groups and politicians who thought that equity or constituent demands required granting specific shares of public contracting dollars to minority- and women-owned business enterprises (MWBEs).[7]

Starting in the 1970s, programs creating advantages in the form of quotas or enforceable goals for MWBEs seeking public contracts became widespread. How many of these programs are there today? There is no definitive answer. One Google search found that 47 states, plus Washington, DC, and Puerto Rico, have MWBE certification programs. There are many more such programs sponsored by cities, counties, special districts, educational institutions, and corporations.

In 1977, Rep. Parren Mitchell, a founder of the Congressional Black Caucus and chair of the House Small Business Committee, attached an amendment to a public works bill that compelled state and local governments seeking federal grants to set aside 10% of those funds for minority-owned firms. In 1983, Congress authorized the Disadvantaged Business Enterprise (DBE) program, which required state and local governments receiving federal transportation funding for highways, airports, and seaports to expend at least 10% of those funds on DBEs. Some DBE programs as administered are race-neutral, but some are not.[8] In 1988, the federal 8(a) program was begun, permitting the Small Business Administration to set aside federal contracts for minority-owned firms.

II. Early Judicial Evaluation of Race Preferential Procurement Programs

The Fifth Amendment has been interpreted to require equal protection of the laws by the federal government, and the Fourteenth Amendment specifically declares that state (and, by extension, local) governments must give all persons equal protection of the laws. Title VI of the 1964 Civil Rights Act bars racial discrimination in all public and private programs receiving federal assistance.

The plain text of these laws bans all forms of racial discrimination by all governments in spending public funds. So how do so many race-preferential

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[7] *See generally* George R. La Noue, Local Officials' Guide to Minority Business Programs and Disparity Studies (National League of Cities, rev. ed. 1994).

[8] *See generally* George R. La Noue, *Follow the Money: Who Benefits from the Federal Aviation Administration's DBE Program?*, 38 Am. Rev. Pub. Admin. 480 (2008).

procurement programs survive? For one thing, they often enjoy strong political support. Furthermore, courts have disagreed about whether the Fourteenth Amendment permits race-conscious government programs aimed at ending the subordinate role of some racial groups, particularly blacks, resulting from past discrimination in our society. Court decisions regarding procurement preferences have played a major role in establishing the controlling judicial precedents interpreting that Amendment.

Litigation challenging procurement preferences is complex, lengthy, and costly. In some early cases, plaintiffs were successful, but only after weeks-long trials featuring extensive expert testimony.[9] These cases were brought by large construction associations that could afford the upfront expenses. But after a while, these organizations became aware of unfavorable local political climates and withdrew from litigation—they thought it was better to build bridges than burn them. Further, the governments sued typically had considerably more resources for their defense than did plaintiffs for their challenges.

Eventually, a challenge to a procurement preference reached the Supreme Court. The Court's 1989 decision in *City of Richmond v. Croson* is the most important case about racial preferences in government contracting. Richmond, the capital of the Confederacy in the 19th century, had seen important demographic and political changes in the 20th. Its city council had become majority African-American, and it passed an ordinance requiring that thirty percent of all municipal procurement dollars be set aside for minority-owned firms. J.A. Croson, an Ohio based company, had won a small contract to install urinals in the city jail, but if forced to subcontract to minority firms, it would have lost money. Croson's challenge to this requirement, backed by the Associated General Contractors of America, yielded the decision that set the standard for evaluating all preferential procurement programs. After a series of appeals, the Supreme Court found that the city's thirty percent set-aside for minority-owned firms violated the Fourteenth Amendment.[10]

In explaining that decision, Justice Sandra Day O'Connor's plurality opinion set some important rules. It determined that government use of racial criteria for awarding benefits is subject to strict scrutiny.[11] This test requires

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[9] *See, e.g.*, Associated Gen. Contractors v. City of Columbus, 936 F. Supp. 1363 (S.D. Ohio 1996); Contractors Ass'n of Eastern Pa. v. City of Phila., 735 F. Supp. 1274 (E.D. Pa. 1990), *aff'd*, 945 F.2d. 1260 (3d Cir. 1991); Builders Ass'n of Greater Chi. v. Cnty. of Cook, 123 F. Supp. 2d 1087 (N.D. Ill. 2000), *aff'd*, 256 F.3d 642 (7th Cir. 2001); Builders Ass'n of Greater Chi. v. City of Chi., 298 F. Supp. 2d 725 (N.D. Ill. 2003).

[10] City of Richmond v. Croson, 488 U.S. 469 (1989).

[11] *Id.* at 472.

judges to avoid deferring to legislative or executive findings, and instead to examine rigorously the proffered evidence of the need for racial preferences. The program in question must be more than just politically desirable or beneficial to some members of the community. Given the constitutional requirement of equal treatment of persons without regard to race, the challenged program must be aimed at a *compelling interest* of remedying current identified governmental discrimination.[12] Further, program design must be *narrowly tailored* to achieve that interest and thus must avoid including groups or persons not recently injured or extending longer than necessary to remedy the identified problem.[13] Although it did not prove true in this context that strict scrutiny was strict in theory and fatal in fact,[14] it was a high judicial bar for programs with racial preferences.

In *Croson*, the Court noted, "There was no direct evidence of race discrimination on the part of the city in letting [prime] contracts or any evidence that the city's prime contractors had discriminated against minority-owned subcontractors."[15] Also, "There is nothing approaching a prima facie case of a constitutional or statutory violation by anyone in the Richmond construction industry."[16] The Court went on to state that "the city does not even know how many MBE's in the relevant market are qualified to undertake prime or subcontracting work in public construction projects."[17] Additionally, "[w]hile the States and their subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination, they must identify that discrimination . . . with some specificity before they may use race conscious relief."[18] Finally, "[w]here such discrimination occurs [against a specific firm], a city would be justified in penalizing the discriminator and providing appropriate relief to the victim of discrimination."[19] Without such specific findings, though, Justice O'Connor was concerned that "[t]he dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement

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[12] *Id.* at 485.

[13] *Id.* at 486.

[14] *See* Gerald Gunther, *The Supreme Court, 1971 Term - Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

[15] *Croson*, 488 U.S. at 480.

[16] *Id.* at 500.

[17] *Id.* at 502.

[18] *Id.* at 504.

[19] *Id.* at 509.

would be lost in a mosaic of shifting preferences based on inherently unmeasurable clams of past wrongs."[20]

III. THE DEVELOPMENT OF THE DISPARITY STUDY INDUSTRY AND ITS SHORTCOMINGS

Justice O'Connor's admonitions in *Croson* should be read to severely limit race-preferential procurement programs to extreme cases. But few governments took them seriously because Justice O'Connor went on to say:

> Where there is a significant statistical disparity between the number of *qualified* minority contractors *willing* and *able* to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise.[21]

Governments latched on to this paragraph, leading to a massive investment in so-called disparity studies, which sought to create a predicate for the creation or continuation of MWBE programs.

More than 600 such studies were commissioned over the ensuing years, at an estimated cost of more than 300 million dollars. Almost no academic institutions attempted procurement disparity studies, though they had research centers with the necessary capacity. A few of the early studies were performed by national accounting companies or involved major scholars, but eventually the overwhelming majority of studies were completed by a handful of for-profit consultants who understood the results the market demanded.[22] A recent article in the *Review of Black Political Economy* concluded that, "In practice, these firms are contracted to find evidence of disparity and there is institutional pressure on these firms to find it—they have failed if they do not find it or if they find the 'wrong' disparity (with the wrong group). These are not academically neutral studies."[23]

For a disparity study to adequately address the *Croson* stipulations and raise an "inference" that there is discrimination that is remediable by a

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[20] *Id.* at 505-506.

[21] *Id.* at 509 (emphases added).

[22] Dorothy Gaiter, *Court Ruling Makes Discrimination Studies a Hot Industry*, WALL ST. J., Aug. 8, 1993.

[23] Maria Lungu et al., *Disparity Studies: Isomorphic Discrimination?*, REV. BLACK POL. ECON., at 3 (2023), *available at* https://www.researchgate.net/profile/Maria-Lungu-8/publication/368301835_Disparity_Studies_Isomorphic_Discrimination/links/642726f666f8522c38e94767/Disparity-Studies-Isomorphic-Discrimination.pdf.

MWBE preference, it must analyze the utilization of firms that are comparably "qualified," "willing," and "able." This is no easy task, and it requires that analysts answer several key questions.[24]

First, how should the number of "qualified" firms be measured? Firms are qualified or unqualified according to the requirements of a specific procurement. For large governments, measuring this variable would necessitate examining qualification requirements for hundreds of contracts and the qualifications of hundreds of firms seeking them.

Second, how should the number of "willing" firms be determined? Public procurement is not a lottery, but is essentially a competition.[25] To enter this competition, a firm must produce a bid, which costs time and money. Firms are constantly deciding which competitions they should enter, depending on the costs and potential benefits of doing so in a potential contract. A well-run firm will be selective about which contracts it bids for—which competitions it enters. A string of bad decisions can lead to a firm's bankruptcy. Thus, the number of "willing" firms cannot simply be equated with the number of firms in a geographical area. Only if a firm bids is there evidence it is "willing" to assume the risks and responsibilities of a particular contract.

Third, how should the number of firms that are "able" or have the capacity to complete a job be measured? A firm's supply of capital or skilled employees may be limited. Some contracts require performance bonds, insurance, or other fiscal requirements. A firm that has the ability to complete a

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[24] A version of this discussion of availability can be found in George R. La Noue, *Legal Standards for Affirmative Action in Government Contracting*, *in* HOUSTON COMMUNITY COLLEGE STUDY OF AVAILABILITY AND UTILIZATION, Dec. 2023.

[25] *See, e.g.*, *Associated Gen. Contractors v. Columbus*, 936 F. Supp. 1363. The city had created its MWBE program based on multiple disparity studies. It based availability on firms included in various lists, including a city vendor list. The court found, however:

> The city maintains records of all firms which have submitted bids on prime contracts. This would be a ready source of information regarding the identity of firms which are qualified to provide contracting services as prime contractors. . . . On prime contracts only firms which submit bids are "available." "The concept of investigating discrimination in the award of prime contracts by indirect statistical analysis is inappropriate in this case. The process of awarding prime contracts is not the equivalent of a lottery in which each bidder has an equal chance to win. Prime contracts are awarded to the lowest responsible bidder."

Id. at 1389, 1400. The court concluded, "There was no evidence that the city ever failed to award a prime contract to a minority firm that was the lowest bidder." *Id.* at 1372. In fact, the Columbus studies never even investigated which firms submitted bids, how often, or on what size contracts.

job in April may not have that ability in November because of other commitments. Some firms work only as prime contractors, some as subcontractors, and some as both.

These three factors together indicate the availability of firms for particular contracts, and the key to any disparity study is accurately calculating availability. If availability data are incorrect, the subsequently calculated disparity ratios will be incorrect. Few jurisdictions have the necessary data in accessible formats prior to commissioning a disparity study. Calculating how many comparable firms are qualified, willing, and able to complete a contract is complicated, time-consuming, and expensive.

Consequently, the for-profit companies which dominate the disparity study mini-industry sought easily accessible data. First, they relied on census data, but this data merely reports the total number of firms in industry categories in a geographical area, not whether they are available for the actual contracts a government offers in a particular time period. Second, some studies sought to use Dun & Bradstreet (D&B) databases, which raises a few problems. For one, they exclude many smaller firms. Further, the D&B lists do not have information about whether a firm is qualified, willing, and able to compete for a specific government procurement. Moreover, D&B data are considered proprietary, so neither the plaintiff nor the court can examine that data in raw form. Consequently, many disparity study firms switched to compiling the names of firms on existing lists (trade association membership, registered vendors, certified MWBEs, etc.) and using the resulting compilations to measure availability. But even assuming the source lists are current and accurate, they do not distinguish which firms have the characteristics to compete for specific government contracts in a particular time frame. When disparity study firms are forced to provide their availability lists in litigation, the inadequacy of their availability measures to meet the *Croson* requirements is evident.[26]

Even if a disparity study produces a valid disparity ratio—one based on careful availability measures that show minority- or women-owned firms are not receiving the statistically expected number of contracts or dollars awarded—that alone does not create a compelling interest sufficient to support an MWBE program without other kinds of evidence. A basic premise in statistical analysis is that a correlation, without more, does not lead to a spe-

[26] *See generally* George R. La Noue, *Who Counts?: Determining the Availability of Minority Businesses for Public Contracting After* Croson, 21 HARV. J.L. & PUB. POL'Y 793 (1998).

cific conclusion of causation. *Croson* recognizes that principle by saying disparity analysis may give rise to "an *inference* of discriminatory exclusion."[27] In short, a well done disparity analysis can creates hypotheses that should be followed up, but not a certain conclusion that there is specific discrimination that enables a race-preferential program to survive strict scrutiny.

IV. RECENT FEDERAL COURT RULINGS ON RACE-BASED ECONOMIC BENEFITS, AND THE PROBABLE IMPACT OF *SFFA*

In *Students for Fair Admissions v. President and Fellows of Harvard College* and *Students for Fair Admissions v. University of North Carolina*, the U.S. Supreme Court held that racial preferences in college admissions violate the Fourteenth Amendment and Title VI.[28] But even before the Supreme Court handed down this decision in 2023, racial preferences connected to public economic benefits were being struck down by lower federal courts.

In 2021, U.S. Department of Agriculture Secretary Thomas Vilsack announced that USDA would immediately forgive 13,000 to 15,000 loans to non-white food producers at a potential cost of up to $4 billion.[29] It was labeled Covid-19 relief, but the context of the new policy suggested a broader purpose. USDA declared that the Biden-Harris Administration was committed "to equity across the Department by removing systemic barriers and building a workforce more representative of America."[30] The program of race-based debt relief only for minority farmers and ranchers was halted by

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[27] *Croson*, 488 U.S. at 509.

[28] 600 U.S. 181 (2023) (*SFFA*).

[29] *A Hearing to Review the State of Black Farmers in the U.S. Before the H. Comm. on Agric.*, 117th Cong., transcript at 6, 123 (2021), *available at* https://www.congress.gov/117/chrg/CHRG-117hhrg46332/CHRG-117hhrg46332.pdf. *See also* George R. La Noue, *The Race Card in ARPA's Food Supply Deck*, 22 FEDERALIST SOC'Y REV. 184, 189-91 (2021), *available at* https://fedsoc.org/fedsoc-review/the-race-card-in-arpa-s-food-supply-deck.

[30] *See* Zach Ducheneaux, *American Rescue Plan Socially Disadvantaged Farmer Debt Repayments*, USDA (Mar. 26, 2021), https://www.farmers.gov/blog/american-rescue-plan-socially-disadvantaged-farmer-debt-payments. *See A Hearing to Review the State of Black Farmers in the U.S. Before the H. Comm. on Agric.*, 117th Cong. (2021) (testimony of Thomas J. Vilsack, Sec'y of Agric.), *written testimony available at* https://www.congress.gov/117/meeting/house/111400/witnesses/HHRG-117-AG00-Wstate-VilsackT-20210325.pdf. *See also* Statement, The White House, Fact Sheet: President Biden Signs Executive Order Advancing Diversity, Equity, Inclusion, and Accessibility in the Federal Government (June 25, 2021), *available at* https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/25/fact-sheet-president-biden-signs-executive-order-advancing-diversity-equity-inclusion-and-accessibility-in-the-federal-government/.

several district courts in different parts of the country.[31] The Department of Justice did not appeal those decisions.

Also in 2021, a Covid-19 relief program that prioritized federal funds for restaurants owned by minorities and women was found unconstitutional. The House Small Business Committee, chaired by former chair of the Congressional Hispanic Caucus Nydia Velazquez, found that during the pandemic "women—especially mothers and women of color—are exiting the workforce at alarming rates," and that "eight out of ten minority businesses are on the brink of closure."[32] The consequence of this prioritization was that the $29 billion in restaurant relief funds were running out before white male owners could even have their applications considered. In *Vitolo v. Guzman,* the Sixth Circuit found the race- and sex-based priority unconstitutional and, moreover, outlined standards for establishing a compelling interest:

> The government has a compelling interest in remedying past discrimination only when three criteria are met:
>
> First, the policy must target a specific episode of past discrimination. It cannot rest on a "generalized assertion that there has been past discrimination in an entire industry."
>
> Second, there must be evidence of *intentional* discrimination in the past. Statistical disparities don't cut it, although they may be used as evidence to establish intentional discrimination.
>
> Third, the government must have had a hand in the past discrimination it now seeks to remedy.[33]

Again, the DOJ did not appeal.

Important questions have been raised about the scope of the Supreme Court's decision in *SFFA*, and whether and how it extends beyond the higher education context.[34] The Court did not directly address any public procurement program, but almost all of them receive federal funds and so are subject

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[31] Wynn v. Vilsack, 545 F. Supp. 3d 1271 (M.D. Fla. 2021); Faust v. Vilsack, 519 F. Supp. 3d 470 (E.D. Wisc. 2021); Miller v. Vilsack, No. 4:21-CV-00595, 2021 WL 1115194 (N.D. Tex. 2021).

[32] *Help is On the Way: Budget Reconciliation Moves the American Rescue Plan Forward*, House Comm. on the Budget (Feb. 19, 2021), https://democrats-budget.house.gov/resources/reports/help-way-budget-reconciliation-moves-american-rescue-plan-forward.

[33] Vitolo v. Guzman, 999 F.3d 353, 361 (6th Cir. 2021) (Thapar, J.) (internal citations omitted).

[34] *See, e.g.*, *DEIA Initiatives in the Workplace Post-SFFA*, FREEDOM OF THOUGHT (Oct. 26, 2023), https://freedomofthought.fedsoc.org/deia-initiatives-in-the-workplace-post-sffa; Jonathan Berry, *Implications for Philanthropy: U.S. Supreme Court Ruling on Affirmative Action in Higher*

to the Fifth and Fourteenth Amendments' or Title VI's equal protection provisions. The Court insisted that the only way race preferential admissions can have a compelling interest is if they remedy specific constitutional or statutory violations.[35] The *Croson* decision had suggested the same standard in the procurement context.[36]

On July 19, 2023, following up on *Vitolo* and also incorporating *SFFA*, a federal district court in the Eastern District of Tennessee held unconstitutional the race preferences in the federal contracting 8(a) program.[37] Under the 8(a) program, the Small Business Administration (SBA) can set aside procurements in any federal agency for "socially and economically" disadvantaged firms.[38] In practice, this has meant businesses owned by racial and ethnic minorities, and indeed SBA long maintained a "presumption" that all minority-owned firms were socially and economically disadvantaged.[39] This presumption was based on a list of countries of origin, which has not changed in decades.[40] In *Ultima Services Corporation v. U.S. Department of Agriculture*, the court ruled that the program lacked a compelling interest and was not narrowly tailored because it did not purport to remedy specific past discrimination against the beneficiary firms.[41] The SBA responded by giving up its presumption and replacing it with a purportedly race-neutral individual essay application process—similar to the one *SFFA* suggests might pass constitutional muster in college admissions.[42]

Education, PHILANTHROPY ROUNDTABLE (Nov. 1, 2023), https://www.philanthropyroundtable.org/wp-content/uploads/2023/11/Toolkit_Implications-for-Philanthropy.pdf; Lara A. Flath et al., *The Supreme Court's Affirmative Action Opinion Continues To Spawn Challenges to DEI Programs*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP (Dec. 13, 2023), https://www.skadden.com/insights/publications/2023/12/2024-insights/esg/the-supreme-courts-affirmative-action-opinion; Francesca L. Odell et al., *How Boards Should Be Thinking about the Supreme Court's SFFA Affirmative Action Decision*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 14, 2024), https://corpgov.law.harvard.edu/2024/02/14/how-boards-should-be-thinking-about-the-supreme-courts-sffa-affirmative-action-decision/.

[35] *SFFA*, 600 U.S. at 252-53.

[36] 488 U.S. at 500.

[37] Ultima Servs. Corp. v. U.S. Dep't of Agric., 2:20-CV-00041-DLC-CRW, 2023 WL 4633481 (E.D. Tenn. 2023).

[38] *Id.* at **3-4.

[39] *Id.* at *4.

[40] *See* 13 C.F.R. § 124.103(b)(1) (2023).

[41] *Ultima Servs. Corp.*, 2023 WL 4633481, at *12.

[42] Notice of Compliance, *Ultima Servs. Corp.*, 2023 WL 4633481 (filed Aug. 29, 2023). *See SFFA*, 600 U.S. at 230-31.

V. HOW WILL THE SHIFTING LEGAL LANDSCAPE AFFECT ONGOING LITIGATION OVER RACE-PREFERENTIAL PROCUREMENT?

A. Nuziard v. Minority Business Development Agency

The Minority Business Development Agency (MBDA) is a federal agency which, under the Biden administration, created regional centers across the country to provide assistance to business owners. Those centers had a policy of providing services only to firms whose owners' identities were consistent with a federal list of racial and ethnic minorities. When white business owners approached these centers for help, they were rejected because of their race. Jeffrey Nuziard in Texas, along with other business owners from Florida and Wisconsin, represented by the Wisconsin Institute for Law and Liberty (WILL), sued to enjoin the MBDA's race-exclusive policy in 2023.[43]

A few weeks before the *SFFA* decision was announced, a United States District Court in Texas issued a preliminary injunction finding that the policy violated the Fifth Amendment's equal protection guarantee.[44] The DOJ responded to this ruling by putting into the record several expert reports. They covered statistical analysis of disparities in federal procurement, a meta-analysis of a sample of state and local disparity studies, and an expert report based on anecdotes about and statistics related to procurement disparities in Texas. That was an enormous amount of material to analyze and rebut. The case record totaled 4,456 pages. WILL decided to forgo an expert rebuttal and focused its reply on the fact that none of the material in the DOJ's expert reports identified the constitutional or statutory violations *SFFA* requires to support a racial preference.[45]

On March 5, 2024, Judge Mark T. Pittman delivered a 93-page ruling finding the MBDA regional centers' race-exclusive policy unconstitutional and issuing a permanent injunction.[46] The court found that two meta-analysis studies introduced by DOJ—which detailed disparities in the private credit market and disparities in private contracting—were flawed and did not provide the evidence of illegal discrimination that *SFFA* requires to support

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[43] Complaint, Nuziard v. Minority Bus. Dev. Agency, 676 F. Supp. 3d 473 (N.D. Tex., filed June 5, 2023) (No. 4:23-CV-0278-P).

[44] *Nuziard*, 676 F. Supp. 3d at 485.

[45] Plaintiffs' Reply Brief in Support of their Motion for Summary Judgment, *Nuziard*, 676 F. Supp. 3d 473 (filed Dec. 1, 2023) (No. 4:23-CV-0278-P).

[46] Nuziard v. Minority Bus. Dev. Agency, 4:23-cv-00278-P, 2024 WL 965299 (N.D. Tex. Mar. 5, 2024).

race-conscious remedies.[47] DOJ had also introduced a third disparity study on government prime contracting, and the court found that because that study provided "robust empirics" and focused on discrimination by the government, it could support a compelling interest.[48] The opinion does not reflect any examination of whether that third study controlled for whether firms were qualified, willing, and able (*Croson*'s availability variables), and there was no plaintiffs' expert report to rebut the study's findings.[49]

Next, Judge Pittman moved to the narrow tailoring prong of his strict scrutiny analysis, finding that the racial and ethnic presumptions informing the minorities list MBDA relied on "comprise a bizarre amalgam that is often arbitrary."[50] Citing *SFFA*'s statement that "race may never be used as a 'negative' and . . . may not operate as a stereotype," the court concluded that MBDA's use of race involved both negatives and stereotypes.[51] Judge Pittman noted that the MBDA racial presumptions had no "logical endpoint," a criterion for narrow tailoring under *SFFA*.[52] Further, MBDA had not considered using race-neutral remedies to ameliorate the business inequalities it saw in society. While hesitant to issue a nationwide injunction, the court concluded that was the proper remedy, since the MBDA service centers are scattered across the nation and all followed the same racially exclusionary policy.[53]

Coupled with the ruling in *Ultima* about the inadequacy of the minority lists used to support governmental preferences,[54] *Nuziard* will make it very difficult for the many state and local programs to defend their use of the same lists to define their MBE programs.

B. Mid-America Milling v. U.S. Department of Transportation

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[47] *Id.* at **26-27, **30-32.

[48] *Id.* at *33.

[49] This contrasts with other circuit courts' evaluations of disparity studies, which have found that the characteristics of MWBEs and non-MWBEs are different, and that disparity analysis should control for those differences. *See, e.g.*, Mich. Road Builders Ass'n, Inc. v. Milliken, 834 F.2d 583, 592 (6th Cir. 1987); Associated Gen. Contractors, Inc. v. Drabik, 214 F.3d 730, 736 (6th Cir. 2000); Eng'g Contractors Ass'n of S. Fla. v. Dade Cnty., 122 F.3d 895, 917 (11th Cir. 1997); W. States Paving, Inc. v. Wash. Dep't of Transp., 407 F.3d 983, 1000-01 (11th Cir. 2005).

[50] *Nuziard*, 2024 WL 965299, at *4 n.10.

[51] *Id.* at *33 (quoting *SFFA*, 600 U.S. at 281).

[52] *Id.* at *37 (quoting *SFFA*, 600 U.S. at 212).

[53] *Id.* at *45.

[54] *See Ultima*, 2023 WL 4633481; *supra* notes 32-37 and accompanying text.

In *Mid-America Milling Company v. U.S. Department of Transportation*, WILL is representing companies challenging the use of federal DBE goals in Kentucky and Indiana.[55] The case may have national implications: the plaintiff companies operate in multiple states covering multiple circuits and are challenging a federal policy.

The DBE program has been in place since the 1980s and requires set-asides of federal transportation contracts for "disadvantaged business enterprises."[56] In its current manifestation, the 2021 Infrastructure Investment and Jobs Act requires that 10% of the more than $37 billion of new surface transportation funding go to DBEs. The Act uses the same presumptions about which firms are socially and economically disadvantaged as did SBA's 8(a) program prior to the *Ultima* case.[57] The *Ultima* decision invalidating that presumption for the SBA, the *Nuziard* decision invalidating it for the MBDA, and *SFFA*'s critique of the concept that a person's country of origin should confer advantages or disadvantages[58] will all make it difficult to defend the DBE program.

In two DBE cases from the early 2000s, under-resourced plaintiffs represented by small firms lost when they sought summary judgments, which turned out not to be an appropriate procedure for rebutting complex state disparity studies.[59] If WILL is successful in showing that the DBE program was never based on evidence of violations that would satisfy *SFFA* or *Vitolo*, even accurate state findings of statistical disparities or DBE availability will not justify setting DBE goals on specific contracts, and so conventional disparity studies will become completely unnecessary.

C. Other Impacts

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[55] Complaint, Mid-America Milling Co., LLC v. U.S. Dep't of Transp., No. 3:23-cv-00072 (E.D. Ky. 2023) (*MAMCO*).

[56] *See supra* Section I.

[57] Infrastructure Investment and Jobs Act, Pub L. No. 117-58, § 11101(e), 135 Stat. 429, 449 (2021). *See supra* Sections I, IV.

[58] 600 U.S. at 216-18.

[59] *See* Sherbrooke Turf Inc. v. Minn. Dep't of Transp., 345 F.3d 964, 969-70, 973-74 (8th Cir. 2003). *But see W. States Paving*, 407 F.3d 1000-01 (citing Maryland Troopers Association v. Evans, 993 F.2d 1072 (4th Cir. 1993); Coral Constr. Co. v. King Cnty., 941 F.2d 910 (9th Cir. 1991); *Drabik,* 214 F.3d 730; O'Donnell Constr. Co. v. D.C., 963 F.2d 420 (D.C. Cir. 1992)) (finding that states' evidence that proportion of minority firms who won contracts was lower than their proportion in the state did not suffice to show discrimination because it failed to address availability).

There is another, less visible potential impact of *SFFA* and perhaps *Vitolo*. Governments which passed legislation requiring MWBE goals may now be hesitant to actually place those goals on specific contracts if that might provoke litigation undermining their whole regime of race preferences. Also, governments which contemplate commissioning or adopting disparity studies may now have second thoughts, if the studies would have to show they committed constitutional or statutory violations to effectively defend their preferential programs. The application of truly strict scrutiny to these programs might chill their creation altogether.

When district and appeals courts rule against racial preferences, other lower courts might disagree. But when the Supreme Court rules, its precedents are binding. *SFFA*'s majority opinion cites *Croson* and announces clearly that racial preferences can only be used to remedy specific constitutional or statutory violations.[60] It is unlikely that this string of defeats for race-based economic benefits and procurement preferences will be overturned. The DOJ seems to accept that reality by declining to appeal its losses. Improved disparity studies may still be useful in identifying problems in a procurement system, but it is unlikely they will ever again be sufficient to provide a compelling interest or narrow tailoring for MWBE programs as they currently exist.

VI. CONCLUSION

There have been concerted efforts to end specific discrimination in employment and housing. But there have been no efforts by public or private litigators to end particular procurement discrimination against MWBEs. In the government contracting context, litigation over discrimination—including disparity studies conducted for the purpose—has always been about the desire of governments to create or maintain programs to help minority groups they wished to support. Consequently, these race-preferential programs benefitted firms that were not themselves proved victims of discrimination, and they harmed firms that had not discriminated. Any program that is so over-inclusive is not narrowly tailored.

Hundreds of procurement disparity studies have been conducted, and it is remarkable that they almost never identified any particular perpetrator or

[60] *See SFFA*, 600 U.S. at 226, 248-50, 260, 317 (2023) (citing *Croson*).

instance of discrimination which might have been a constitutional or statutory violation remediable by a race-preferential program. There are two reasons for that significant omission. First, disparity study firms did not want to accuse their government funders of legal violations in their procurement processes. Second, if such violations had been identified, a narrowly tailored remedy would have had to be more focused on the specific victimized firms and involve monetary indemnifications the governments did not wish to make. Set-aside programs for all MWBEs were more desirable politically.

SFFA's reiteration of the requirement that a constitutional or statutory violation must undergird the use of a race-conscious remedy may lead to new outcomes in litigation over MWBE preferences. Not only may it be easier and quicker for plaintiffs to shut down these programs by forcing defendants to admit that relevant violations have not occurred, but firms disadvantaged by past preferential programs may also seek financial remedies. Sometimes, those may be firms owned by minorities who were not included in a previous MWBE program,[61] but more often they will be white male or stockholder owned firms disadvantaged by the programs.

Successful challenges to group-based presumptions will impact almost all MWBE programs. Eligibility for such programs has been based only on government certification that a firm is majority-owned by racial minorities or women, regardless of whether there is any evidence that the firm or the person benefitting had experienced discrimination in the award of government contracts.[62] After *SFFA* and other decisions invalidating racial preferences in government-run or -funded programs, firms will have to produce individualized evidence of discrimination to justify preferences. This will reduce the number of MWBEs eligible for preferences, and perhaps political support for these programs as well.

In *SFFA*, Chief Justice Roberts stated bluntly for the majority, "The way to end discrimination is to end it. All of it." That sounds like the death knell for virtually all existing race-preferential procurement plans.

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[61] *See, e.g.*, Hispanic Chamber of Commerce v. City of Milwaukee, No. 12-cv-545 (E.D. Wisc. 2012) (challenge brought by minority groups against MWBE program which preferred only black- and women-owned firms).

[62] *See generally* George R. La Noue, *Defining Social and Economic Disadvantage: Are Governmental Preferential Business Certification Programs Narrowly Tailored?*, 12 UNIV. MD. L.J. OF RACE, RELIGION, GENDER & CLASS 2, 274-319 (2012).

Other Views:

- Statement, The White House, Presidential Actions: Executive Order On Advancing Racial Equity and Support for Underserved Communities Through the Federal Government (Jan. 20, 2021), *available at* https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/.
- Connor Maxwell et al., *A Blueprint for Revamping the Minority Business Development Agency*, CTR. FOR AM. PROGRESS (July 31, 2020), https://www.americanprogress.org/article/blueprint-revamping-minority-business-development-agency/.
- Katherine Franke & Ting Ting Cheng, *The ERA Brief—June 2021*, COLUM. L. SCH. CTR. FOR GENDER & SEXUALITY L. (June 1, 2021), https://gender-sexuality.law.columbia.edu/content/why-do-we-need-era-new-decision-6th-circuit-answers-question.

SURPRISE, THE ONLY CONSTANT*

JULIUS L. ("JERRY") LOESER**

A review of ALEX POLLOCK & HOWARD ADLER, SURPRISED AGAIN! THE COVID CRISIS AND THE NEW MARKET BUBBLE (2022)

> *I approach phenomena that I don't understand with good cheer and don't give in to them. I'm above them. Man should be aware that he is above lions, tigers, stars, above everything in nature, even above what is incomprehensible and seems miraculous, otherwise he's not a man but a mouse afraid of everything.*
>
> The House with the Mezzanine: An Artist's Story, Anton Chekhov

In the late 1980s, the United States experienced what was called the "Savings and Loan Crisis." Savings and loan associations (S&Ls), firms much like banks, had committed the financial sin of borrowing short and lending long: they borrowed by taking deposits repayable in the near term to finance their making of longer-term thirty-year residential and other real estate loans at fixed interest rates. As interest rates eventually rose, the S&Ls and investment firms found themselves having to pay higher and higher amounts of interest to cover the low fixed amounts of interest they were receiving from their borrowers. That is a financial practice in which one can engage, albeit not

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

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indefinitely. Regulators and investors nonetheless were surprised when many S&Ls failed, costing the federal government billions of dollars.

Even after that, in the late 1990s and early 2000s, the government and financial markets incented banks and investment firms to lend to higher-risk low-income borrowers to purchase homes. Policymakers thought sincerely that relaxed lending standards would enable lower-income persons to more quickly and easily realize the American dream of home ownership, which would in turn enable them to build up equity in their newly purchased homes as home values rose. That equity could be used to start a small business or send children to college. Unfortunately, home prices did not continue to rise relentlessly and eventually dropped, leaving lenders with inadequate collateral. As these borrowers eventually were unable to repay their loans, the lenders found themselves holding loans of dubious and uncertain value, and investors were surprised. This all came to a head in 2008 with what is now called the "Great Financial Crisis." Regulators charged with protecting our financial system were surprised again.

In 2023, interest rates rose at the behest of the Federal Reserve Board as it fought inflation. Silicon Valley Bank (SVB) and other banks found themselves holding bonds and loans paying lower rates of interest, which thus were of increasingly lower market value. SVB and some other banks had followed a business model of attracting large deposits in amounts greater than the $250,000 cap on federal deposit insurance. Those uninsured deposits—what bank regulators call "hot money"—could be expected to be withdrawn by depositors seeking higher interest rates or sensing trouble at the bank. And in our technological age, most banks provide corporate treasurers with the means to transfer money in and out of the bank in an instant electronically. The combination of hot money and the ability to withdraw funds instantly enabled a run on SVB and other banks the moment that corporate treasurers sensed that financial weakness at SVB threatened repayment of their uninsured deposits. Regulators and markets were surprised yet again.

Somehow, regulators responsible for protecting the financial system and investors are repeatedly surprised by financial crisis after financial crisis.

It is in that context that Alex Pollock and Howard Adler have written *Surprised Again! The COVID Crisis and the New Market Bubble*. Pollock was the Principal Deputy Director of the U.S. Department of Treasury's Office of Financial Research, and Adler was the Deputy Assistant Secretary of that Department for the Financial Stability Oversight Council (FSOC). Both agencies were established by the Dodd-Frank Act in 2010 to prevent another

financial crisis. Thus, both writers are highly qualified to serve as prophets warning of another possible financial crisis and to help avoid the next surprise.

I. COVID-19 AND ITS DIRECT EFFECTS

Every reader is familiar with the health crisis associated with the spread of Covid-19 in 2020, and many will be familiar with the political problems caused by that health crisis. However, many will not be familiar with the economic and financial problems associated with the pandemic. In April 2020, U.S. unemployment reached 14.8 percent, the highest level since 1940, much higher than the 9.9 percent recorded in 2009 during the Great Financial Crisis. In six weeks, stock prices dropped 36 percent. Gross domestic product dropped by nine percent in a single quarter. Then, in the second half of 2020, the U.S. economy experienced an unprecedented rebound.

The authors explain how the inevitable government intervention in 2020 continued into the rebounding 2021. The amount of assets on the Federal Reserve's balance sheet doubled in two years from $4.2 trillion in February 2020 to $8.9 trillion in February 2022 as it bought government bonds and mortgage-backed securities to stimulate the economy. In December 2021, housing prices rose more than 19 percent. Government intervention triggered a seven percent rise in the Consumer Price Index that year, though the Federal Reserve had, in December 2020, forecast a 1.3 percent rise in prices for 2021. It was surprised again. Inflation, of course, reduces the value of savings and wages, and it continues as I write.

Pollock and Adler believe that warning signs were on the horizon even before the Covid crisis began in 2020. But they argue those warning signs were missed by policymakers, regulators, markets, and even the authors themselves.

II. FINANCIAL PANIC

The book begins by explaining how quickly financial panic spread after the first U.S. Covid death in February 2020. In the following month, as in all historic panics, investors sold assets to "dash to cash." Investors no longer were interested in buying debt (bonds and loans), and interest rates, accordingly, rose. Bond prices dropped. Banks dramatically increased their loan loss reserves.

Simultaneously, Americans, like people around the world, were seized by an entirely rational fear of sickness and death. In 2020, 350,000 Americans died of Covid, 0.1 percent of our population. Government intervention shut down much of the U.S. economy, leaving millions jobless and thousands of businesses failing. In April 2020, the unemployment rate peaked at almost 15 percent.

Pollock and Adler explain the financial crisis that ensued.

Unemployed borrowers likely would have defaulted on their debts, so the federal government decreed a moratorium on foreclosures and evictions and prohibited lenders from reporting failure to pay as delinquent. The consequence was stress on the $11 trillion housing finance industry.

The shutdown also hurt various other industries, such as the travel and hospitality sectors, and, indirectly, firms that had lent to those industries. In the initial two weeks of the Covid crisis, March 11-24, 2020, investors withdrew 30 percent of their holdings from money market funds whose assets consisted of nongovernment securities. That was worse than the 26 percent of holdings withdrawn during the worst two weeks of the 2008 Financial Crisis.

Credit reporting agencies downgraded corporate debt dramatically. Issuers that were downgraded from investment grade to high-yield—so-called "fallen angels"—reached the highest number, as Pollock and Adler wryly put it, "since Lucifer and his cohorts were cast from heaven." Inevitably, many issuers of corporate bonds defaulted.

Revenue to pay municipal revenue bonds issued to pay for now-empty airports, stadiums, and office complexes dried up, leading to rating agency downgrades of those bonds.

Values of retail, hotel, and office commercial real estate dropped as people stayed home. Indeed, we are still experiencing this effect on office commercial real estate. This had—and continues to have—a negative effect on commercial real estate lenders, including banks. Residential real estate values, however, experienced a bubble as the Federal Reserve Board maintained mortgage interest rates at around an unprecedented three percent through 2020 and 2021 by buying mortgage-backed securities in such large amounts that, by year-end 2021, it held $2.6 trillion in such securities.

Covid's effects on the American economy were almost as bad as the sickness and death caused by Covid.

III. GOVERNMENT INTERVENTION

In any financial crisis, the federal government seems to step in to save the day, and the Covid financial crisis was no exception. Pollock and Adler explain the myriad extraordinary efforts the federal government undertook to avoid financial disaster, far beyond the Federal Reserve's extraordinary purchases of massive amounts of mortgage-backed securities. As mentioned above, Congress enacted a law requiring holders of federally backed mortgage loans to forbear from reporting defaults to credit reporting agencies, thereby undermining the reliability of credit reports.

After explaining all this background, Pollock and Adler describe how the government raced to the rescue with massive lending programs. To finance the massive lending, the federal government itself borrowed by issuing bonds. Those bonds in large part were purchased by the Federal Reserve System by creating new money to pay for those bonds. The Federal Reserve itself established fourteen lending programs, including a facility to support the commercial paper market; facilities for foreign central banks that purchased U.S. Treasury securities; and facilities to support money market mutual funds, municipalities, and medium-sized businesses. Total assets on the balance sheet of the Federal Reserve increased from $4 trillion to more than $8 trillion, as mentioned above. Thus, more than $4 trillion was pumped into the economy. That flood of new money created by the Federal Reserve System undoubtedly caused the dramatic increases in prices the U.S. subsequently experienced. However, by the end of 2020, the U.S. economy had recovered. The short-term panic had been stemmed, but the stimulus continued. At what long-term cost?

The book explains, chapter by chapter, the effect of the crisis on various components of the financial sector: money market mutual funds, cryptocurrencies, banks, mortgages, states and municipalities, pension funds, and student loans. This gives the book a clear shape and a pace that keeps moving. It is a lively and coherent narrative.

IV. MONEY MARKET MUTUAL FUNDS

The authors first describe how money market mutual funds, in 2020 as in 2008, faced a "run" as fund investors demanded return of their cash at $1.00 per share. However, the short-term high-quality investments held by the funds were less liquid than the fund shares. As mentioned above, the Federal Reserve created a facility to save the money market mutual funds: it lent

to banks to finance the purchase of the assets of money market mutual funds by such banks.

After the Great Financial Crisis of 2008, the Securities and Exchange Commission, traditionally a regulator promoting disclosure, imposed substantive safety and soundness regulations on the money market mutual fund industry. But those regulations failed to prevent financial problems in 2020 and, in some cases, exacerbated the problems. The SEC implicitly acknowledged this in December, 2021 when it proposed 325 pages of amendments to its money market mutual fund rules. Pollock and Adler don't propose regulating money market mutual funds like banks, but one might wonder whether these financial intermediaries ought not to be regulated precisely in the same way banks are regulated. However, as we have seen in financial crisis after financial crisis, bank regulation certainly is not a panacea for the prevention of bank failures.

V. THE EVERYTHING BUBBLE

In another chapter, the authors explain a second surprise: the 87 percent increase in the Dow Jones Industrial Average between its trough in March 2020 and September 23, 2021, even though the health crisis continued unabated. What the authors call the "Everything Bubble" affected not only stock prices, but also bond prices, the price of housing, and even prices of cryptocurrencies, all fueled by low interest rates maintained by the Federal Reserve. Some quipped that these rates were the lowest in 5,000 years.

The rapid economic expansion was fed not only by low interest rates, but also by government payments and subsidies that created enormous budget deficits requiring the issuance of large amounts of government debt that was monetized by purchases of that debt by the Federal Reserve. In March 2020, the yield on 10-year Treasury bonds hit 0.32 percent, which, to be fair to the Fed, was more a function of investor flight to safety than Fed monetary policy. However, 18 months later, those rates were at relatively historic lows of 1.5 percent; at that point, Federal Reserve policy appears to have been solely responsible for the low yields. Then, of course, as the fundamental laws of economics had not been repealed, inflation reared its ugly head, rising to seven percent for the year 2021. This particularly hurt holders of long-term bonds paying low interest rates. Meanwhile, savers, particularly retirees, found themselves losing as inflation rates exceeded rates paid on savings. In passing, the authors make the profound point that, in effect, the government

was expropriating those savings to finance deficits incurred to ameliorate the effects of the Covid crisis—an unlegislated redistribution of wealth.

As this reviewer writes in early April 2024, the Everything Bubble has continued to expand. A surge in the price of artificial intelligence chip-maker Nvidia has driven the stock market to record highs. The price of Nvidia stock has risen 700 percent since October 14, 2022, making it the third most valuable U.S. company, with a market value of more than two trillion dollars. The firm reported record earnings on February 21, 2024, and its market value increased by almost $280 billion in two days. It took 180 trading days for its market value to jump from one trillion dollars to two trillion dollars. It took Apple and Microsoft more than 500 days to do the same thing. Other chipmakers have seen an increase in value too, and the NASDAQ Composite Index reached a record high on February 29, 2024. The S&P 500 has already reached 15 record closes in 2024. The Everything Bubble continues to grow.

VI. CRYPTOCURRENCIES

Readers unfamiliar with cryptocurrencies and the public policy issues they raise will receive a quick education in the book's chapter on the subject. Cryptocurrencies were not unaffected by the Everything Bubble in asset prices. The price of Bitcoin, as the authors explain, increased 600 percent from October 2020 to April 2021. The price then dropped, bounced back up, and then dropped again, before ending up quite high. Other cryptocurrencies experienced similar price volatility. Of course, we are all accustomed to government-issued currency—fiat currency—taking for granted a governmental monopoly on the issuance of money. However, some economists have questioned whether such a monopoly is healthy. They argue that permitting people to reject money abused by the government (i.e., money devalued by inflation caused by excessive government spending), and permitting them to accept currency they trust, might be a very effective check on a government's mismanagement of its finances.

It is not clear that cryptocurrencies could ever become a form of money that people would trust and use as a means of payment. Most cryptocurrencies have no assets backing them up and no intrinsic value except for perception. Beyond functioning as speculative investments, they have only been substantially utilized as a means of payment by criminal elements. Pollock and Adler explain that cryptocurrency prices seem to be far too volatile for them to be used as a means of payment. Yet El Salvador, in September 2021, adopted Bitcoin as its official currency, alongside the U.S. dollar. Meanwhile,

central banks around the world are considering issuance of central bank digital currency (CBDC). Cryptocurrency in its infancy was not considered a significant threat to financial stability, but by year-end 2021, the total market capitalization of cryptocurrencies exceeded the amount of U.S. currency in circulation. Of course, U.S. currency is usable for the making of payments whereas cryptocurrencies, again, are not generally used to make payments.

The authors describe how, shortly before the Covid crisis, Facebook, which then had more than three billion users, announced that it was considering issuing a form of cryptocurrency to be called "Libra," a stablecoin backed by investments in financial assets. It was essentially a money market mutual fund, to be governed from Switzerland. The authors explain how this could have become a threat to the status of the U.S. dollar as the world's reserve currency and indirectly could have increased U.S. government borrowing costs. Furthermore, Libra would have been outside the control of U.S. regulators, who were not only concerned about money laundering implications, but also about the ability of Facebook to access spending information about billions of individuals. In 2019, the Chairman of the House Financial Services Committee formally asked Facebook to stop any forward movement on Libra. Finance ministers and central bankers from around the world expressed formal concerns about Libra. Facebook proposed changes to the Libra framework, agreeing to comply with all regulations of every regulator in the world. It applied for a payment system license from the Swiss Financial Market Supervisory Authority which, in April 2020, advised Facebook that it, the Authority, needed to coordinate with more than 20 other national supervisory authorities and central banks. Facebook responded that it would not proceed until all relevant regulatory approvals were received. In May 2021, Facebook abandoned the Libra application, instead proposing to issue a dollar-denominated stablecoin through a U.S. bank. In January 2022, Facebook announced that it was dissolving its stablecoin business and selling the technology to the U.S. bank.

Potential U.S. regulation of cryptocurrency is complicated by the differing jurisdictions of federal agencies. The SEC has jurisdiction over issuers of any cryptocurrency that constitutes an "investment contract," i.e., a right to a return based on the efforts of others. However, the SEC is authorized to regulate primarily to ensure full disclosure of material information and the prevention of fraud, not to ensure the safety and soundness of investments. The Commodities Futures Trading Commission (CFTC) claims jurisdiction of other types of cryptocurrencies as "commodities," but it is also generally

limited to the prevention of fraud. Most states have laws regulating firms that transmit money, essentially protecting consumers who entrust funds to such firms. The Financial Crimes Enforcement Network (FinCEN) in the U.S. Treasury Department requires registration of all "money service businesses" to combat money laundering. The federal agencies have asked Congress to legislate regulation of stablecoins and cryptocurrencies to remedy gaps in this patchwork,.

The authors describe unsuccessful efforts to regulate stablecoin, which theoretically is backed by dollars, but practically may not be freely redeemable. Contracts between the issuer and the buyer may permit redemptions by the buyer, except in certain cases—such as the issuer experiencing losses, illiquidity, unavailability of reserves—and then only in very large amounts and subject to fees. The reserves of the issuer also may be invested in low quality assets. The issuer is not legally required to provide full audited financial statements to buyers.

Proposals have been floated to regulate issuers of stablecoins in the same way FDIC-insured banks are regulated. Issuers would be subject to capital requirements and required to pay insurance premiums to a government insurer that would examine the issuer to control its risk. Stablecoin issuers would be subject to the myriad regulations to which banks are subject. The authors contend that would adversely affect the profitability of stablecoin issuers. Such regulation would require congressional action, which has not been forthcoming. The book suggests that the FSOC could theoretically designate issuers of stablecoins as systemically important, which would subject them to some bank-like supervision and regulation by the Fed; ironically, this would put the issuer of U.S. currency, Federal Reserve Notes, in charge of regulating its competitors, issuers of cryptocurrency.

The book describes China's approach to regulation of cryptocurrency and compares that to the U.S. system. China's central bank issues its own digital currency, and Chinese law prohibits all other cryptocurrency transactions by its citizens. This leads to the question whether the U.S. should follow China's lead and develop its own CBDC over which the Federal Reserve, like China's central bank, would likely then have a monopoly.

Pollock and Adler logically turn to a discussion of CBDC. As evidenced by China's system, CBDC is a means by which an authoritarian government can monitor and control its population, as every transaction by every citizen must pass through the central bank's computer system. Ominously, too, of course, the government theoretically could freeze the account of any

discomforting "dissident," preventing the dissident from transacting; the government could even confiscate the funds in the account of the dissident.

The Federal Reserve has been studying issuance of its own CBDC for at least three years and has even invited public comment on the issue. It has said that it would not issue such currency without authorization from Congress. The authors discuss the pros and cons of a U.S. CBDC and predict that the U.S. will eventually adopt its own CBDC, albeit over libertarian objections.

VII. BANKS

In March 2020, at the time of the initial Covid shock, bank stock prices crashed. Banks, facing the unknown, took huge provisions for potential loan losses, reducing earnings already reduced by the low level of interest rates. As it turned out, loan losses were not as serious as portended, and bank stocks recovered to pre-pandemic levels a year later. The book questions, quite appropriately, whether bank-feared loan losses would have been realized in the absence of the government's extraordinary intervention in the economy. The authors take this opportunity to discuss whether some large banks are too big to fail, concluding that those large banks, indeed, are too big to be allowed to fail.

Pollock and Adler also explain why they believe that the number of bank failures during the Covid crisis pales in comparison to the number of bank failures in earlier financial crises. They predict coming financial risk, particularly the risk posed by leveraged loans (loans to already highly leveraged (indebted) firms) that bank regulators have discouraged banks from making. The risk related to leveraged loans has shifted to nonbank players. Those nonbank firms rushed to fill the gap created by the regulator-forced abandonment of that market by banks. Pollock and Adler also cite as a source of risk the exposure that many small and medium-sized banks have to commercial real estate loans. As Covid forced many employees in office buildings to work from home, and as workers have resisted efforts by employers to persuade them to return to the office, office buildings sit largely empty. Employers paying rent on empty office space seek rental concessions from landlords who nonetheless need revenue to repay their bank loans. It is hard to avoid the conclusion that eventually this pressure will increase defaults on those loans and cause serious loan losses at banks.

VIII. MORTGAGES

The book also discusses the effect of the Covid Financial Crisis on the nation's mortgage markets. It describes what it calls the three-sided "Government Mortgage Triangle," consisting of:

1. what the authors call the "Government Mortgage Complex": the majority government-owned purchasers of most residential mortgages in the U.S., the Federal National Mortgage Association (FNMA) and the Federal Home Loan Mortgage Corporation (FHLMC), along with the wholly government-owned Government National Mortgage Association (GNMA), which guarantees residential mortgage loans made by the Federal Housing Administration and the Veterans Administration);
2. the U. S. Treasury, which is the majority owner of FNMA and FHLMC (and, in effect, guarantees their obligations) and the sole owner of GNMA; and
3. the Federal Reserve, the holder of trillions of dollars in Treasury debt and mortgage securities.

At one point, the authors ponder how helpful it would be to have a consolidated set of books for the Triangle, eliminating interagency transactions. Regrettably, the book does not speculate on what such a consolidated financial statement might look like. The Government Mortgage Complex guaranteed $8.8 trillion in obligations in late 2021 and held assets of $8.3 trillion; the Fed held $2.7 trillion in mortgage securities at that time.

By the time Covid reached our shores, the Federal Reserve had long maintained unusually low interest rates, partly by purchasing hundreds of billions of dollars' worth of mortgage-backed securities (eventually indirectly holding 23 percent of the country's residential mortgages) with new money that the Federal Reserve created. The demand for housing was consequently stimulated, and as the supply of housing did not correspondingly increase, the fundamental laws of economics dictated that housing prices would rise accordingly. By subsidizing residential mortgages, the Federal Reserve inflated the price of housing. Between March 2020 and October 2021, housing prices on average increased by 27 percent. Instead of removing the proverbial punchbowl, the authors comment, "the Federal Reserve . . . was spiking the punch." That adversely affected housing affordability for low-income families, although it likely benefited the housing industry of builders and their suppliers and laborers.

As Mr. Pollock is fond of correctly explaining, the Federal Reserve does not follow Generally Accepted Accounting Principles, even though the banks it regulates are required to follow such principles. If the Federal Reserve did apply such accounting principles, in the current normal higher interest rate environment, it would have a substantial negative net worth if it also marked to market value its substantial multi-trillion dollar securities portfolio which it, instead, carries at par (face) value.

The book further explains that, while the Fed was inflating housing prices in 2020 and 2021, other federal agencies were at work similarly helping the housing industry and wealthy homebuyers by pushing up housing prices. The Federal Housing Finance Agency (FHFA), which regulates the government-owned and implicitly government-guaranteed FNMA and FHLMC, which purchase most of the residential mortgages originated in the country, increased the size of any individual loan they might buy to enable them to finance the purchase of homes sold at a price of $1,213,500, the top three percent of houses in the country at the time. Not to be outdone, the Federal Housing Administration (FHA), the government's lender to high-risk low-income borrowers seeking to purchase homes, decided to lend for the purchase of homes at prices as high as $1,011,250. The authors attribute these developments to the natural desire of institutions to grow, a desire supported by the beneficiaries of their largesse. The authors quip that, while the Fed was spiking the punch, the FHFA and the FHA brought in a bigger punchbowl.

The book also explains another extraordinary effect that the Covid financial crisis had on mortgage markets. Payments on most residential mortgages are not actually made to firms that *own* the mortgage loans but to firms that *service* the loans, collecting payments and forwarding them on to the holders of the loans. The servicers are often firms that originated the loans, but not always. An unusual aspect of the servicing business is that servicers' contracts with the holders of the loans require the servicers to make payments to loan holders and to property- taxing authorities even if borrowers fail to pay. When the federal government imposed a moratorium on mortgage payments to help consumers hurt by the pandemic, mortgage servicers nonetheless retained a contractual obligation to pay the holders of the loans. Those servicers would have gone out of business, as the authors explain, but for three government actions. First, GNMA set up a program to finance mortgage servicers. Second, FNMA and FHLMC—technically the holders of vast amounts of those mortgages—voluntarily limited the contractual exposure of servicers to four months' worth of payments. Third, as interest rates dropped

at the behest of the Fed, many borrowers refinanced their mortgage loans at lower rates, providing servicers the cash flow needed to advance payments to mortgage holders and taxing authorities. States are now in the process of adopting capital and liquidity requirements for mortgage servicers.

IX. State and Local Governments

The Covid financial crisis not only affected securities, currency, banking, and mortgage markets; the authors explain how it also affected the ability of state and local governments to borrow. Investors withdrew almost half the shares in municipal bond funds, and municipal debt issuance dropped by more than half in March 2020 as investor interest shrank. Normally, municipal bond interest rates are lower than interest rates paid on U.S. Treasury obligations because interest on municipal bonds is not subject to federal income tax. However, during the Covid crisis, the flight to safety reversed that for a year and a half, as investors demanded higher interest on municipal bonds to compensate for the higher credit risk (and lesser liquidity) that state and local government obligations presented compared to that of obligations of the federal government. Investor concern over the credit risk presented by state and local government debt was justified by the negative effects that lockdowns had on local income and sales tax and other revenues.

As revenues declined, state and local government expenses for health care and education rose. In 2020, 82 local bond issuers defaulted on $5.8 billion in principal, the largest amount since 2012. In April 2020, the Fed came to the rescue, calming these bond markets by establishing a facility to buy up to $500 billion in state and local government debt. And, in March 2021, Congress passed the American Rescue Plan Act which made $350 billion available to state and local governments. Meanwhile, property tax revenues, on which local governments depend, increased as housing prices were driven up by low mortgage interest rates. The market for state and local government obligations thus recovered. The authors also go beyond the Covid crisis to share thoughts about the large amounts of unfunded pension debt owed by certain states and municipalities—Illinois and Chicago being the worst cases—and provide some in-depth analysis of Puerto Rico's debt struggle.

X. Pension Funds

Pension funds, which the authors characterize as "dubious promises," were also affected by the Covid financial crisis. The authors estimate that

there is a $6 trillion shortfall between the amount of the total assets of U.S. pension funds and their estimated liabilities. They explain that is partially a consequence of the Federal Reserve's maintenance of low interest rates. As rate follows risk, the return on safe assets held by pension funds had been minimal. Single private employer and union multiemployer pension plans are each guaranteed by separate programs of the federal Pension Benefit Guaranty Corporation (PBGC). The PBGC's union multiemployer program was insolvent in 2020 with a negative net worth—a $68 billion deficit. That deficit was the consequence of long-standing factors wholly unrelated to Covid. In 2021, Congress in the American Rescue Plan Act bailed that program out, the result being a $500 million positive net worth for the program. The Act further provided that the federal government would pay any insolvent or critically troubled union multiemployer plan enough to pay all benefits due through 2051; that is estimated to cost $86 billion, an estimate that may be conservative since the shortfall at just one large union multiemployer pension plan is about $44 billion. The authors suggest, and I wholeheartedly agree, that this bailout was only made possible by the government's willingness to spend astronomical amounts of money in response to the Covid crisis. Pollock and Adler also point out the irony that most of the taxpayers who ultimately will pay for these union multiemployer benefits do not have such benefits themselves. They also point out that past government bailouts have been accompanied by reforms to prevent the recurrence of such bailouts, but that no such reforms were required or made in the case of this bailout.

Surprised Again! also discusses the even greater problems with public pension funds covering state and local government employees. The assets of such funds in 2021 totaled only 84 percent of their estimated liabilities, meaning that such funds are underfunded by $1 trillion. As in the case of the union multiemployer pension funds bailout, Congress used the Covid crisis as an excuse to bail out state and local governments; the American Rescue Plan Act gave $350 billion to those governments.

The authors provide a case study of pension problems using the State of Illinois, the state with the worst public pension plan problem. The state's five public pension plans were underfunded by $144 billion on June 30, 2020, according to the state itself; but Moody's, using more realistic discount rates, estimated that the number was $313 billion. When the state's additional 662 public pension plans, including Chicago's, are added, the overall deficit rises to $530 billion, according to Moody's. The Pew Charitable Trust estimates that Illinois' pension plans are only 39 percent funded, the lowest funding

percentage in the country. It is estimated that Illinois public employees contribute only four to eight percent of what they will receive. Sixty percent of Illinois government workers retire in their fifties. Further contributing to the problem is the fact that government employees in Illinois earn extraordinarily high salaries: tree-trimmers make more than $196,000 a year, nurses in state prisons make more than $277,000 a year, and junior college presidents make more than $491,000 a year. A quarter of the state's budget goes to pensions. The state's constitution prohibits pensions from being reduced, a seemingly insurmountable obstacle to public pension reform in Illinois. Pension benefits and public employee contributions are negotiated between unions and the politicians dependent on their support. What could go wrong? This would have nothing to do with the Covid financial crisis, except that Illinois was the only state in the union to borrow from the Federal Reserve under the Fed's April 2020 $500 billion municipal bond facility.

XI. STUDENT LOANS

Pollock and Adler then turn to student loans, characterizing them as a failed government lending program. Student loans outstanding in 2021 totaled $1.8 trillion, $1.6 trillion of which represented federal student loans guaranteed by the U.S. government. The total amount had doubled in the prior ten years, substantially fueling the rising costs of college. In response to Covid, politicians deferred payments on student loans and stopped the accrual of interest on those loans, costing the government $4 billion to $5 billion a month. Student loan losses due to Covid could cost taxpayers $500 billion, according to one estimate.

After the book went to press, President Biden, in August 2022, proposed his first student loan forgiveness program, forgiving up to $10,000 to $20,000 in debt per borrower depending on the nature of the student loan. The Biden administration estimated the total cost of this program to be $30 billion a year, but the Congressional Budget Office estimated that the giveaway would add $426 billion to the deficit the first year. The Supreme Court ruled that this program was beyond the President's legal authority. Undeterred, President Biden then, in January 2024, announced another student debt relief program costing taxpayers, in his analysis, $4.9 billion; yet another announced in March 2024 would cost, in his estimate, $6 billion. In April 2024, President Biden announced an additional $7.4 billion in student loan relief.

In discussing student loans, the book returns to the theme it discussed regarding securities and mortgage markets: dramatically increasing the flow of money inevitably results in increased prices, be it of securities, housing, or college. Reckless government spending inflates prices. The authors propose that problems with the risk of student loan defaults could be avoided if colleges had "skin in the game," i.e. financial responsibility for a portion of losses on student loans, proceeds of which they receive. That solution was adopted by law to reduce risk in the case of residential mortgage loans after the 2008-2009 financial crisis. Colleges no doubt would oppose any such legislative fix on the basis that they are not able to assess repayment risk any better than the government is.

XII. CENTRAL BANKING

Finally, *Surprised Again!* turns to central banking. Historically, the role of central banks like the Fed has been to serve as the lender of last resort, advancing liquid funds against illiquid, but good, collateral. During the Covid financial crisis, the Federal Reserve advanced trillions of dollars. The authors express strong concern that financial markets in the U.S. and speculators have come to expect, in crisis after crisis, that they will be able to put risk to the Fed in one way or another. The expectation is that the Fed will maintain excessively low interest rates and print money and buy debt and establish facilities to lend directly, or indirectly through banks, to firms in need or on the security of their debt. That expectation fuels speculation. On the other hand, the authors recognize that it would be irresponsible to let our financial system come crashing down. Without question, the Fed has saved the day repeatedly. But in doing so, it undoubtedly has, created unfortunate expectations. One wonders why it must do so repeatedly, i.e. why our economy and financial system seem to careen from crisis to crisis. Regrettably, reflections on that phenomenon are not within the scope of this short book of only 194 pages.

The authors do explain that other countries also followed the central-bank-as-savior model in the Covid crisis. In Japan and the larger European countries, central banks purchased more than half of the debt issued by their national governments during the Covid financial crisis. And they note that, as the crisis subsided in 2021 and markets revived, the Fed, the Bank of Japan, and the European Central Bank, along with the Bank of England and the Swiss National Bank, continued to pursue Quantitative Easing, buying new government and mortgage securities, thereby creating new money, restraining

interest rate growth and fueling the rise in prices. The amount of the Fed's assets doubled with Quantitative Easing in 2009 and doubled again every five years thereafter. Thankfully, the amount now is declining, with Quantitative Tightening, as the Fed fights the inflation and price instability that it arguably caused, or at least failed to prevent.

The authors note that the majority of Fed assets consists of Treasury securities, but that a very significant amount has consisted of mortgage securities. Thus, the Fed has been subsidizing the housing industry, doubtless an important part of our economy. Wealth has been transferred from taxpayers to firms working in that sector. This represents an allocation of credit to a specific sector of the economy, the policy basis for which was not adopted by the representatives of the people sitting in Congress. This governmental preference for one industry over all others raises fundamental democratic questions. Might we someday find a progressive government's Fed purchasing bonds issued by firms engaged in the fight against climate change? Or might a hawkish wartime Fed buy bonds issued by weapons manufacturers? Should these decisions be made by our elected representatives sitting in Congress or, as at present, by unelected government officials?

The authors explain that the creation of trillions of dollars of Covid financial crisis stimulus would not have been possible had the value of the dollar been tied to the price of gold, as it was under the international Bretton Woods Agreement at the end of World War II. In August 1971, President Richard Nixon "temporarily" suspended the convertibility of the dollar into gold, thereby permitting the unlimited creation of dollars. Nixon's action was followed by the inflation of the 1970s—up to 13 percent annually. Today, the Fed, to reduce the risk of deflation, targets a two percent annual rate of inflation despite its statutory duty to maintain long run growth of the monetary and credit aggregates to promote effectively stable prices. Due to a combination of the Fed's actions and federal government spending, the annual inflation rate reached 9.1 percent in January 2021. Although Fed economists initially assured everyone that inflation was merely "transitory," it is still with us as I write. The Fed and those who listened to it were surprised, again. The authors note that this could not have happened but for President Nixon's fateful decision in August 1971, almost 50 years before.

XIII. The Next Financial Crisis

In their last chapter, the authors ponder what the next financial crisis will be, noting that historically a new financial crisis seems to arise every ten years.

They wryly quote the late Federal Reserve Chairman Paul Volcker as saying, "[a]bout every ten years, we have the biggest crisis in 50 years." Their thoughts on this subject are particularly important when one recalls their backgrounds at the Treasury's Office of Financial Research and FSOC.

The authors suggest that one cause of another financial crisis might be central banks' taking away the proverbial punchbowl too soon. If central banks do so—after asset prices have inflated so much, and debt increased to such high levels—the necessary contraction when the punchbowl is removed would trigger massive failures and losses. As I write, consumer credit is at an all-time high, as are consumer delinquencies. A related potential cause of crisis would be the effect of high interest rates on the price of housing. Real estate mortgage interest rates have, since Covid, hovered around seven percent, with no consequent crash in housing prices (except possibly in China), a fact that the authors presciently predicted.

Other potential causes of a future financial crisis the authors mention include a serious hack of our computer-dependent financial system; a similar failure of our electrical system; another pandemic (can we place much assurance in the understanding that Covid was a once-in-a-100 year health event?); and a major war (the media have been mentioning a potential World War III over Ukraine, the Middle East, and Taiwan). Moreover, analysts increasingly express concern about whether commercial real estate loans on the books of small and medium-sized commercial banks will be repaid. Real estate developers find their tenants defaulting on their rent obligations as workers decline to return to the office. The Chairman of the Fed has testified before Congress that we should expect more bank failures consequently. Or the cause of the next financial crisis could be a surprise again.

Finally, the book updates itself. The manuscript was finished in early February 2022; an epilogue was added three months later, illustrating how quickly economic developments come. In those three months, Russia invaded Ukraine, and the U.S. imposed economic sanctions on Russia. That incented Russia and other countries to transact in currencies other than the dollar, thereby weakening the dollar. Meanwhile, Canada froze the bank accounts of truckers protesting Covid vaccine mandates, serving as an example of what a government issuing its own digital currency could do to dissidents. Inflation continued, causing the Fed to increase interest rates. Financial markets—including those for cryptocurrencies (and even for stablecoins)—dropped. Gross domestic product fell. These were the developments that made it into the epilogue.

But rapidly changing economic developments are a problem for books about any financial crisis, even for an excellent book such as this: things just keep changing. Since *Surprised Again!* was published, financial markets have recovered and reached new highs; FTX, a major cryptocurrency exchange, and similar firms have failed; significant bank failures have occurred; war has started in the Middle East; municipal governments have become financially overwhelmed by migrants entering the U.S. unlawfully; the Federal Reserve System has experienced unprecedented losses on a Generally Accepted Accounting Principles basis; the President has tried to issue blanket student loan forgiveness, been rebuffed on that by the Supreme Court, and tried again and again nonetheless; and a major bridge in Baltimore supporting the East Coast supply chain has collapsed.

XIV. CONCLUSION

When one considers the implicit guarantees that the federal government has made for FNMA and FHLMC and the PBGC, the explicit guarantee of GNMA, plus the roughly $34 trillion national debt, one can easily reach the conclusion that our federal government has been financially mismanaged for years and probably decades. The irresponsibility of congressmen and senators could not be clearer. Add the loose monetary policy pursued by the Fed with its inflationary impact, and one must wonder whether our government has helped or hurt us. Nonetheless, the book resists explicitly blaming and shaming anyone. (Mr. Pollock is a bit less reluctant to do so in a letter to the editor of *The Wall Street Journal* published in March of this year in which he wryly suggests that "[e]veryone should pity members of the [Fed] who must inwardly confess that they can't know the answers, yet have to play their parts in the Fed melodrama nonetheless.")

The book explains all of this quite cogently and in a manner easily understandable for the reader who is not a financial expert. Occasionally it ventures into effects on Treasury markets and short-term funding markets—such as those involving repurchase agreements, securities lending, and commercial paper—and on collateralized debt obligations. These may be somewhat beyond the understanding of non-financial readers. Nonetheless, Pollock and Adler have provided a concise and compelling view of the financial crisis triggered by Covid. Unfortunately, no one, not even Pollock and Adler, can ensure that, when the next financial crisis hits, the regulators, the markets, and the American people won't be surprised again.

The book also opens a fascinating window into the thinking of two highly placed government officials, the two authors, who had enormous financial responsibilities during the Covid crisis. As mentioned above, Pollock served as Principal Deputy Director of the Office of Financial Research in the U.S. Treasury Department as the Covid crisis unfolded, and Howard Adler served as the Deputy Assistant Secretary of the Treasury for FSOC during that time. The book illustrates how sophisticated their thinking was and is, and on how grand a stage they operated.

Surprised Again! The COVID Crisis and the New Market Bubble provides a fascinating mosaic of economic data illuminated by easily comprehensible charts deployed in the service of informing the reader of every currently foreseeable consequence of the Covid financial crisis. Nothing that I can foresee is left in the shadows.

Though Pollock and Adler's book is written in clear, concise, understandable language, it is not unsophisticated. Indeed, to this reader, many aspects of the explication seem profound. Although this writer has never been an academic, he cannot help but think that the book would make an excellent case study for college economics courses teaching the far-flung consequences of economic policy decisions.

Finally, on a strictly philosophical level, one might wonder at man's eternal search for certainty and predictability, the desire to avoid surprise by striving for the means to know all and understand how everything in nature functions. In ancient times, man turned to religion to explain things and, over the centuries, he turned to science. Some talk of the laws of nature and suggest that those laws are immutable, again assuring us of certainty and predictability. The study of economics is part of that search for certainty and predictability. The desire to subject all of life to discernible rules may be in vain and, thus, we may be doomed—at least in the universe of finance and economics—to be surprised again, and again, and again. Capitalism itself particularly requires investors and bankers to believe in some level of certainty if they are to invest and lend with an expectation of a return. Still, those investors and bankers find themselves surprised again!

Other Views:

- Eric Milstein & David Wessel, *What did the Fed do in response to the COVID-19 crisis?,* BROOKINGS INST. (Jan. 2, 2024), https://www.brookings.edu/articles/fed-response-to-covid19/.
- Vern McKinley, *Surprised Again! The COVID Crisis and the New Market Bubble*, CATO INST. (Summer 2023), https://www.cato.org/regulation/summer-2023/surprised-again-covid-crisis-new-market-bubble.

CORNER POST AND 28 U.S.C. § 2401(a): NOT MUCH TO LOOK AT?*

MICHAEL SHOWALTER**

This term the U.S. Supreme Court will decide *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*, a statutory-interpretation case concerning the time limit on suits brought against the federal government under the Administrative Procedure Act (APA). The six-year limitations period of 28 U.S.C. § 2401(a), which applies to actions against the United States, begins when "the right of action first accrues." The question presented is whether the APA right of action first accrues upon injury to the plaintiff or instead upon final agency action. In addition to its implications for APA suits, the case implicates fundamental and far-reaching questions of interpretive methodology.

The question presented is inconsequential in a typical case because injury and final agency action typically occur simultaneously, but in this case it matters greatly. Corner Post, a convenience store that started in 2018, sued under the APA to challenge a 2011 Federal Reserve regulation that increases its fees for debit-card transactions. If the limitations period started in 2011 with final agency action, it expired before Corner Post even existed. On the other hand, if the limitations period started in 2018 when Corner Post first was injured, the Federal Reserve's 2011 rule is vulnerable to suit even after the passage of six years.

This highlights that a legislature's choice about when to start a limitations period involves a tradeoff that is consequential whenever there is a temporal gap between the defendant's allegedly unlawful act and the plaintiff's injury. If the limitations period starts at injury, some defendants will never have

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

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complete repose—at any time someone could be newly injured by the defendant's unlawful act and file suit. If the limitations period starts with the defendant's unlawful act, on the other hand, it can deprive some plaintiffs of their day in court—it may expire before they have been injured.

In *Corner Post*, the Eighth Circuit held that Section 2401(a) bars Corner Post's suit because it starts the clock at final agency action. But like the several other circuit courts that have reached that conclusion, the Eighth Circuit did not even perfunctorily examine Section 2401(a)'s linguistic meaning. That contravenes the marching orders of the Supreme Court, which has "stressed over and over again in recent years" that statutory interpretation must "heed . . . what a statute actually says."[1] It is safe to predict that whatever the outcome, the Supreme Court's Justices will pay closer attention to statutory text than these circuit courts have.

Their votes might turn on differences in their interpretive methodologies. Some judges and commentators believe that statutory text sometimes "runs out"—i.e., the text's meaning or application is unclear—and that when that becomes apparent, policy-laden choice is all that is left.[2] Others believe that judges must apply the "best reading" of the statutory text even when they are not completely certain about what the right answer is.[3] This difference in methodology can create dissent any time a portion of a court believes the interpretive question presents uncertainty.

Corner Post may ultimately provide an example. At oral argument, Justice Elena Kagan asserted that when it comes to Section 2401(a), "there's not much in the text to look at."[4] But other Justices may think there is enough evidence of original understanding to conclude that one statutory reading is superior to the other. Justice Neil Gorsuch, for example, observed that *accrue* has "a lot of encrusted meaning" and the Court has "a lot of precedent about it."[5] The Justices' votes may hinge on how quick they are to declare uncertainty and what standard of proof they demand for interpretive assertions.

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[1] Groff v. DeJoy, 600 U.S. 447, 468 (2023).

[2] *Cf.* Kisor v. Wilkie, 139 S. Ct. 2400, 2415 (2019) (Kagan, J.).

[3] *See, e.g.*, Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2121 (2016) ("[C]ourts should seek the best reading of the statute."); *see also, e.g.*, Advocate Health Care Network v. Stapleton, 137 S. Ct. 1652, 1663 (2017) (deciding statutory-interpretation case by discerning "the best reading of the statute").

[4] Tr. of Oral Arg. at 12, Corner Post, Inc. v. Bd. of Govs. of the Fed. Res. Sys., No. 22-1008 (Feb. 20, 2024) ("Corner Post Tr.").

[5] *Id.* at 47.

Corner Post also highlights that there is sometimes more evidence of the law than first meets the eye. While an interpreter may not immediately know whether accrual begins at injury or final agency action from a glance at Section 2401(a), the traditional tools of interpretation reveal quite a lot about the original semantic meaning of the phrase "right of action first accrues" and the cluster of ideas surrounding it. All agree that *accrue* meant "to arise" or "to come into existence," so we know that Section 2401(a)'s limitations period begins only when the right of action comes into existence.[6] And we know from enactment-era dictionaries that *right of action* meant the right to bring suit. A right to bring suit belongs to individual plaintiffs, of course, not the world. Putting the definitions together, Section 2401(a)'s original semantic meaning conveys that its limitations period starts "when the plaintiff's right to bring suit comes into existence."

That alone gets us a long way, and the background rules and cluster of ideas surrounding Section 2401(a) get us even further. At the time of enactment, rights of action *accrued* when the plaintiff was injured and could bring suit. The Federal Reserve acknowledges that this was the "standard rule" for accrual (and still is today). The Federal Reserve argues that claims of administrative injury are different, but it has not identified anything in the text of Section 2401(a) or the APA that indicates as much. Indeed, the Federal Reserve has advanced no theory of the original understanding of Section 2401(a)'s operative phrase. Instead, the Federal Reserve has pointed to a host of *other* administrative-law statutes that do not use accrual language and instead peg their limitations periods to final agency action. (A Hobbs Act suit, for example, must be filed "within 60 days after … entry" of the agency action in question.) According to the Federal Reserve, these statutes indicate that Congress prefers to begin limitations periods at final agency action in the administrative context. But the Supreme Court treats variation in statutory language as indicating *difference* in operation, not sameness.

If anything has "run out" by failing to provide clear answers, it is the policy. As Chief Justice John Roberts observed when questioning Corner Post, "under your system, [a] challenge as to how everything is structured [can be] brought 10 years later, 20 years later."[7] But as Chief Justice Roberts also observed when questioning the Federal Reserve, under its position "[y]ou have an individual or an entity that is harmed by something the government is doing, and you're saying, well, that's just too bad, you can't do anything

[6] *See id.* at 12; *infra* Part III.

[7] Corner Post Tr. at 18.

about it because other people had six years."[8] There is policy downside either way. There is no clear and indisputable answer as to when an APA limitations period *should* start.

As the Chief Justice's questions indicate, the outcome in *Corner Post* will have serious real-world implications. The Eighth Circuit decision deprives persons newly injured by old agency action of access to the federal courts and allows certain unlawful agency action to evade judicial correction. Particularly given the administrative state's expansion and its increasingly aggressive assertions of power, it should not be assumed that Congress intended that result.

I. TIME LIMITS ON LAWSUITS

Some background on statutory limitations periods is needed to understand the interpretive dispute in *Corner Post*. A legislature can limit the time to file suit with either a statute of limitations or a statute of repose.[9] The Supreme Court has explained that both types of limitations period "operate to bar a plaintiff's suit," for both "time is the controlling factor," and there is "considerable common ground in the policies underlying the two types of statute."[10] But they "seek to attain different purposes and objectives," and—importantly here—"the time periods specified are measured from different points."[11]

A statute of limitations creates a limitations period that starts "on the date when the claim accrued."[12] A claim accrues "when the injury occurred or was discovered."[13] A statute of limitations, therefore, looks at the suit from the plaintiff's vantage point.

A statute of repose, "on the other hand," "puts an outer limit on the right to bring a civil action."[14] The limit is measured "not from the date on which the claim accrues" but instead "from the date of the last culpable act or omission of the defendant."[15] That is so even if the limitations period "ends

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[8] *Id.* at 41.

[9] *See* CTS Corp. v. Waldburger, 573 U.S. 1, 7 (2014) ("Statutes of limitations and statutes of repose both are mechanisms used to limit the temporal extent or duration of liability for [unlawful] acts.").

[10] *Id.*

[11] *Id.*

[12] *Id.* (quoting BLACK'S LAW DICTIONARY 1546 (9th ed. 2009)).

[13] *Id.* at 8.

[14] *Id.*

[15] *Id.*

before the plaintiff has suffered a resulting injury."[16] A statute of repose "is not related to the accrual of any cause of action."[17] As an "absolute . . . bar on a defendant's temporal liability,"[18] a statute of repose looks at the suit from the defendant's vantage point.

Because last culpable act and injury often occur simultaneously, a statute of limitations and statute of repose will often start the clock at the same time. But when there is a temporal gap between last culpable act and injury, the limit's starting point depends on which kind of limitations period it is. And a temporal gap between last culpable act and injury raises the possibility that a limitations period will create hardship for one of the parties. A statute of limitations can cause hardship to defendants because it can allow suits for new injuries that occur long after the defendant's last culpable act. A statute of repose, meanwhile, can cause hardship to plaintiffs because it can eliminate the opportunity to sue by extinguishing the time to file suit before the plaintiff has been injured. When deciding between a statute of limitations and a statute of repose, then, a legislature must make a tradeoff. The legislature must decide which is the lesser evil for a given cause of action; it cannot avoid both.

II. STATUTORY TEXT AND HISTORY

The question in *Corner Post* is whether with respect to APA claims Section 2401(a)'s limitations period starts at injury (as a statute of limitations) or at final agency action (as a statute of repose). Section 2401(a)'s first predecessor was enacted in 1863, when Congress provided that certain claims against the United States, "cognizable by the court of claims," are barred unless filed "within six years after the claim first accrues."[19] Then, in the 1887 Tucker Act, Congress provided for district court jurisdiction over claims

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[16] *Id.*

[17] *Id.* While "general *usage* of the [two] legal terms has not always been precise," *id.* at 14 (emphasis added), and the term *statute of repose* was not used in the 19th century, *CTS Corp.*'s discussion makes clear that statutes of limitation and statutes of repose carry real *conceptual* distinction. Some limitations periods are based on accrual (in what the *CTS Corp.* Court calls statutes of limitation) while others set an outer bound of temporal liability regardless of accrual date (in what the Court calls statutes of repose). The Federal Reserve's assertion that the "distinction between statutes of limitations and statutes of repose . . . sheds no light" on this case is unfounded. Brief for the Respondent at 32, Corner Post, Inc. v. Bd. of Govs. of the Fed. Res. Sys., No. 22-1008 (Dec. 13, 2023) ("Resp. Br.").

[18] *CTS Corp.*, 573 U.S. at 8.

[19] Act of Mar. 3, 1863 § 10, 12 Stat. 765, 767.

against the United States for $10,000 or less (the Little Tucker Act) and Court of Federal Claims jurisdiction over claims against the United States for more than $10,000 (the Big Tucker Act).[20] Like the 1863 statute, the Tucker Act barred suits against the United States "under this act" unless brought "within six years after the right accrued for which the claim is made."[21] In 1911, Congress separated the Big and Little Tucker Acts and codified respective statutes of limitation in different places. For the Big Tucker Act, Congress used the language from the 1863 statute; for the Little Tucker Act, Congress used the 1887 language.[22]

Congress enacted the APA in 1946 and did not include a limitations period in that statute. The DOJ Attorney General's Manual published in 1947 observed that "the time within which review must be sought will be governed, as in the past, by relevant statutory provisions or by judicial application of the doctrine of laches."[23] In 1948, Congress moved the Little Tucker Act statute of limitations to 28 U.S.C. § 2401(a) and removed the words "under this act."[24] By removing those words, Congress made Section 2401(a) a "catch-all limit for non-tort actions against the United States."[25] Here is the full text of Section 2401(a) as currently enacted:

> Except as provided by [a chapter not relevant here], every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

In the decades following the APA's enactment, no one thought that Section 2401(a) applied to APA suits. In a 1967 case, the Supreme Court assumed (like the 1947 Attorney General Manual) that APA suits are subject

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[20] *See* Act of Mar. 3, 1887, ch. 359, § 2, 24 Stat. 505, 505.

[21] *Id.* § 1, 24 Stat. at 505.

[22] *See* Herr v. U.S. Forest Serv., 803 F.3d 809, 815 (6th Cir. 2015).

[23] Dep't of Justice, Attorney General's Manual on the Administrative Procedure Act 93 (1947), *available at* tinyurl.com/4nu4mtxw ("DOJ APA Manual").

[24] Act of June 25, 1948, 62 Stat. 869, 971 (codified at 28 U.S.C. § 2401(a)).

[25] Auction Co. of Am. v. FDIC, 132 F.3d 746, 749 (D.C. Cir. 1997); *see also* Werner v. United States, 188 F.2d 266, 268 (9th Cir. 1951) (Section 2401(a) "created a general statute of limitations insofar as suits against the United States are concerned."); United States v. Mottaz, 476 U.S. 834, 838 (1986) (Section 2401(a) provides "the general statute of limitations governing actions against the United States.").

to laches, not Section 2401(a) or any other statute of limitations.[26] But beginning in the 1980s, the circuit courts began to assume that Section 2401(a) applies to suits brought under the APA.[27] Section 702 of the APA provides a cause of action for persons "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute."[28] Section 704 provides that a plaintiff may only challenge "final agency action for which there is no other adequate remedy in a court."[29]

While courts subject APA claims to Section 2401(a)'s six-year limitations period, other administrative-injury claims are subject to much shorter limitations periods. The Administrative Orders Review Act (also known as the Hobbs Act), for example, provides a limitations period of 60 days.[30] Some agencies' organic statutes provide even shorter limitations periods.[31] And these shorter limitations periods do not start at accrual. The Hobbs Act limitations period starts upon "entry" of the agency's "final order."[32] Other statutes' limitations periods similarly run from when a regulation is "promulgated"[33] or from an order's "entry"[34] or from when an "order or decision becomes final."[35] While the Federal Reserve has repeatedly referred to these limitations periods as accrual-based, it has offered no justification for that description.[36] These limitations periods do not use the word *accrual* and appear to pay no attention to when any claim accrues.[37]

III. SECTION 2401(a)'S ORIGINAL UNDERSTANDING

Bedrock principles of statutory interpretation guide the inquiry into the meaning of the Section 2401(a) phrase "right of action first accrues." For one,

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[26] *See* James R. Conde & Michael Buschbacher, *The Little Tucker Act's Statute of Limitations Does Not Govern Garden-Variety Pre-enforcement Suits Under the APA*, YALE J. REG. NOTICE & COMMENT at n.18 & accompanying text (Sept. 26, 2023), tinyurl.com/y9bcvd7f (citing Abbott Labs. v. Gardner, 387 U.S. 136, 155 (1967)).

[27] *See id.* at n.4 & accompanying text; *but see generally id.* (arguing that this is incorrect).

[28] 5 U.S.C. § 702.

[29] *Id.* § 704.

[30] 28 U.S.C. § 2344.

[31] *E.g.*, 12 U.S.C. § 1848 (thirty days).

[32] 28 U.S.C. § 2344.

[33] 29 U.S.C. § 655(f); 16 U.S.C. § 7804(d)(1).

[34] 21 U.S.C. § 348(g)(1).

[35] 39 U.S.C. § 3663.

[36] *See, e.g.*, Resp. Br. at 20; Corner Post Tr. at 39, 41, 51.

[37] *See* Resp. Br. at 16 n.4 (string-citing a long list of limitations periods).

because Section 2401(a)'s text is "obviously transplanted from another legal source," i.e., a statutory provision dating to the 19th century, it "brings the old soil with it."[38] Second, interpreting Section 2401(a) requires analysis not only of the original semantic meaning of the phrase "right of action first accrues" but also of the "background rules" associated with accrual.[39] That is, the interpreter must look to the "cluster of ideas that were attached to [the phrase]" "accumulated [in] the legal tradition and meaning of centuries of practice."[40] Staring at the words "right of action first accrues" might not be terribly enlightening to a modern interpreter. But using the traditional tools of interpretation—dictionaries, enactment-era background rules, the canons, and so on—an interpreter can discern a great deal about the meaning and application of that phrase.

To start, the linguistic meaning of the phrase "right of action first accrues" is probative on its own. Enactment-era dictionaries defined that phrase's terms, *right of action* and *accrue*, and their meaning is not meaningfully contested. A *right of action* was a "right to bring suit."[41] Although implicit in that definition, it is uncontested that the right to bring suit belonged to individual plaintiffs, not to the world, just like it does today.[42] *Accrue* meant "to arise, to happen, to come into force or existence."[43] Putting those definitions together, Section 2401(a) provides that its limitations period begins when the plaintiff's right to bring suit comes into existence.

That presents a challenge for the Federal Reserve—it is difficult to argue that Corner Post's right to bring suit came into existence in 2011, years before it existed. Even the leading commentator defending the Federal Reserve's position, Professor Susan Morse, has conceded that "the text of 28 U.S.C. § 2401(a) . . . suggests . . . that accrual should begin separately for each specific plaintiff's claim."[44] Morse has for that reason further conceded that accrual based on "when a specific plaintiff can sue" "does apply to cases first contemplated by 28 U.S.C. § 2401(a)."[45] And Morse has acknowledged that

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[38] George v. McDonough, 142 S. Ct. 1953, 1959 (2022).

[39] Staples v. United States, 511 U.S. 600, 605 (1994).

[40] Sekhar v. United States, 570 U.S. 729, 733 (2013).

[41] Right of Action, BLACK'S LAW DICTIONARY 1560 (3d ed. 1933).

[42] *See, e.g.*, 5 U.S.C. § 702 (APA right of action belongs to "[a] person").

[43] Accrue, BLACK'S LAW DICTIONARY, *supra* note 41, at 18; *see also, e.g.*, Gabelli v. SEC, 568 U.S. 442, 448 (2013) (citing dictionaries and treatises "from the 19th century up until today" for the proposition that "[i]n common parlance a right accrues when it comes into existence").

[44] Susan C. Morse, *Old Regs*, 31 GEO. MASON L. REV. No. 1 (2023) (manuscript at 4), *available at* ssrn.com/abstract=4191798, perma.cc/MW42-WFCZ.

[45] *Id.*

under the Federal Reserve's position, "accrual is triggered by an action of the defendant, not a claim of the plaintiff," which is "contrary to the plaintiff-focused approach taken when interpreting 28 U.S.C. § 2401(a)'s application [in other contexts]."[46]

Next, the background rules and cluster of ideas surrounding accrual shed substantial light on Section 2401(a)'s original understanding.[47] As the Federal Reserve concedes, and John Kendrick has detailed, "[e]very source" reflecting the rules of 19th-century accrual indicates that a right of action could not accrue before injury.[48] Dictionaries explained that "an action *accrues* when the plaintiff has a right to commence it."[49] As an "invariable rule," according to an 1883 treatise on statutes of limitation, neither a person's "right to a remedy" nor "his liability to be precluded by time from its prosecution" "will commence till he has suffered some actual inconvenience."[50] Another treatise explained that a right of action "accrue[s] when the party has been 'hurt' and not when the other party has violated the contract or the law."[51] Cases said the same: "All" statutes of limitation "begin to run when the right of action is complete."[52]

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[46] *Id.* at 4–5. Professor Morse rests her defense of the Federal Reserve's position on her assertion that APA claims are different because the "[t]he administrative procedure right of action arises at promulgation (or other final agency action), then exists and continues, waiting unchanged for any eligible plaintiff to come along and raise it." *Id.* at 5. But that is question-begging—the time at which the right of action arises is what is in dispute. Professor Morse does not explain why APA claims are different than other claims for which there is a temporal gap between unlawful conduct and injury—in any case like that, the unlawful conduct "exists and continues, waiting unchanged" for a plaintiff to be injured. And Professor Morse does not explain how a plaintiff's right to bring suit can exist at a time the plaintiff does not exist itself.

[47] *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION 38 (1997) ("What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text.").

[48] John Kendrick, *(Un)limiting Administrative Review:* Wind River*, Section 2401(a), and the Right to Challenge Federal Agencies*, 103 VA. L. REV. 157, 159 (2017); *see also id.* at 180–92 (examining enactment-era cases, dictionaries, and treatises).

[49] 1 A. Burrill, A Law Dictionary and Glossary 17 (1850).

[50] H.G. WOOD, A TREATISE ON THE LIMITATION OF ACTIONS AT LAW AND IN EQUITY 363–64 (Boston, Soule & Bugbee Law Publishers 1883). This remained true when the APA was enacted. *See, e.g.*, Accrue, BLACK'S LAW DICTIONARY (4th ed. 1957) ("[a] cause of action 'accrues' when a suit may be maintained thereon," specifically "on [the] date that damage is sustained").

[51] JOHN F. KELLY, A TREATISE ON THE CODE LIMITATIONS OF ACTIONS UNDER ALL STATE CODES 91 (1903).

[52] Clark v. Iowa City, 87 U.S. (20 Wall.) 583, 589 (1874); *see also, e.g.*, Wilcox v. Plummer's Ex'rs, 29 U.S. 172, 181 (1830) ("When might this action have been instituted, is the question; for from that time the statute [of limitations] must run."); Rice v. United States, 122 U.S. 611, 617 (1887) ("A claim first accrues . . . when a suit may first be brought upon it, and from that day the . . . limitation begins to run.").

The Supreme Court has repeatedly affirmed these principles in the decades since. Under the "standard rule," a claim accrues "when the plaintiff has a complete and present cause of action"; a limitations period cannot run "before a plaintiff can file a suit."[53] The Court has "repeatedly recognized" that "Congress legislates against [that] standard rule."[54] That standard rule, according to the Supreme Court, cannot be displaced "in the absence of any [contrary] indication in the text of the limitations period."[55] Here, Section 2401(a) "reads like an ordinary, run-of-the-mill statute of limitations."[56]

While the standard rule can be rebutted with textual evidence, moreover, the Federal Reserve has not identified anything suggesting that an accrual-based limitations period ever can run before the plaintiff has been *injured*. The Federal Reserve cites *Reading Co. v. Koons* as a counter to the standard rule,[57] but accrual did not precede injury in that case. Rather, the Supreme Court simply rejected a plaintiff's attempt to game a limitations period through its control of the date on which it could bring suit. *Reading* involved a wrongful-death claim under the Employers' Liability Act, under which only the administrator of the decedent could sue.[58] The question was whether the Act's three-year limitations period began at death or at the appointment of the administrator.[59] If the latter, the decedent's beneficiaries could delay accrual by "choos[ing] their own time for applying for the appointment of an administrator and consequently for setting the statute running."[60] In *Reading*, for example, the appointment was not made until six years after death.[61] Unsurprisingly, the Court rejected this gamesmanship and held that accrual began at "the time of injury," i.e., death.[62] The Court emphasized that the right of action really belonged to the beneficiaries, not the administrator, and "at the death of decedent there are real parties in interest

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[53] *Gabelli*, 568 U.S. at 448; Green v. Brennan, 578 U.S. 547, 554 (2016).

[54] United States ex rel. Wilson, 545 U.S. 409, 418 (2005) (cleaned); *see also* Spannaus v. DOJ, 824 F.2d 52, 56 n.3 (D.C. Cir. 1987) ("virtually axiomatic" that "a statute of limitations cannot begin to run against a plaintiff before the plaintiff can maintain a suit").

[55] *Green*, 578 U.S. at 554 (cleaned).

[56] United States v. Wong, 575 U.S. 402, 411 (2015) (referring to similar wording in Section 2401(b)).

[57] Resp. Br. at 26–27 (citing Reading Co. v. Koons, 271 U.S. 58 (1926)).

[58] 271 U.S. at 60.

[59] *Id.*

[60] *Id.* at 65.

[61] *Id.* at 64.

[62] *Id.* at 63.

[i.e., the beneficiaries] who may procure the action to be brought."[63] The beneficiaries could "start the machinery of the law in motion to enforce it" by appointing an administrator, and could even file suit themselves and later amend to name the administrator as plaintiff.[64] *Reading* is only arguably an exception to the standard rule that accrual occurs only when there is a complete and present cause of action, and it certainly is not an exception to the seemingly ironclad rule that accrual cannot precede injury.

The Federal Reserve argues that Section 2401(a) is unique as applied to APA suits because they involve a claim of administrative injury. According to the Federal Reserve, the "default rule for accrual" is "ill-suited for the administrative-law context."[65] But when the APA was enacted, and for decades after, it was understood that APA claims were not subject to any limitations period at all.[66] Rather, they were subject to laches, a doctrine that would not bar the suit of a newly opened business.[67] As for accrual, the Federal Reserve has not pointed to a single example of an accrual-based limitations period in the administrative context that started before injury. Indeed, as noted, the Federal Reserve has not pointed to any exception in any context at any time in which accrual could precede injury. Nineteenth century Americans understood that accrual is plaintiff-focused and cannot precede injury as a general matter, whatever the claim.[68]

The Federal Reserve emphasizes that *other* administrative statutory limitations periods begin at final agency action. According to the Federal Reserve, these provisions suggest that Congress prefers to start the clock at final agency action in the administrative context.[69] But that is the opposite of

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[63] *Id.* at 62–63.

[64] *Id.* at 62.

[65] *See* Resp. Br. at 19–20 (cleaned).

[66] *See* DOJ APA Manual, *supra* note 23, at 93; *Abbott Labs.*, 387 U.S. at 155; Conde & Buschbacher, *supra* note 26.

[67] *See* Laches, BLACK'S LAW DICTIONARY (1st ed. 1891) (defining "laches" as "[n]egligence, consisting in the omission of something which a party might do, and might reasonably be expected to do, towards the vindication or enforcement of his rights").

[68] The Federal Reserve invokes a 1967 statement of the Supreme Court that there are "hazards inherent in attempting to define for all purposes when a 'cause of action' first 'accrues.'" Resp. Br. at 13 (quoting Crown Coat Front Co. v. United States, 386 U.S. 503, 517 (1967)). But that is simply because the time at which a right of action comes into existence must be determined for each kind of action. Defining when a contract claim comes into existence might not determine when another type of claim comes into existence. That does not change the rules about what accrual means and how it operates. For all purposes, accrual-based limitation periods focus on the plaintiff, not the defendant, and never does accrual precede injury.

[69] Resp. Br. at 15.

how courts interpret statutes. Under the "well-settled" meaningful-variation canon, a "materially different term . . . denotes a different idea."[70] Unlike Section 2401(a), the other statutory provisions are not accrual-based.[71] That Congress used different language in Section 2401(a) than in other statutes of limitation covering claims of administrative injury suggests that Section 2401(a) operates differently, not the same.

That inference is especially strong in *Corner Post* because, as the Supreme Court explained in *Rotkiske v. Klemm*, "atextual judicial supplementation" is "particularly inappropriate" when "Congress has shown that it knows how to adopt the omitted language."[72] In other words, it is not merely that Section 2401(a)'s language varies from that of the other provisions—it is that the other provisions contain exactly the language the Federal Reserve wishes to read into Section 2401(a). In *Rotkiske*, the Court rejected a limitations-period argument because Congress has "enacted statutes that expressly included the language [the litigant] asks us to read in"—they "set[] limitations periods to run" in exactly the way the litigant proposed.[73] The Court concluded that it is "not our role to second-guess Congress' decision" to create a different type of limitations period in the provision at issue.[74]

That logic seems equally applicable in *Corner Post*. Congress easily could have provided that the limitations period for APA claims starts once the regulation is "published in the Federal Register," for example, as it did in 16 U.S.C. § 7804(d)(1).[75] The limitations periods pegged to final agency action show that Congress "knows exactly how to specify" such a limitations period though it chose to do "nothing like that" with respect to the APA.[76]

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[70] Sw. Airlines Co. v. Saxon, 596 U.S. 450, 458–59 (2022).

[71] The Federal Reserve argues that Section 2401(a) should not be read to adopt a "different accrual rule" than the other statutory provisions such as the Hobbs Act. Resp. Br. at 20. But that argument rests on a flawed premise—none of the other statutory provisions have accrual rules. They are not accrual-based limitations periods. *See id.* at 16 n.4 (string-citing a long list of limitations periods, none of which are pegged to accrual of the plaintiff's right of action).

[72] 140 S. Ct. 355, 361 (2019) (capitalization altered).

[73] *Id.*

[74] *Id.*

[75] *See also* Brief for the Respondent in Opposition at 11, Corner Post, Inc. v. Bd. of Govs. of the Fed. Res. Sys., No. 22-1008 (June 16, 2023) ("Gov't BIO") (recognizing that "[i]n a variety of circumstances, Congress has established deadlines for suit that run from the defendant's allegedly unlawful conduct").

[76] Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1617 (2018).

The "omission of any such provision is strong, and arguably sufficient, evidence that Congress had no such intent."[77]

Even though the phrase "right of action first accrues" in Section 2401(a)'s first sentence is undisputedly the decisive phrase in this appeal, the Federal Reserve has not advanced any argument about its meaning. The Federal Reserve's merits brief mentions that phrase seven times, and in none of those instances does the Federal Reserve state a position about what those words mean or when a right of action first accrued at the time of enactment.[78]

The Federal Reserve instead argues that Corner Post's reading "is inconsistent with the *second* sentence of Section 2401(a)."[79] That sentence provides that "[t]he action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases." According to the Federal Reserve, that "necessarily reflects Congress's understanding that a claim can 'accrue[]' for purposes of Section 2401(a) at a time when a person is 'under legal disability,' 28 U.S.C. 2401(a), and thus is unable to sue on that claim."[80] And that, the Federal Reserve continues, "is irreconcilable with [Corner Post's] view that accrual under Section 2401(a) cannot occur while a plaintiff is legally unable to sue."[81]

But Section 2401(a)'s second sentence is entirely consistent with the view that Section 2401(a) accrual starts at injury. The term "legal disability" refers to "a mental derangement precluding a person from comprehending rights which he would be otherwise bound to understand."[82] A legally disabled person's cause of action accrues at injury just like anyone else's; Section 2401(a) simply tolls the time to bring suit in light of the disability. The same goes for persons beyond the seas—their cause of action accrues at injury and the time to sue is tolled while they are beyond the seas. Indeed, the second sentence indicates exactly that by envisioning persons disabled or beyond the seas "at the time the claim accrues."[83] A claim can accrue even while the

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[77] Yellow Freight Sys., Inc. v. Donnelly, 494 U.S. 820, 823 (1990).

[78] *See* Resp. Br. at 2, 9, 12, 13, 23, 30, 31.

[79] *Id.* at 23 (emphasis added).

[80] *Id.* at 24 (cleaned).

[81] *Id.*

[82] Sabree v. United States, 409 F. App'x 339, 341 (Fed. Cir. 2011); *see also* BLACK'S LAW DICTIONARY, *supra* note 12, at 528 (defining "disability" as "[t]he inability to perform some function; esp., the inability of one person to alter a given relation with another person").

[83] 28 U.S.C. § 2401(a).

plaintiff is disabled or overseas because the plaintiff can be injured while disabled or overseas. A plaintiff cannot, by contrast, be injured before it exists.

IV. THE CIRCUIT COURTS' APPROACH

In light of the APA's "generous review provisions," courts "restrict access to judicial review" "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent."[84] And the Supreme Court has repeatedly explained that "[t]he best evidence of congressional intent . . . is the statutory text that Congress enacted."[85]

But aside from the Sixth Circuit,[86] the circuit courts have not examined statutory text. They have instead balanced interests and settled on a framework that to them "make[s] the most sense."[87] The Eighth Circuit, for example, did not even ask the pertinent interpretive questions. The Eighth Circuit never inquired into Section 2401(a)'s original meaning, or how the APA might implicitly modify that meaning. Instead, the Eighth Circuit simply announced that "[t]his court concludes that . . . [Petitioner's] right of action accrue[d] . . . upon publication of the regulation."[88]

When the circuit courts have cited any statutory text at all, they have pointed to the APA's limitation of its cause of action to "final agency action" in Section 704 without explaining that provision's relevance.[89] Similarly, in opposing certiorari, the Federal Reserve simply noted that "the APA establishes a cause of action to challenge 'final agency action'" and then stated its conclusion: "Accordingly, when an agency makes a final decision that [satisfies the Supreme Court's test for finality], the 'right of action' established by the APA 'accrues.'"[90]

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[84] *Abbott Labs.*, 387 U.S. at 141.

[85] Marx v. Gen. Revenue Corp., 568 U.S. 371, 392 n.4 (2013) (Sotomayor, J., dissenting) (citing W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 98 (1991)).

[86] *Herr*, 803 F.3d 809.

[87] Wind River Mining Corp. v. United States, 946 F.2d 710, 715 (9th Cir. 1991).

[88] N. Dakota Retail Ass'n v. Bd. of Govs. of the Fed. Res. Sys., 55 F.4th 634, 641 (8th Cir. 2022).

[89] *See, e.g.*, Wong v. Doar, 571 F.3d 247, 263 & n.15 (2d Cir. 2009) ("Under the APA, the statute of limitations begins to run at the time the challenged agency action becomes final. *See* 5 U.S.C. § 704."); Jersey Heights Neighborhood Ass'n v. Glendening, 174 F.3d 180, 186 (4th Cir. 1999) (holding without analysis that the APA right of action accrues "upon 'final agency action,' 5 U.S.C. § 704"); Harris v. FAA, 353 F.3d 1006, 1010 (D.C. Cir. 2004) ("The right of action first accrues on the date of the final agency action." (citing 5 U.S.C. § 704)).

[90] Gov't BIO at 8.

But the observation that the APA limits its cause of action to final agency action does not support a conclusion that accrual occurs at final agency action rather than at injury. Section 704 simply states that an APA claim cannot be brought until the plaintiff is injured *and* the agency action is final—in other words, finality "is another necessary, but not by itself a sufficient, ground for stating a claim under the APA."[91] And APA Section 702 does not alter those accrual rules either. Because Section 702 authorizes judicial review only when a person is "aggrieved" by final agency action, if anything it indicates that the normal accrual rules apply to APA claims. The APA largely "restate[d] the law governing judicial review of administrative action;"[92] it did not upend centuries-old accrual rules. At most, the APA is silent on accrual. And the APA's limitations-period "silence" "means that ordinary background law applies."[93] Statutory silence signals congressional "satisfaction with widely accepted definitions, not a departure from them."[94]

Rather than focusing on statutory text, the circuit courts have focused on policy implications. They have invoked the concern that under Corner Post's approach "there effectively would be no statute of limitations."[95] That is incontestably incorrect—if Corner Post had filed its lawsuit more than six years after its alleged injury, Section 2401(a) would bar the suit just like any other statute of limitations. What these courts really mean is that there effectively is no *repose* for the defendant.

That is indeed true—because Section 2401(a) is not a statute of repose. A legislature's choice of limitations period "reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones."[96] Most pertinent here, anytime a legislature enacts a limitations period, it must decide whether to enact a statute of limitations or a statute of repose. Because

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[91] *Herr*, 803 F.3d at 819.

[92] DOJ APA Manual, *supra* note 23, at 124.

[93] New Jersey v. New York, 523 U.S. 767, 813 (1998) (Breyer, J., concurring); *see also, e.g.*, Albernaz v. United States, 450 U.S. 333, 341–42 (1981) ("[I]f anything is to be assumed from the congressional silence . . . , it is that Congress was aware of the [background] rule and legislated with it in mind."); *id.* at 341 (Congress is "predominantly a lawyer's body," and it is appropriate "to assume that our elected representatives . . . know the law.").

[94] Beck v. Prupis, 529 U.S. 494, 501 (2000); *see also* PDR Network, LLC v. Carlton & Harris Chiropractic, Inc., 139 S. Ct. 2051, 2061 (2019) (Kavanaugh, J., concurring in the judgment) (congressional "silence" "should not be read to preclude judicial review").

[95] Preminger v. Sec'y of Veterans Affairs, 517 F.3d 1299, 1307 (Fed. Cir. 2008) (citing *Wind River*, 946 F.2d at 714).

[96] *Rotkiske*, 140 S. Ct. at 361.

each option may carry negative consequences when there is a temporal gap between last culpable act and injury, the choice between them involves a tradeoff.

The parties' respective arguments illuminate that tradeoff. The Federal Reserve has emphasized that under Corner Post's reading, the limitations period would "leave defendants subject indefinitely to actions for the wrong done."[97] Corner Post, meanwhile, has emphasized that under the Federal Reserve's reading, the limitations period for APA suits would expire before some plaintiffs have any opportunity to sue.[98] Corner Post has described this result as absurd.[99] The Federal Reserve has countered that the result is not absurd because many federal statutes contain limitations periods that unambiguously entail that result.[100] And it is true that the result is not absurd in the sense of having consequences that no legislature could tolerate. A company is in fact statutorily barred from bringing Hobbs Act challenges outside of that statute's limitations period even if it expires before the company exists.

But this exchange simply highlights the tradeoff inherent in the choice between a statute of limitations versus a statute of repose. What Corner Post emphasizes is the downside of a statute of repose—some injured plaintiffs will have no opportunity to sue. What the Federal Reserve emphasizes is the downside of a statute of limitations—a loss of repose for defendants because newly injured plaintiffs can bring suit long after last culpable act. The question, then, is simply which side of that tradeoff Congress picked when it enacted Section 2401(a). In other words, the question is whether Section 2401(a) is a statute of limitations or a statute of repose.

Under Supreme Court precedent, Section 2401(a) is a statute of limitations and not a statute of repose. A statute of repose limit is "not related to the accrual of any cause of action."[101] Section 2401(a) obviously *is* related to accrual—it uses that very word. That means Section 2401(a) is not a statute of repose. And unlike statutes of repose, statutes of limitation *are* related to accrual. They are "based on the date when the claim accrued."[102] The Federal Reserve points out that Section 2401(a) "does not contain either

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[97] Gov't BIO at 12 (quotation marks omitted).

[98] Petition for Certiorari at 29, Corner Post, Inc. v. Bd. of Govs. of the Fed. Reserve Sys., No. 22-1008 (Apr. 13, 2023).

[99] *Id.*

[100] Resp. Br. at 10.

[101] *CTS Corp*, 573 U.S. at 9.

[102] *Id.* at 7; *see also id.* ("a statute of limitations begins to run when the cause of action 'accrues'").

the phrase 'statute of limitations' or the phrase 'statute of repose,'"[103] but because Section 2401(a)'s limit is "based on the date when the claim accrued,"[104] there is no doubt about which it is.

Because Section 2401(a) is a statute of limitations, it "begins to run when the injury occurred or was discovered."[105] That means it purposely does *not* provide a defendant with "freedom from liability" and the assurance that "past events [are] behind him."[106] Because a legislature cannot ensure both repose for defendants and remedy for plaintiffs, statutes of limitation like Section 2401(a) accept some loss of repose to ensure that all injured plaintiffs are able to bring suit.[107] To say that Section 2401(a) must provide federal agencies with date-based repose ignores that Congress chose the other side of that tradeoff.

V. MATTERS OF INTERPRETATION

At oral argument, Corner Post's lawyer observed that "if you look at the lower court decisions applying this statutory scheme, not a single one of them actually looked at the text of 2401 or 702."[108] Justice Kagan responded: "Well, but what I'm suggesting . . . is that there's not much in the text to look at."[109] This colloquy implicates a broader issue concerning indeterminacy and the standard of proof applicable to an interpretive assertion.

In a different oral argument a month prior, Justice Kagan asserted that "sometimes law runs out."[110] She elaborated that assertion in a 2019 opinion, writing that "sometimes the law runs out, and policy-laden choice is what is left over."[111] The law runs out, according to Justice Kagan, when the law does

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[103] Resp. Br. at 32.

[104] *CTS Corp.*, 573 U.S. at 7.

[105] *Id.* at 8.

[106] *Id.* at 9; *see also* Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc., 582 U.S. 497, 505 (2017) (statutes of repose give "more explicit and certain protection to defendants" than statutes of limitation).

[107] *See Spannaus*, 824 F.2d at 56 n.3 (It is "virtually axiomatic" that "a statute of limitations cannot begin to run against a plaintiff *before* the plaintiff can maintain a suit" even though that is not true of statutes of repose.).

[108] Corner Post Tr. at 11.

[109] *Id.* at 12.

[110] Tr. of Oral Arg. at 12, Relentless, Inc. v. Department of Com., No. 22-1219 (Jan. 17, 2024).

[111] *Kisor*, 139 S. Ct. at 2415. Justice Kagan made this assertion in the context of interpretation of agency regulations, but in *Relentless* she stated that statutory text sometimes "runs out," *see supra*

not "give[] an answer."[112] And the law does not give an answer, she continued, when there is more than one "reasonable construction."[113] When a judge has employed the tools of interpretation and "the interpretive question still has no single right answer," the judge "can . . . conclude that it is more one of policy than of law."[114] In sum, policy-laden choice is warranted when reasonable people can disagree about the answer to an interpretive question.

Justice Brett Kavanaugh, on the other hand, has argued that judges should simply "determine the best reading of the statute."[115] While "[f]iguring out the best reading of the statute is not always an easy task," Justice Kavanaugh believes that it is the judge's job to do so: statutory texts "are not just common law principles or aspirations to be shaped and applied as judges think reasonable."[116] And judges "should not be diverted by an arbitrary initial inquiry into whether the statute can be characterized as clear or ambiguous."[117] In other words, judges should apply what they perceive as the best reading regardless whether there might be reasonable disagreement about what that is.

Justice Clarence Thomas, similarly, has argued that "even in difficult cases," when "original meaning is not obvious at first blush," judges must nonetheless "diligently pursu[e] that meaning."[118] That discerning the original meaning of a text may "require[] a taxing inquiry" does not make the text "capable of multiple permissible interpretations."[119] For Justice Thomas, like Justice Kavanaugh, this is about the judicial role in the separation of powers: "Stopping the [interpretive] inquiry short—or allowing personal views to color it—permits courts to substitute their own preferences over the text."[120]

At bottom, this disagreement is largely about standard of proof. As Professor Gary Lawson has explained, an assertion of interpretive indeterminacy (such as the assertion that law has run out) requires

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note 110 & accompanying text, and appeared to defend the circuit courts' "policy-laden choice" on this ground in *Corner Post*, *see infra* note 126 & accompanying text.

[112] *Kisor*, 139 U.S. at 2415.

[113] *Id.*

[114] *Id.* (cleaned).

[115] Kavanaugh, *supra* note 3, at 2144 (capitalization altered).

[116] *Id.* at 2121, 2135.

[117] *Id.* at 2144.

[118] Gamble v. United States, 139 S. Ct. 1960, 1987 (2019) (Thomas, J., concurring).

[119] *Id.*

[120] *Id.*

specification of a standard of proof.[121] A proposition is indeterminate "only if there is so much uncertainty about the right answer that the applicable standard of proof cannot be satisfied for either the proposition or its negation."[122] Justice Kagan is implicitly applying something akin to a clear-and-convincing standard of proof to interpretive propositions—if the evidence of the law is not clear and convincing, the law does not give an answer. Justices Kavanaugh and Thomas, on the other hand, are applying something more like a preponderance standard—if the evidence suggests that one interpretation is better than another, the superior interpretation prevails. With that standard, indeterminacy exists only when "the evidence is in complete and precise equipoise," and "[t]here are almost always better or worse answers."[123] The law virtually never "runs out."

Whatever standard of proof is used, it should be identified and justified. Justices Kavanaugh and Thomas, for example, have articulated reasons why they think their best-reading approach best conforms to the judicial role in the Constitution's separation of powers. In the academy, Professors John O. McGinnis & Michael B. Rappaport have argued that under our country's "original interpretive rules," interpreters "were required to select the interpretation of ambiguous and vague terms that had the stronger evidence in its favor."[124]

A related question, when a court uses a clear-and-convincing standard, is what happens next when no interpretation meets that standard. In Justice Kagan's formulation, policy takes over—a "policy-laden choice" is all an interpreter is "left" with.[125] That is why when Corner Post's lawyer accused the circuit courts of focusing on policy rather than text, Justice Kagan defended them by asserting that "there's not much in the text to look at."[126] It seems that Justice Kagan meant that Section 2401(a)'s text provides no clear answer to the question presented, and that justifies the circuit courts' turn to policy.

Normally, of course, "[i]t is Congress, not [the Supreme] Court, that balances [policy] interests;" the Court "simply enforce[s] the value judgments

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[121] GARY LAWSON, EVIDENCE OF THE LAW 114 (2017) ("It is literally impossible to evaluate claims about indeterminacy when the standard of proof is not specified.").

[122] *Id.* at 111.

[123] *Id.* at 112, 122.

[124] John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 774 (2009).

[125] *Kisor*, 139 S. Ct. at 2415.

[126] Corner Post Tr. at 12.

made by Congress."[127] It is not obvious that the Constitution permits departure from this division of labor when an interpretive question does not have a clear and convincing answer. Policy judgments, moreover, often cannot themselves meet a clear-and-convincing standard. In *Corner Post*, for example, the tradeoffs inherent in legislating Section 2401(a)'s limitations period do not allow a "single right answer" that stands beyond reasonable disagreement. And when a legal question is contested on both interpretation and policy, it is not obvious why judicial decisionmaking should turn on the latter.

VI. REAL-WORLD IMPLICATIONS

These theoretical interpretive issues could have substantial real-world implications in *Corner Post*. The APA is a "bill of rights" for "the hundreds of thousands of Americans whose affairs are controlled or regulated" by federal agencies.[128] It was designed to serve as "a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices."[129]

The APA's guarantees have become all the more critical as the administrative state has grown. Today, "the Executive Branch . . . wields vast power and touches almost every aspect of daily life."[130] Much of the federal government's operation now consists of "hundreds of federal agencies poking into every nook and cranny of daily life."[131] Our Constitution's founders "could hardly have envisioned today's 'vast and varied federal bureaucracy' and the authority administrative agencies now hold over our economic, social, and political activities."[132] These agencies "produce[] reams of regulations—so many that they dwarf the statutes enacted by Congress."[133] The Code of Federal Regulations contained 18,000 pages near the close of

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[127] *Rotkiske*, 140 S. Ct. at 361.

[128] 92 Cong. Rec. 2149 (1946) (statement of Sen. McCarran).

[129] Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 109 (2015) (Scalia, J., concurring) (quoting United States v. Morton Salt Co., 338 U.S. 632, 644 (1950)); *see also* S. Rep. No. 79-752, at 212 (1945) (APA judicial review is designed to prevent Congress's statutes from becoming "blank checks drawn to the credit of some administrative officer or board"); Shaughnessy v. Pedreiro, 349 U.S. 48, 51 (1955) (APA was intended in part to "remove obstacles to judicial review of agency action").

[130] Free Enter. Fund v. PCAOB, 561 U.S. 477, 499 (2010).

[131] City of Arlington v. FCC, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting).

[132] *Id.* at 313 (Roberts, C.J.).

[133] *Kisor*, 139 S. Ct. at 2446–47 (Gorsuch, J., concurring in the judgment) (quotations marks omitted).

the New Deal in 1938, but now contains more than 175,000 pages.[134] And agencies "add thousands more pages of regulations every year."[135]

In light of the administrative state's expanded scope, "the cost of . . . deny[ing] citizens an impartial judicial hearing" when injured by agency action "has increased dramatically."[136] And while unlawful agency action often imposes immediate injury, under the Eighth Circuit's approach, agencies may escape judicial oversight when their action causes injury more than six years later. While aggrieved persons always can challenge agency action when defending an enforcement action, the Supreme Court does not usually consider the availability of defense review "a 'meaningful' avenue of relief."[137] The time, cost, and reputational ruin accompanying enforcement actions often "practically necessitate a pre-enforcement . . . suit" "if there is to be a suit at all."[138]

Many persons aggrieved by unlawful agency action, moreover, will never have the opportunity to participate in an enforcement action. In *Corner Post*, for example, there will never be an enforcement action because Corner Post's injury is caused by private persons regulated by the Federal Reserve's 21-cent standard.[139] The possibility of "filing [a] petition to rescind regulations" and then "appealing the denial of the petition,"[140] does not solve the problem because the agency may not have a procedure for a petition to rescind the action at issue, and even if it does, it may simply decline to issue a decision on the petition or delay such action indefinitely. When an agency takes injurious action outside the enforcement context, therefore, the APA's cause of action is usually the only mechanism to contest the action.

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[134] Paul J. Larkin, Jr. & GianCarlo Canaparo, *Gunfight at the New Deal Corral*, 19 GEO. J.L. & PUB. POL'Y 477, 488 (2021).

[135] *Kisor*, 139 S. Ct. at 2447 (Gorsuch, J.).

[136] *Id.*; *see also* Bowen v. Mich. Acad. of Fam. Physicians, 476 U.S. 667, 670 (1986) (citing the Supreme Court's "insist[ence]" that the availability of judicial review of executive action is part of "[t]he very essence of civil liberty").

[137] *Free Enter. Fund*, 561 U.S. at 490–91.

[138] CIC Servs., LLC v. IRS, 141 S. Ct. 1582, 1592 (2021); *see also* Sackett v. EPA, 566 U.S. 120, 124–25, 127 (2012) (plaintiffs would have "accrue[d], by the Government's telling, an additional $75,000 in potential liability" "each day they wait[ed] for the Agency to [bring an enforcement action]").

[139] *See* Brief for the Petitioner at 34, Corner Post, Inc. v. Bd. of Govs. of the Fed. Reserve Sys., No. 22-1008 (Nov. 13, 2023).

[140] *Wind River*, 946 F.2d at 714.

VII. CONCLUSION

While the Supreme Court almost certainly will examine Section 2401(a)'s text more closely than the circuit courts have, its Justices may disagree on whether the interpretive inquiry should end with that text. That disagreement could stem not only from different readings of Section 2401(a)'s text but also different standards of proof for interpretive assertions. In *Corner Post*, this theoretical disagreement could have significant implications for a very real-world question: whether Americans newly injured by old agency action have a day in court.

Other Views:

- Brief for Respondent, Corner Post, Inc. v. Board of Governors of the Federal Reserve System, No. 22-1008 (Feb. 20, 2024), https://www.supremecourt.gov/DocketPDF/22/22-1008/269285/20230616132214160_22-1008%20-%20Corner%20Post%20v.%20Board%20of%20Governors%20of%20the%20Federal%20Reserve%20System.pdf.
- Susan C. Morse, *Old Regs*, 31 GEO. MASON L. REV. No. 191 (2023), *available at* https://lawreview.gmu.edu/print_issues/old-regs/.
- Sydney Bryant and Devon Ombres, Corner Post v. Federal Reserve*: The Supreme Court Could Open a Pandora's Box for Federal Regulation*, CENTER FOR AMERICAN PROGRESS (Feb. 12, 2024), https://www.americanprogress.org/article/corner-post-v-federal-reserve-the-supreme-court-could-open-a-pandoras-box-for-federal-regulation/.
- Charles P. Pierce, *The Corner Post Case Could Do to New Deal Regulations What Citizens United Did to Campaign Finance*, ESQUIRE (Feb. 20, 2024), https://www.esquire.com/news-politics/politics/a46872722/supreme-court-corner-post-suit/.

TOWARD A MORE CONFIDENT STATE CONSTITUTIONALISM*

STEPHEN J. MARKMAN**

This article is adapted from a speech Justice Markman delivered to the Florida Annual Education Conference of District Appellate Judges in Jacksonville, Florida, in January 2024.

Good morning. It is an honor to speak before this very distinguished and daunting audience on recent efforts at revitalizing state constitutions. It is an effort that has been given growing attention in recent years as a result of state court decisions, national conferences and debates (often sponsored by the Federalist Society), and new books, including two very excellent ones authored interestingly by federal Judge Jeff Sutton, chief judge of the Sixth Circuit Court of Appeals, *51 Imperfect Solutions* and *Who Decides?*[1] Most of all, however, it has been propelled by a growing number of thoughtful state jurists who have reflected upon their own courts, their own constitutions, and their own nation, and sensed that a better judicial balance should be drawn between federal and state judicial power. I am especially privileged today to speak before the appellate judiciary of *Florida* because, I believe, no serious state constitutional reforms can be achieved without the engagement and the leadership of the judiciaries of our most dynamic states. Just as New York and California once supplied leadership and direction for past efforts at revitalizing state courts and constitutions, the same today must come from states such as Florida and Texas. By these remarks, I hope I can offer some thoughts on

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

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[1] JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018); JEFFREY S. SUTTON, WHO DECIDES?: STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION (2021).

both theory and nuts-and-bolts measures that might be considered by judges and justices of a federalist disposition. These, from the perspective of a long-serving state justice who was required three years ago by his own state's constitution to retire on account of its irrebuttable presumption of senility arising at a certain age. What better credentials could I bring to this conference? Please permit me to share several thoughts concerning the *state* of state constitutions.

I. WHY STATE CONSTITUTIONS?

Of course, the threshold question must be asked: *why* should state constitutions be reinvigorated in the first place? For what purpose? To what end? I respectfully respond: for essentially the same reasons that federalism should *generally* be reinvigorated within America. Because our constitutional balance of power has gone increasingly askew; because the American nation has become increasingly polarized; because one-size-fits-all policies increasingly do not fit a nation spread across a hemisphere; and because state constitutions have become increasingly dormant and irrelevant. And because the *virtues* of judicial federalism are reasonably clear and well-understood, encompassing the dispersal of judicial power; the facilitation of localism, diversity, and innovation; the strengthening of a judicial system that is closer to, and more respectful of, the judgments of those whom it governs; and the restoration of charters of government that served well during our nation's first century and a half to guide our growing and ascending republic. But perhaps most of all, in order to afford our fifty state citizenries more effective control over their own collective and individual destinies. As Madison observed in *Federalist 46*, the federal and state governments are but "different agents and trustees of the people, constituted with different powers and designed for different purposes." Not, he states, as "mutual rivals or enemies," but as "common" servants of the people in whom "ultimate authority" reposes.[2]

I recall reading not too long ago about a newly-enacted Florida law concerning minors attending drag shows that was promptly enjoined, as many such laws are, by a federal trial court. I know little of the experience of minors with drag shows, except that I and my two children and seven grandchildren have had little occasion to attend such shows. I have since lost sight of this matter but strongly suspect that the people of Florida whose elected

[2] THE FEDERALIST NO. 46 (Madison), *available at* https://avalon.law.yale.edu/18th_century/fed46.asp.

representatives enacted this law will never see it take effect. To me, this is a matter of considerable moment for a nation whose experiment in representative self-government was possibly the greatest legacy of its Founders. And it prompted me to reflect upon recent laws enacted by the elected representatives of the people of my *own* state. The people of Michigan have also experienced federal judicial nullification in recent years, to one degree or another, in the following realms of state policy: electoral recounts, rules of appellate procedure, sentencing guidelines, straight-ticket voting, electoral integrity measures, sex offender registration, advertising of local adult businesses, juvenile sentencing, state prisoner rights, public employee pensions, welfare entitlements, emergency municipal managers, affirmative action, legislative branch procedures, redistricting, criminal procedure, and, of course, understandings of what comprises a marriage.

There was a time in our constitutional history in which a genuinely "federal case" was one whose impact would be felt well *beyond* the borders of a single state—for instance, a national commercial dispute, a controversy with broad interstate commerce implications, or the interpretation of a far-reaching congressional enactment. There was also a time in which, as Hamilton remarked in *Federalist 83*, "state courts [possessed] concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly prohibited,"[3] rather than as has seemingly evolved, that *federal* courts possess concurrent jurisdiction in all cases arising under the laws of the several *states* of the Union. America not only survived this past era of broad state jurisdiction, but prospered. Yet during the past 75 years or so, the nearly-unwavering trend has been toward *greater* centralized power in the federal courts—producing more *uniform* judicial policies and reflecting *diminished* regard for the diversity, variety, and inclinations of our fifty states, their people, and their local constitutions. This trend has arisen for many reasons, too numerous to catalog in these remarks, although I mention in passing a few of the most obvious: an incorporated Bill of Rights; the enactment of 5,000 or so new federal criminal statutes; countless scores of thousands of new federal regulatory offenses; and ever-broadening interpretations of myriad federal constitutional provisions, many located within the Fourteenth Amendment. I recall in this regard reading many years ago of President Clinton's Solicitor General arguing preposterously before the U.S. Supreme Court that the Violence Against Women Act was constitutional and necessary because state courts and

[3] THE FEDERALIST NO. 82 (Hamilton), *available at* https://avalon.law.yale.edu/18th_century/fed82.asp.

state prosecutors failed to accord sufficient attention to the allegations of female rape victims.[4]

State constitutions of the 18th, 19th, and early 20th centuries may not have been the inspiration for many thirty-point headlines in the local newspapers or the stuff of creative exercises in constitutional decision-making or the product of national revolution or civil war or social upheaval, as is our federal constitution. Yet these constitutions provided the backdrop for governing the everyday affairs of the American people for 150 years, just as did the similarly-unheralded and overlooked common law of our states. *State* court constitutional decisions were those of local business and commerce, of the peaceableness and tranquility of the community, of a pioneering and westward people, and of individual rights within the context of an unincorporated national constitution—in support of the ordinary and the commonplace and on behalf of a self-reliant and independent and entrepreneurial people. *Together*, our two constitutions gave rise to the greatness of our land, *neither* intruding excessively upon the parochial affairs of "we the people," in whose name both of these charters had been ratified. When perhaps the greatest constitutional scholar of the second half of the 19th century, Thomas Cooley, a former justice of the Michigan Supreme Court, wrote his classic treatise on *Constitutional Limitations*, it was principally a work focused upon the substance and evolution and contributions of our *state* constitutions.

Furthermore, our state constitutional inheritance was—as it largely remains today—characterized by interpretive rigor and discipline, commonsense and reasonable constructions of the law, and an emphasis upon stability and predictability of decision-making. Even during the present era of relative state constitutional dormancy and federal preemption, our state judiciaries, in my judgment, have served as mature and steadying forces, cognizant of their constitutional place and respecting the role of governors, legislatures, municipalities, and the sphere of the private. The work of our fifty state supreme courts may not impress the bench and bar and academia as particularly "sexy," or as noteworthy as the continuous discovery of new constitutional rights and entitlements, but it is a legacy, I believe, of which we here this morning can each be proud.

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[4] U.S. v. Morrison, 529 U.S. 598, 620 (2000).

II. THE CURRENT LANDSCAPE

As I further survey our contemporary judicial landscape, I see much that is concerning to a person of federalist and decentralizing and "government closest to the people" inclinations. I see a stultifying uniformity of state criminal laws and procedures (and soon, I predict, increasingly uniform *punishments* in the name of "proportionality" and the Eighth Amendment). I see an almost thoroughly incorporated Constitution under the auspices of nine lawyers in black robes sitting upon a single tribunal in Washington, DC, for a tenure of life. I see a constitutional regime in which each and every U.S. Supreme Court decision incorporating a federal right must be scoured, scrutinized, and parsed by every state judge and justice of the land to ensure that each and every aspect of its footnotes, details, multi-part tests, and passing reflections is elevated as the controlling law of their own states. I see a growing line of demarcation by which federal courts decide a broadening range of questions of state constitutional moment. And I see on the High Court a growing rigidity of factions and divisions and 5-4 groupings that, at least to *this* observer, are suggestive less of the rule of *law* than of the rule of *judges*. And in the meantime, I see fifty state constitutions, several of which date back to the 18th century, and which themselves influenced the federal Constitution, that lie fallow—largely treated as an afterthought. Constitutions about which even their own bench and bar know relatively little concerning their substance, their provenance, and their historical development. But perhaps things may be different in Florida? I do not know.

I have no illusions that remedying this state of affairs will not require leadership and initiative coming most of all from the U.S. Supreme Court itself. For present constitutional distortions are not largely the result of happenstance or serendipity, but of considered federal court decision-making, which for decades has concentrated and centralized, even during occasional intervals of conservative leadership. Yet it is too facile to blame everything upon the federal judiciary, for our state judicial institutions have also been complicit—largely silent and acquiescent in response to every enlargement of federal jurisdiction. This, despite the fact that *we* who are here this morning are the principal *custodians* of the state constitutions that have become so attenuated and diminished. *We* are the guarantors and protectors of these charters and yet have largely been missing-in-action as this centralization has systematically taken place. While the reforming New York and California courts of an earlier era acted largely in *concert* with the federal judiciary of the day, state

courts today instead largely stand in a contrarian position to longstanding and continuing constitutional trends. But, at least for the present *moment*, perhaps for a few passing terms of the High Court, ours may be of a somewhat less contrarian position. For there are glimmerings of a revitalized federalist sentiment coming, not only from thoughtful federal jurists such as Judge Sutton, but from within the U.S. Supreme Court itself, reflected in such decisions as *Dobbs v. Jackson Women's Health Organization*,[5] *Rucho v. Common Cause*,[6] and (at least arguably) *Moore v. Harper*.[7] There are influential jurists and courts which may be willing to pay heed to those who speak for our fifty state constitutions.

III. Revitalizing State Constitutions

Let me briefly offer an illustrative list of ten *unilateral* actions that might conceivably be undertaken by an energetic state judiciary committed to reinvigorating its own state constitution. In these ways, and doubtlessly in others, you might in a sense *speak* to the federal judiciary and to the Supreme Court:

1. Encourage and be receptive to certified questions from federal courts, and be prepared to respond to these in a timely manner so as not to delay the underlying federal litigation. Affirmatively responding to a certified question is a show of respect for state laws and the state constitution while reflecting judicial comity with the federal judiciary. To offer a thorough and timely response is to recognize that state law issues are better resolved by state courts than by federal courts. It is to ensure that the people of the state will have controversies arising under their own laws and constitution resolved by those whose principal responsibility it is to do so, and whose interpretations will presumably be most authoritative and well-grounded. By rejecting a certified question, you cede responsibility for the interpretation of your own law and constitution to the federal judiciary. You also fail to reciprocate the comity shown by the federal court.

2. Ensure that your state bar examination reasonably inquires into state law and constitutional matters. To do so will alert those undergoing this examination that they must include such issues in their examination preparations, and that not all belongs to the realm of the federal. It may also alert law schools that they must better prepare their students for legal practice within

[5] 597 U.S. 215 (2022).
[6] 588 U.S. 684 (2019).
[7] 600 U.S. 1 (2023).

the judicial system responsible for resolving more than 95% of all day-to-day litigation.[8] I have been told that the law school at Florida State University has just such courses. Why would you not wish to communicate to new members of your state bar a more balanced sense of professional emphasis? For similar reasons, I share Florida's lack of enthusiasm for the Uniform Bar Examination and its successor, the NexGen Bar Examination, which each disregard matters of state law.

3. Consider requiring separate filings on state-constitutional issues and federal-constitutional issues, for several reasons: to encourage argumentative clarity, to ensure that relevant arguments on each are not submitted peremptorily or as mere after-thought, and to emphasize that similar or even identical counterpart federal/state clauses are not necessarily redundancies. Relatedly, why not, as several states currently do, resolve state constitutional issues *prior* to federal constitutional issues so that the independent character of the state analysis can be further clarified and emphasized? Moreover, of course, courts of discretionary jurisdiction could also choose on appropriate occasions to grant leave *only* on the state constitutional issues.

4. When your court addresses both federal and state constitutional issues, ensure that it is made *clear* and *explicit* where you believe you have "adequately and independently" resolved an issue on state constitutional grounds so that your decision will be rendered less vulnerable to reversal by the Supreme Court. Of course, you must always adhere to *minimum* federal constitutional standards, but there will be occasions on which you are sufficiently reliant upon your state constitution to be reasonably insulated from federal review.

5. In addressing criminal appeals in which you anticipate non-trivial habeas filings, undertake even in your boilerplate orders of denial to explain in at least some minimum detail why the appeal has been denied. Do not assume that what was obvious to your court will be equally obvious to the federal court. Also, take care to respond to *every* prong of a multi-pronged criminal appeal in order to avert both unwarranted habeas review as well as de novo review of the missing appellate issue.

6. Avoid lock-stepping state and federal constitutional provisions. There is no reason for you to bind forever your interpretations of your state

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[8] COURT STATISTICS PROJECT, *Federal and State Caseload Trends*, https://www.courtstatistics.org/court-statistics/state-versus-federal-caseloads (last visited Apr. 5, 2024) ("Between 2012 and 2022, an average of 98.5% of U.S. court cases were filed in state courts. Only 1.5% were filed in federal courts.").

constitution to federal court interpretations of a distinctive constitution. Your constitution is an *independent* source of law, with its own precedents, context, and history, and you are the *independent* guarantors of that constitution. To lock-step is effectively to delegate interpretive responsibility over *your* constitution to non-state courts. Further, it suggests, warrantedly or not, that you have chosen to forego the kind of reasoned and thorough exercise of judgment you *owe* to your own constitution, and that message will be understood clearly by your own bench and bar. I am aware that there is some lock-stepping *required* by the Florida Constitution,[9] and of course this must be respected by your courts. But it is nonetheless an unusual command that the authority of *Florida* judges to say what the Florida Constitution means should expressly be delegated to *non*-Florida judges—*not* by the operation of the Supremacy Clause of the federal Constitution but by the operation of the state constitution. As one scholar has remarked, it is to impose upon your own courts a "constitutional voyage without direction."

7. Understand clearly where there *is*, and where there is *not*, an obligation of deference to the Supreme Court and other federal tribunals. For instance, where Florida courts address questions of jurisprudence, rules of interpretation, professional and ethical standards of conduct, and the architecture of state government, including its separated powers, checks and balances, doctrines of delegation, rules of administrative law, and "political questions," there might well be *no* obligation to abide by federal determinations, including those of the Supreme Court. The same might also be true of defining secondary constitutional terms and standards such as "reasonableness," "rational basis," "clear error," and "totality of the circumstances," as to which your own courts might well retain considerable if not plenary authority and discretion. And, of course, many state constitutional provisions are spelled out in considerably greater detail than federal counterpart provisions and may also be largely subject to your own best legal judgment. You are also typically free to depart from federal constitutional interpretations of lower federal courts, although, of course, you may find these to be persuasive. On one occasion that I recall, the Michigan Supreme Court explicitly disagreed with the Sixth Circuit concerning the meaning of the "fair cross-section" requirement of the Sixth Amendment; we issued a conflicting opinion and were ultimately upheld by the Supreme Court.[10]

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[9] FLA. CONST. art. I, § 17 (excessive punishments); *cf.*, art. I, § 12 (searches and seizures).

[10] Berghuis v. Smith, 559 U.S. 314 (2010) (affirming People v. Smith, 463 Mich. 199 (2000)).

8. Judge Sutton has spoken thoughtfully in his encouragement of state courts and justices, on appropriate occasions, to consider writing separate opinions raising concerns about the application of Supreme Court federal constitutional interpretations to state counterpart provisions.[11] *Not* to reject or repudiate these interpretations—for they must be honored under the Supremacy Clause—but to argue respectfully and thoughtfully that a *better* state constitutional rule, and hence a *better* resolution of the underlying case, might have been possible and appropriate, but had been foreclosed by decisions of the Supreme Court. In other words, state judges might point out that there were reasonable *alternative* interpretations of their state constitutions that were in better accord with their language, context, history, and purpose.

Why might such an argument be offered? Perhaps in order to make *thinkable* what today is largely *unthinkable*: that states and their constitutions can be trusted to render reasonable constitutional judgments. Or at least to make *thinkable* that the most *expansive* understandings of incorporation—that every jot-by-jot and bag-and-baggage detail of an incorporated right must apply indistinguishably within each of the fifty states—could be relaxed to allow some greater measure of state court judgment and flexibility in the interpretation of its own constitution. And thereby to reinitiate what Justice Brennan once described as the "conversation" he sought between the Supreme Court and state courts.

Consider, for example, the national conversation—and debate—that might be encouraged if multiple state courts were to urge upon the Court greater deference to state constitutions and illustrate how better results might reasonably have been obtained under those constitutions. As Justice Brennan further observed, the most dynamic era of incorporation of the Bill of Rights occurred within merely a seven-year period from 1962 to 1969, during which time the Supreme Court issued nine incorporating opinions.[12] Is it, and should it be, forever inconceivable that a similarly dynamic era of judicial counter-reform— committed to the *restoration* of judicial federalism—might someday be initiated? State courts, in other words, could offer the Court at least some *glimpse* of what such an era might look like through an accumulation of opinions in which they spoke frankly to the Court of the character, the attributes, and the potential of their state constitutions, reminding the Justices of their historical contributions and why "we the people" of Florida

[11] Oral presentation by Judge Sutton, Federalist Society conference, Park City, Utah (July 2022).

[12] William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 493 (1977).

might possess distinctive attitudes from those of New Jersey or California on significant issues of law as to which a single and uniform national policy might not be indispensable. Has any current Justice ever served as a member of a state court or as a custodian of a state constitution? Might not some tempering of the Supreme Court's national influence also yield some tempering of the increasingly harsh and divisive Senate judicial confirmation process? And indeed, might it not yield some tempering of the growing political polarization of red and blue states and their citizenries?

9. Engage in outreach efforts on behalf of state constitutionalism, inviting relevant arguments to be made by the bench and bar and seeking out the perspectives of amici and scholars for the same purpose. On the basis of this same outreach rationale, you might also consider bench-bar conferences, CLE and CJE programs (such as this one), and a variety of other means by which to communicate your court's interest in uplifting its state constitution. Perhaps too your state might see fit to render more accessible, and better organized, the debates, legislative histories, and leading decisions giving meaning to your state constitution.

10. Finally, do not overlook state procedural, evidentiary, administrative, and professional and ethical reforms and initiatives that may be suggested by, or otherwise be compatible with, your state constitutions. These might include, for example, parallel but separate briefing procedures for federal and state constitutional arguments as mentioned earlier; reforms to assist juries in their truth-seeking responsibilities; ensuring effective post-appellate opportunities for raising claims of actual innocence; and rules generally to expedite the litigative and appellate processes. State courts are largely sovereign in these and other of their supervising and superintending responsibilities.

IV. First Principles of State Constitutionalism

There are also fundamental discussions of first principles that must accompany any strengthening of our state constitutions. Most importantly, in my judgment, how *do* we, and how do we *not*, give meaning to these documents? My own simple response is that we do so as we have *always* given proper meaning to such documents: by the responsible and conscientious application of our "judicial power," typically the *only* power conferred upon the judiciary by our federal and state constitutions. This power is only rarely defined within these documents except for the occasional state-by-state addition to, or subtraction from, the power, such as Florida's lock-stepping provisions or Michigan's grant of authority to its state supreme court to issue advisory

opinions concerning the constitutionality of newly-enacted statutes prior to their effective date at the request of the governor or legislature. Apart, however, from such individual variations, the "judicial power" customarily encompasses the power to resolve actual cases and controversies within the court's jurisdiction; the power of judicial review; the power to determine and to administer the procedures of the judicial process; and the power to punish contempt of court. Moreover, the judiciary exercises these authorities within the constraints of a system of separated powers and checks and balances. And thus, in accordance with *Marbury v. Madison*, it is empowered only to pronounce what the law *is* and not what it *ought* to be, for the latter authority belongs to a coordinate branch.[13]

In other words, courts assess by application of the "equal rule of law," and through reasonable rules of interpretation, what the law and constitution *mean*. For, as Justice Frankfurter once summarized, the "highest example of judicial duty is to subordinate one's *personal* will and one's *private* views to the law."[14] We do this, of course, by examining the language and the context of the law; its structure and organization; its manifest purposes; its relationship with other provisions of the law and with related laws; its grammar, punctuation, and syntax; its precedents; and its proper legislative history. We thereby examine the *law* and not our *consciences*. And we do so because we have each taken an *oath* to "this" constitution, as most state preambles provide; because we have each taken an oath to a constitution ratified in the name of "we the people" and their posterity and not to a personal constitution; because we each act within the confines of a system of separated and checked powers; and because there is no alternative means by which to give faithful meaning to such a document of law than by respecting and deferring to its language. All so that the people themselves may look to the words of their own constitution and have some reasonable comprehension of their rights and responsibilities. It is not a *mechanical* process of interpretation—and good judgment and experience are best required—but it is also not a *free-for-all*. And if it is the equal rule of law we *seek*, and the arbitrary rule of judges we seek to *avoid*, we must interpret our state constitutions in accord with such principles and in conformity with the judicial power. We are each the

[13] Marbury v. Madison, 5 U.S. 137 (1803).

[14] Jeffrey S. Sutton, *Remembering Justice Scalia*, 69 STAN. L. REV. 1595, 1599 (2017) (quoting Tom C. Clark, *Mr. Justice Frankfurter: "A Heritage for All Who Love the Law,"* 51 A.B.A. J. 330, 332 (1965)).

custodians and guardians of our state constitution, but not its authors or drafters.

Why do I set forth these Judiciary 101 observations? You are experienced and accomplished jurists and all of you are well aware of your own authority and of the limitations upon this authority. I do so only because there are voices—often quite thoughtful and committed *federalist* voices—which differ in some respects and whose views concerning the judicial power must also be considered respectfully in the construction of state constitutions.

Some contend, for example, that the state constitution differs from the federal constitution in determinative ways. The state constitution is typically a lengthier document; it customarily contains more detailed and elaborate provisions concerning such matters as schools, libraries, roads, taxation, zoning, and municipal authority; it tends to be easier to amend, both by the legislature and sometimes directly by the people themselves; it is a charter of a general and not a limited grant of power; its legislative history is often more obscure and difficult to identify; it may tend to read in a less elevated "statutory" manner than in a more elevated "constitutional" manner; and, of course, it is subject to interpretation by judges whose selection, retention, and tenure are very different from those of judges who principally interpret the federal Constitution.

I would emphasize instead that what our two constitutions possess in *common* is the traditional and historic judicial power each exclusively confers upon the judge as well as the overall "separation of powers" context within which that power must be carried out. And thus, to me, it matters not that you or I have been elected or appointed; that our term is for a period of years or for a lifetime; or that there are myriad substantive distinctions between our two constitutions. For the positive law set forth by these companion charters of representative self-government must, I believe, be accorded meaning by the same *rules* and *tools* of interpretation, by the exercise of the same "judicial power" that has always defined our constitutional systems.

And therefore I am in respectful disagreement with those who assert, for instance, that state constitutions "better serve to vindicate" individual rights because state judges and justices possess greater "flexibility" to interpret the law in accordance with their own state's distinctive "culture, geography, and history."[15] To me, if state constitutions, in fact, reflect more diversely upon such matters—as indeed, they all certainly *do*—it is because their *framers* have

[15] SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note 1, at 17.

taken these differences into account in the formulation of these constitutions. Not because of some greater or lesser flexibility belonging to their *interpreters*. In my quarter of a century on the appellate bench of Michigan, all but four of those years on its highest court, I never once viewed myself as possessing greater or narrower interpretive *discretion* than my federal trial or circuit court counterparts as an arbiter of our *state* constitution, but only as possessing a greater *obligation* to get the law right as the *final* arbiter of that constitution. And I possessed no greater interpretive flexibility in pronouncing the law in Hillsdale than I did in Detroit, Holland, or Sault Ste. Marie, with each of *their* very distinctive and defining "cultures, geographies, and histories." As to each, I possessed only the "judicial power," awesome as it is, in the vindication of rights and the construction of laws. And as to each, I was equally *constrained* by the limits of that same power.

V. HOLY GRAIL CONSTITUTIONALISM

But greater flexibility of interpretive authority is not all that should be avoided in the course of revitalizing our state constitutions. What should also be avoided is the temptation to discover in these constitutions dubious new rights and responsibilities by the application of questionable theories of contemporary federal *constitutionalism*. To succumb, in other words, to what the late Professor David Currie of the University of Chicago Law School once characterized as the "incessant quest for the judicial holy grail," which he defined as the "discovery of a clause that lets [judges] strike down any law [they] do not like."[16] And as a result, to expand upon the judicial role and to enlarge the judicial power at the expense of the more accountable and representative branches of state government. To accord greater authority to public officials who have been appointed at the expense of public officials who have been elected by the people. To strengthen the branch comprised exclusively of lawyers and elites at the expense of those branches closer to the people. In practical terms as well, to pursue this holy grail would also confer upon the state judiciary a "second bite of the apple"—after the first bite by the federal court—to strike down state laws and public policies duly enacted by the people's representatives and which breached no genuine federal or state constitutional prohibition.

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[16] DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: 1789-1888, 346-47 (1985).

What are some of these holy grail provisions and theories? You are cognizant of most of these, but fertile academic minds continue to labor in the pages of our legal journals and amicus briefs in pursuit of ever more innovative and creative theories by which *democratic* judgments can be supplanted and replaced by the non-majoritarian judgments of judicial and academic elites. These include the supposed constitutional right of privacy; arbitrarily determined new protected classes under the Equal Protection Clause; the Ninth Amendment; fundamental rights conceptions of the Fourteenth Amendment; substantive due process; rational basis analysis; the Privileges or Immunities Clause of the Fourteenth Amendment; the relaxation of state-action requirements of the Fourteenth Amendment; the adoption of so-called positive constitutional rights; and judicial determinations of what constitute "disproportionate" criminal sentences under the Eighth Amendment.

Indeed, if you promise not to reveal this to anyone, I will share with you what is truly the most expansive, and overlooked, of all holy grail provisions, in both our federal and state constitutions. It is called the Preamble. The Florida Preamble, for instance, speaks of "securing the benefits of liberty," "perfecting government," and guaranteeing "equal political rights." What conceivable judicial policy preference could not comfortably fit within these terms if they were to be given substantive meaning?

These holy grail provisions tend to be notable mostly for their broad, vague, and standardless language, typically applied in circumstances far removed from their historical context and purpose, and each with considerable potential for furthering the interests of those who would impose their own public policy agendas upon the people without the inconvenience of actually having to *persuade* democratic and representative majorities. These provisions tend also to possess in common the potential for the perpetual judicial "discovery" of new rights that rely *heavily* upon the consciences and inclinations of the judge and only *lightly* upon the intentions and purposes of the constitutional framers. Such provisions tend to encourage what is effectively the "rule of judges," rather than the "rule of law," a disembodied sense of "justice" rather than "justice under law." Often, a holy grail provision can be identified, as with the Ninth Amendment, by the sudden discovery—centuries after its drafting—of its revolutionary potential as the source of alleged new constitutional rights and entitlements. At other times, as with the right of privacy, it can be identified by its putative derivation from *multiple* constitutional provisions—the alleged constitutional right to contraception was discovered within the alleged constitutional right of privacy on the basis of

eight separate constitutional provisions in the Supreme Court's *Griswold* decision.[17] Thus, the holy grail provision may be found *anywhere* or *everywhere* within the Constitution, but, properly understood, it may also be found *nowhere* within it. As Judge Robert Bork once remarked, these provisions typically "specify no particular freedom, but merely assure us, in sonorous phrases, that they, the judges, will know what freedoms are required when the time comes."[18] If one judge, for example, can discern in the "right of privacy" abortion, contraception, and euthanasia rights, another can just as easily discern parental, non-vaccination, and home-schooling rights.[19]

Take a closer look, for example, at the Privileges or Immunities Clause of the Fourteenth Amendment that has now lain dormant for 150 years. It is emblematic of what is at stake in holy grail constitutionalism. The clause *did* once have real meaning—likely, in my judgment, conferring equal state rights upon newly-emancipated slaves after the Civil War. The new rights of the emancipated were defined by the existing rights enjoyed by the non-emancipated, largely the white citizenry, and this assemblage of rights differed on a state-by-state basis. Although most contemporary observers believe, as I do, that the Supreme Court subsequently erred in its reading of the new constitutional provision,[20] there is utterly no consensus today on what the clause genuinely signifies. Nonetheless, efforts are continually undertaken to invest the provision with new definition and force, indeed almost *any* definition and almost *any* force. Diverse scholars and academics, for example, have

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[17] Griswold v. Connecticut, 381 U.S. 479 (1965).

[18] ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 118 (1990).

[19] When I write of the constitutional holy grail, I am invariably reminded of the following exchange I witnessed some 45 years ago as Counsel for the Senate Judiciary Committee. President Jimmy Carter's appellate judicial nominee was being probed by one Senator at his confirmation hearing, "Sir, if a decision in a particular case was required by law or statute and yet that offended your conscience, what would you do in that situation?" The nominee paused briefly and then answered, "Senator, I have to be honest with you. If I was faced with a situation like that and it ran against my conscience, I would have to follow my conscience." The nominee proceeded to explain the standards by which he would replace the law of the land with his conscience. "Senator, I was born and raised in this country and I believe that I am steeped in its traditions, its beliefs, and its philosophies, and if I felt strongly in a situation like that, I feel that it would be the product of my very being and upbringing. I would have to follow my conscience." To my mind, however, for a judge to render decisions according to his or her conscience, however elevated and refined that conscience, rather than in accord with the law, is *itself* unconscionable. Nonetheless, the judicial nominee was very soon thereafter confirmed.

[20] The Slaughterhouse Cases, 83 U.S. 36 (1873).

purported to discern in the clause the following new constitutional rights—all, of course, to be determined by courts "when the time comes":

- the guarantee of "positive rights to public benefits"
- "minimum welfare standards"
- "welfare state rights"
- the "obligation of equal treatment"
- "educational equality"
- "redistributive mutual aid policies"
- "natural rights"
- "overcoming the limitations of the 'state action' requirement"
- "common-law rights"
- "sexual rights"
- "healthcare rights"
- "distinctly personal rights"
- the ability to "respond to economic disparity"
- "natural and inalienable rights"
- "fundamental rights"
- "union rights"
- "equal standing rights in the national political community"
- the right to redress "violations of customary international law"
- "rights to opportunities to make the most of our lives"
- "silent and unenumerated rights"
- "privacy rights"
- "economic rights"
- "rights of felons"
- "fundamental rights contained in the Northwest Ordinance"
- "private law rights"
- "the rights of citizens of free governments"
- "all of the rights in the Bill of Rights"
- "unincorporated rights"
- "unenumerated fundamental rights"
- "international human rights"
- "rights stemming from our obligations to our communities"
- "rights drawn from our affirmative entitlements"
- "social and economic entitlements necessary to make national citizenship meaningful"

To name a few. Perhaps it is not surprising that Judge Bork described the Privileges or Immunities Clause as an "inkblot," a "Rorschach test," and

"inscrutable,"[21] while Justice Antonin Scalia characterized it as the "darling of the professoriate,"[22] and other legal critics have labeled it "confused, utterly uncertain, virtually boundless, shadowy, a blank check, murky, mysterious, and standardless."[23] But to those in search of the constitutional holy grail, the clause's utter malleability and pliability and sheer uncertainty are its *strengths*. These promise to assist in the continued elevation of government by judiciary and in the continued evisceration of the republican form of government guaranteed by Article IV of our Constitution.

In summary, I do not consider the pursuit of the constitutional holy grail to suggest the *promise* of the state constitution movement, but rather its *ensnarement* and eventual *demise*. It cannot merely be the elevation of state *courts* that federalists pursue, or even the elevation of state *constitutions*, but the elevation of state *constitutionalism* as well. Thus, *reasonable* and *faithful* and *disciplined* understandings of these documents are required, not application of the worst and borrowed *deformations* of federal constitutionalism—the very deformations that have already rendered federal courts the primary effective expositors of state law and constitutions. If it is among the purposes of a revitalized judicial federalism to reset the balance of authority between federal and state courts—and between federal and state constitutions—and to enhance opportunities for the people of our fifty states to govern better their own affairs and to determine more effectively their own destinies, it is difficult to see how mimicry by state judiciaries of aggressive and concocted federal theories of the judicial power will further these ends.

For these reasons, I do not join in the celebration of such assertions of state constitutionalism as that which resulted in striking down the licensure of eyebrow threaders in Texas on the grounds of so-called substantive due process and the legislative second-guessing entailed in rational basis review.[24] Although my libertarian instincts are buoyed by one less unnecessary regulation, my constitutional instincts are not. And I do not celebrate either the decision of a court of my own state effectively nullifying a longstanding anti-

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[21] BORK, *supra* note 18, at 166. *See* Stephen Markman, *The "Judicial Holy Grail": Why the Supreme Court Should Not Revisit the Privileges or Immunities Clause,* THE HERITAGE FOUNDATION (May 31, 2016), https://www.heritage.org/report/the-judicial-holy-grail-why-the-supreme-court-should-not-revisit-the-privileges-or.

[22] Transcript of Oral Argument at 7, McDonald v. City of Chi., 561 U.S. 742 (2010) (No. 08-1521).

[23] *See* Markman, *supra* note 21.

[24] Patel v. Tex. Dep't of Licensing, 469 S.W.3d 69 (Tex. 2015).

abortion law two years ago under the same state constitutional guise.[25] For decisions of these sorts typically and necessarily lack any genuinely *independent* applications of their state constitution for the obvious reason that there is probably not a single one of these constitutions with due process clauses whose language or histories even remotely suggest any substantive application, much less any coherent standard for this application. Rather, such decisions merely afford state courts a pretext to strike down disfavored legislative enactments by the people's elected representatives on the basis of a federal constitutional theory itself devoid of legitimate foundation. Moreover, if there *has been* any analysis, it is likely to be entirely derivative of the federal analysis. The best contemporary state constitutional decisions—and there *are* a growing number of these (many addressed thoughtfully in Judge Sutton's two books and in the Federalist Society's *State Court Docket Watch* series)[26]—are free from reliance upon federal holy grail theories and instead rely upon close analysis of the language and history of the state constitution.

VI. MISCELLANEOUS OBSERVATIONS

A. State Diversity

Although, as I have remarked, I believe it is inapt in matters of constitutional interpretation to exercise the judicial power differently on account of state "cultures, geographies, and histories," there are many things nonetheless that make Florida *Florida* and Michigan *Michigan* that are *properly* taken into judicial account: the distinctive language and focus of their constitutions; the distinctive laws and administrative practices of their legislative and executive branches; and their distinctive *common laws*. Indeed, the historical contributions of our fifty state common laws (Louisiana partly excepted) have often been overlooked in the same way as have our fifty state constitutions, for they largely address what some dismiss as the ordinary, the mundane, and the pedestrian. Yet these fifty bodies of "judge-discovered-and-articulated" law have largely evolved over the years and decades (and even centuries) in accordance with the longstanding customs and practices of the states and their people, on the basis of "culture, geography, and history." For example, the common law of shoreline property rights and beach-walking has been a matter of

[25] Planned Parenthood of Michigan v. Att'y Gen. of Michigan, No 22-000044-MM (Mich. Ct. of Claims Sept. 7, 2022).

[26] *See generally State Court Docket Watch Archive*, FEDERALIST SOC'Y (last visited Apr. 5, 2024), https://fedsoc.org/scdw/archive.

attention over the years in Michigan, while undoubtedly less so in Nebraska, whose common law of agricultural nuisance may well be more developed. Both our fifty state constitutions and our fifty state common laws are jewels of our system of judicial federalism, and yet both have sometimes been the subject of neglect and inattention by state judiciaries.

More careful attention should also be given to the sometimes-casual adoption by state courts of American Law Institute restatements in pursuit of a *common* common law. Increasingly, such restatements have tended to reflect the *prescriptivism* of the legal professoriate rather than the *descriptivism* of real-world customs and practices. Justice Scalia has described such restatements as reflecting mostly the ALI's own *aspirations* for what the common law *ought* to be,[27] while Justice Thomas has succinctly rejected a Restatement offered to the Court because it "lacks support in the law."[28] These efforts to nationalize our various and diverse common laws are redolent of efforts during the 1940s and 1950s to draft a model state constitution. Such efforts eventually faltered on the grounds that there was no *single* constitutional model appropriate for *all* of our states.

B. Justice Brennan

I am one who is underwhelmed by the "judicial federalism" of Justice William Brennan, which gained traction after being propounded in a *Harvard Law Review* article in 1977, and which still has its enthusiasts. His theory was summarized by the law review itself as follows:

> During the 1960s, as the Supreme Court expanded the measure of federal protection for individual rights, there was little need for litigants to rest their claims on state constitutional grounds. [But] Justice Brennan argues that the trend of recent Supreme Court civil liberties decisions should prompt a reappraisal of that strategy. He notes that numerous state courts have already extended to their citizens by state constitutions *greater* protections than the Supreme Court has held are applicable under the *federal* Bill of Rights. He discusses, and applauds, the implications of this new state court activism for the structure of American federalism.[29]

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[27] Kansas v. Nebraska, 574 U.S. 445, 475-76 (2015) (Scalia, J., concurring in part and dissenting in part).

[28] *Id.* at 483 (Thomas, J., concurring in part and dissenting in part).

[29] William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

To put it in somewhat different terms, after more than a decade of Justice Brennan's philosophy of "selective incorporation" in the ascendancy on the Warren Court—imposing upon each of the fifty states an obligation of exact adherence to the details of his Bill of Rights opinions—this considerably slowed under the Burger Court, and Justice Brennan found himself increasingly in *dissent* in similar decisions. As a result, he chose to remind state judges that his more recent opinions, regrettably for him now only *dissents*, could nonetheless be elevated as *state* constitutional law because there was nothing to prevent state constitutional provisions from being interpreted *more* broadly than their federal counterparts; they just could not be interpreted *less* broadly. While doubtlessly a correct understanding of the "supreme law of the land," the "conversation" Brennan sought to initiate with state judges was rarely embraced because few jurists of a conservative or even a moderate perspective were enticed to *expand* upon his already far-reaching constitutional understandings with new understandings of their own constitutions that were even *further* afield from what they viewed as reasonable interpretations. Even Justice Fortas decried Brennan's approach to incorporation as "slavish,"[30] while Justice Harlan took issue with its "jot-by-jot" obliteration of traditional federalist values.[31] Justice Brennan offered a one-way-only constitutional federalism, deeply unattractive to state jurists possessing a more constrained understanding of both the federal and state constitutions. To many, he was less a pioneer of state constitutionalism—as he has sometimes been portrayed—than a principal architect of its modern decline. Where state constitutions once mattered greatly in governing the affairs of the American people, they matter considerably less today, in large part because of his theory of selective incorporation.

C. The Michigan Supreme Court

Although my own state has recently succumbed to substantive due process in nullifying Michigan's abortion law, there have also been a number of better-grounded displays of state constitutionalism by the Michigan Supreme Court in recent years. The court, for example, relied upon the language of the state constitution's express separation of powers clause to strike down a broad emergency delegation of legislative authority to the governor during

[30] Bloom v. Illinois, 391 U.S. 194, 214 (1968).

[31] Duncan v. Louisiana, 393 U.S. 194, 181 (1968).

the Covid-19 pandemic.[32] The court relied upon the language of the state constitution's takings clause to hold that state eminent domain must pertain to a public *use*, such as the construction of a road or library, and not to a mere public *purpose*,[33] the latter standard adopted by the U.S. Supreme Court.[34] The court relied upon the language of the state constitution's taxation provisions to strike down a progressive tax on pensions.[35] And the court held that a foreclosure sale constituted a taking under the state constitution to the extent that a county retained any surplus beyond the actual tax liability of the property owner, a decision later adopted by the U.S. Supreme Court.[36] Each of these decisions relied upon ordinary and straightforward understandings of long-established state constitutional provisions, and each, in my judgment, illustrated the potential of reliance upon state constitutionalism.

D. The Appeal of State Constitutionalism

While the state constitution movement has been most enthusiastically embraced by conservative state jurists, there is no reason why it should not also hold appeal for more liberal state jurists. Not merely because there remains the undisputed Brennanesque potential for defining state constitutional provisions more broadly than their federal counterparts, but also because of what some may view as their more democratizing aspects. These encompass, in particular, the "direct democracy" institutions of the initiative and referendum processes for enacting state constitutional change—evidenced in recent years in such areas as electoral redistricting, abortion, taxation, and drug legalization. Furthermore, opportunities afforded under state constitutions to address, and to experiment with, everyday matters of local and municipal governance may also hold appeal across the philosophical spectrum. In short, the revitalization of state constitutions offers no guarantee of conservative policy outcomes, but only that state judiciaries and state constitutions will gain in influence and come increasingly to reflect the diverse and local perspectives that characterize the fifty states and their people. It is not the pursuit of a conservative, liberal, libertarian, or progressive constitution

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[32] In re Certified Questions, 505 Mich. 332 (2020); *see also* Stephen Markman, *Remarks on* In re Certified Questions, 15 NYU J.L. & LIBERTY 587 (2022).

[33] Wayne County v. Hathcock, 684 N.W.2d 765 (2004).

[34] Kelo v. City of New London, 545 U.S. 469 (2005).

[35] In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38, 489 Mich. 954 (2011).

[36] Rafaeli v. Oakland County, 505 Mich. 429 (2020). *See* Tyler v. Hennepin County, 598 U.S. 631 (2023).

that most animates the state constitution movement, but the prospect of a restored constitutional architecture that better reflects the intentions of our federal and state framers. There is no reason that the revitalization of our fifty state constitutions should be viewed exclusively as a conservative undertaking; rather, it is the restoration and elevation of the values of federalism and decentralization that are so desperately needed today by a nation in search of consensus, tranquility, and union.

As the custodians of your state constitutions, you must engage in this revitalization in a positive spirit. Yes, these constitutions may sometimes encompass trivialities such as specifying the time and place for the sale of alcoholic beverages or the proper use of overdue library fines. Yes, these constitutions may sometimes encompass idiosyncrasies such as identifying the location of a new state capitol with a surveyor's precision or providing the contours of a ski trail. Yes, these constitutions may sometimes encompass the obscurities of long-forgotten reforms such as those reflected in some of the 800 or so amendments to the Alabama Constitution. Yes, these constitutions may sometimes encompass the detail and specificity of a supplemental or continuing appropriations bill. And yes, these constitutions may sometimes lack the enspiriting language or the rhetorical grace of the federal Constitution. However, as a result of what these constitutions *do* encompass—what you must not forget—they have served well their states, their people, and their nation. They have influenced our federal Constitution in important ways; they have reflected faithfully the interests, the concerns, and the values of our states; and they have governed as we have gained our prosperity, enjoyed our freedoms, and experienced the growth of our institutions of stable self-government. Moreover, despite contemporary challenges, these constitutions have served also to preserve the integrity of our federalist system and the rich variety of American statehood.

When I think of Florida from 1500 miles distant, I think of oranges, amusement parks, space flights, pythons in the Everglades, ocean beaches, hurricanes, tourism, retirees, the panhandle, cigar-making, Cuban refugees, the Fountain of Youth, college football, and hanging chads, and I also think of Orlando, Miami, Naples, and Tallahassee. Is it *possible* that such a state might have developed its own norms and standards and interests and politics over time that may implicate its own constitution in distinctive ways? Of course it is, and each of you should be proud to have been afforded the opportunity and responsibility to speak on behalf of that constitution. It is healthy that we are *united* by the common values of our federal Constitution,

but it is also healthy and liberating that we are *differentiated* by the distinctive values of our state constitutions. For in part, our states are subordinate to the Union, and in other part, they are sovereign and responsible for governing their own affairs. Certainly, state identities no longer vary to the degree that they once did, but it is buoying nevertheless that they are not yet altogether identical or fungible.

E. A Critique of State Constitutionalism

Professor James Gardner, now of the SUNY at Buffalo Law School, has made an insightful critique of the *state* of state constitutionalism, which I quote here at some length:

> After reading dozens of state constitutional decisions, you have absolutely no sense of the history of the state constitution. You do not know the identity of the founders, their purposes in creating the constitution, or the specific events that may have shaped their thinking. You find nothing in the decisions indicating how the various provisions of the document fit together into a coherent whole, and if you do find anything at all it is a handful of quotations from *federal* cases discussing the *federal* Constitution. You are able to form no conception of the character or fundamental values of the people of the state and no idea how to mount an argument that certain things are more important to the people than others. If you have found state court decisions "departing from the federal approach to the corresponding federal provision," you have no idea why the courts departed from federal reasoning; at best, you are left with the vague impression that the courts simply thought the dissents in analogous federal cases more persuasive. But nothing in these state opinions gives you any idea of what you, as an *advocate*, could say to convince the state courts once again to reject the federal approach as a matter of state constitutional law. To treat [the state constitution] as an independent charter of sovereign government.
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> There is also the poverty of state constitutional discourse, by which I mean the lack of a language in which participants in the legal system can debate the meaning of the state constitution. Further, to the extent that such a state constitutional discourse exists, its terms and conventions are often borrowed wholesale from federal constitutional discourse, as though the language of federal constitutional law were some sort of *lingua franca* of constitutional argument generally . . . . By constitutional discourse, I mean a language and set of conventions that allows a participant in the legal system to make an intelligible claim about the meaning of the constitution . . . . When I refer to "federal constitutional discourse" and "state constitutional

> discourse," I refer to a language and set of conventions that allow participants in the legal system to make intelligible claims about the federal and state constitutions, respectively . . . . It is also the means by which participants in the legal system debate among themselves the meaning of the document.
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> Like Sherlock Holmes' dog that did not bark in the night, [state courts' silence on their Framers such as Adams, Jefferson, Madison & Mason] seems significant; the court treats the state constitution, when it treats it at all, as some kind of a-historical and author-less text. . . . Independence of [the state constitutions] is ultimately illusory . . . . One searches the state court's decisions in vain for any indication of differences; there is no discussion of the state's founding history, no mention of its constitution's framers, and no suggestion that the fundamental values or character of the people of the state differ in any way from those of the people of the nation] . They often seem to have done so in a way that is so idiosyncratically result-oriented as to provide little basis for further intelligible debate about the *nature* of the differences between the two documents that account for the court's departures from federal norms.[37]

In fairness, I note that Professor Gardner's observations were, in fact, written more than thirty years ago, but they remain fresh and relevant. Any revitalization of your state constitution will not occur overnight, but it will not occur at *all* if that constitution is not viewed by its state judiciary—its principal defender and expositor—as a truly independent and unique document, given proper meaning only by your most thoughtful and conscientious scholarship. These are not second-class constitutions, to be defined exclusively by comparison and contrast with the federal constitution, or whose provisions are *presumed* to be equivalent with those of the federal Constitution. Rather, the Florida Constitution has evolved over 180 years against the backdrop of everything that is, and everything that has ever been, *Florida*. It is altogether logical and expected that Floridians would have thought differently during that time about many constitutional matters and the necessities of responsible constitutional government. Floridians, as with the citizens of every other state, have always been entitled to dissent from national orthodoxies and to respond to common challenges with their own best exercise of judgment. Doubtless, too, perhaps there have been flukish circumstances, extraordinary

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[37] James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761 (1992), *available at* https://repository.law.umich.edu/mlr/vol90/iss4/3.

and charismatic political figures, and catastrophes and crises that have influenced the Florida Constitution in idiosyncratic ways. Or else for 101 other reasons, Floridians may simply have been outliers on assorted propositions of constitutional government, at odds with New York, New Hampshire, and New Mexico, and other states. None of these circumstances require either apology or justification, but are all due the fullest respect by the courts of your state.

F. State and Federal Judges

I remarked earlier that our federal and state constitutions are distinguished by the interpretations of judges who are *selected* and *retained* by very different methods. To some, these methods evidence—quite wrongly, in my judgment—that federal judges are more independent and state judges more compromised. I have interviewed and studied the background files of many hundreds of *federal* judicial candidates as coordinator of the judicial selection process for President Ronald Reagan. And I have also known many hundreds of *state* jurists with whom I have served during my 25 years on the appellate bench in Michigan. I have been blessed in both regards to have been familiar with jurists from *both* of our two judicial systems. And at least in my opinion, there is *no* discernible difference in their competency, their character, or their sense of professional and ethical obligation. Yes, state judges are sometimes faced with temptations that arise from campaigns and elections, but federal judges too are sometimes faced with temptations that arise from the *absence* of democratic accountability that arise from campaigns and elections. Yet each of these jurists, as I have witnessed them, do their best—as is their duty—to overcome these temptations by force of character and sense of obligation. Federal judges are most strengthened by their tenure and tradition, and state judges by their proximity and accountability to the people. They can each be proud of their respective legacies.

VII. CONCLUSION

In sum, we must enhance the role of state courts, elevate the influence of state constitutions, and strengthen the foundations of a responsible state constitutionalism. It is necessary that we do *all* of the above. This must be done by giving *faithful* meaning to our state constitutions, and by treating these as genuinely *independent* sources of constitutional authority, each with their own distinctive premises, purposes, provisions, and histories, and not as mere appendages of the federal Constitution. What is most necessary in achieving

this is not a more powerful state judiciary, mimicking the most dubious jurisprudential aspects of the federal judicial power at the expense of the representative processes of self-government, but a judicial system in which a better equilibrium is established between federal and the state authority. We must seek this balance in order to further the values, and to fulfill the promise, of judicial and constitutional federalism. Thank you very much.

Other Views:

- William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 493 (1977), *available at* https://www.jstor.org/stable/1340334.
- JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018), *available at* https://global.oup.com/academic/product/51-imperfect-solutions-9780190088811.
- Clint Bolick, *Principles of State Constitutional Interpretation*, 54 ARIZ. ST. L. J. 771 (2022), *available at* https://arizonastatelawjournal.org/wp-content/uploads/2022/02/01-Bolick.pdf.

RELIGIOUS LIBERTY APOLOGETICS*

THOMAS C. BERG**

Nick Reaves and Matthew Krauter have written a fine review, in this journal,[1] of my recent book *Religious Liberty in a Polarized Age*.[2] I am grateful for the care and perceptiveness they brought to my work. They endorse my thesis that in our polarized times. "religious liberty, properly understood, can protect diverse viewpoints, decrease fear and resentment, and channel societal conflicts into more productive discussions within our civic system."[3] They helpfully add multiple examples of how religious liberty promotes both the dignity of human persons and the good of society—supporting my arguments for strong religious liberty by drawing on their own work for Becket, the leading public-interest firm advocating religious liberty for all.[4]

Reaves and Krauter also make two criticisms of the book. Their observations deserve a response—not so much to defend the book as to clarify its assertions and discuss its overall aim. Part I of this article provides some clarifications prompted by Reaves and Krauter's criticisms; Part II, prompted by the title of their review, offers a metaphor for understanding the book's central aim. With some justification, Reaves and Krauter describe the approach of *Religious Liberty in a Polarized Age* as "pragmatism" in arguing for religious liberty. But the book could also be described as "apologetics" for religious liberty. Part II explores that metaphor.

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

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[1] Nick Reaves & Matthew Krauter, *Religious Liberty Pragmatism*, 24 FEDERALIST SOC'Y REV. 331 (2023), *available at* https://fedsoc.org/fedsoc-review/religious-liberty-pragmatism.

[2] THOMAS C. BERG, RELIGIOUS LIBERTY IN A POLARIZED AGE (2023) (hereinafter *RLPA*).

[3] Reaves & Krauter, *supra* note 1, at 331.

[4] *Id.* at 335-38.

I. RESPONSES AND CLARIFICATIONS

Reaves and Krauter commend the book, as noted above. But they also make two criticisms of it.

A. Religious Liberty's Value: Inherent or Instrumental?

Reaves and Krauter's first criticism is that my argument, "[a]t a conceptual level, . . . falls into the same trap [it] accuses liberals and conservatives of falling into: that of using religious liberty as a means to advance other ends."

> Berg criticizes both liberals and conservatives for treating religious liberty debates as a proxy war over other values. But one could argue that Berg himself does not seem to be interested in religious liberty for its own sake, but in religious liberty as a tool for mitigating polarization.[5]

I have two responses to the criticism. First, I affirm, and want to make clear, that religious liberty has inherent value (i.e., value "for its own sake"), not just instrumental value (i.e., value "as a tool for mitigating polarization"). My affirmation of religious liberty's inherent value may need emphasis because, admittedly, much of the book focuses on religious liberty's mitigation of polarization. But the book certainly makes arguments valuing religious liberty for its own sake. Chapter 3—the first of three central chapters with arguments for protecting religious liberty strongly—makes an extended case that religious commitment is especially important and pervasive in people's lives.[6] As a result, I argue, people suffer serious injuries when they are punished or penalized for following that commitment.

The book emphasizes protection of religious exercise as a key aspect of personal identity, acknowledging that religion is not the only such key aspect. But that emphasis still accords religious exercise inherent value. I also emphasize that religious commitment is distinctive among aspects of identity precisely because of its distinctive content. Since religious commitment concerns itself with ultimate reality—the source and ground of all things—it tends to "draw[ ] [various] aspects [of life] together into . . . an 'expansive web of belief and conduct.'"[7] Precisely because of this "comprehensiveness and connectedness," "frustration of one aspect of religious belief or practice can have

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[5] *Id.* at 344.

[6] *RLPA* at 89–111.

[7] *Id.* at 91 (quoting CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 61, 125–26 (2007)).

pervasive effects on a religious believer or institution."[8] Drawing in particular on the work of Kathleen Brady, I argue that

> Religion's concern with ultimate matters helps explain the variety of harms from denials of religious freedom . . . . Religion is a commitment to connect with the highest good or to conform to its commands. Therefore, someone who's prevented from following that commitment is distinctively prone to feel frustration or pain, or fear of eternal loss or punishment.[9]

True, the book emphasizes religious liberty as an instrument (or "tool") for reducing polarization. But it treats religious liberty's value as both inherent and instrumental, and in fact the two arguments work together: The instrumental value follows significantly from the inherent value. It's *because* religious faith is especially central and comprehensive for true believers that impositions on religious liberty are especially likely to inflame polarization (and reducing the impositions may calm it). In the American founding era, James Madison famously set forth the argument that suppression of religious liberty causes polarization and conflict: "Torrents of blood have been spilt in the old world," he wrote, "by the vain attempts of the secular arm, to extinguish Religious discord, by proscribing all difference in Religious opinion."[10] And as Douglas Laycock observes, the reason that "'governmental attempts to impose religious uniformity had been such bloody failures'" was precisely because they provoked resistance from people whose faith was central to their lives.[11] Thus, even my chapter that focuses on preventing polarization begins with a statement that connects that goal to the inherent value of religious freedom. I write, "the thesis of the previous chapter (people's religious commitments tend to be particularly important to them) is related to the thesis of this one (impositions on religious commitment tend particularly to provoke anger and fear)."[12]

That response leads to my second. The argument that religious liberty reduces polarization may be instrumental in nature, but it has a strong pedigree in American (and European) history and tradition. Madison's argument

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[8] *RLPA* at 92.

[9] *Id.* at 94 (citing KATHLEEN BRADY, THE DISTINCTIVENESS OF RELIGION IN AMERICAN LAW: RETHINKING RELIGION CLAUSE JURISPRUDENCE 91–92, 103 (2017)).

[10] James Madison, *Memorial and Remonstrance Against Religious Assessments*, at ¶ 11, *available at* https://founders.archives.gov/documents/Madison/01-08-02-0163.

[11] Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEG. ISS. 313, 317 (1996) (quoted in *RLPA* at 96–97).

[12] *RLPA* at 121.

about "torrents of blood"—a key text in my book[13]—appeared in his *Memorial and Remonstrance Against Religious Assessments*, a classic defense of religious liberty. He went on to say there that the "true remedy" for the potential harms of religious conflict is "equal and compleat liberty" of conscience—which doesn't eliminate conflict but "sufficiently destroys its malignant influence on the health and prosperity of the State."[14] Give wide room to religious belief and practice, Madison insisted, even when they provoke conflict, for suppressing them will make the conflict even worse. This was not the only argument of Madison or of religious liberty's other historic proponents. But it was important: it was a central reason why Americans enacted religious-liberty guarantees, and thus it is relevant to understanding the nature of those guarantees.

Reducing polarization differs from other, more partial ends for which religious-liberty claims have recently been wielded as "tools." I complain in the book that some groups use religious liberty solely as a device to make traditional social values dominant, and that others use it solely as a device to make progressive social values dominant or to upend the dominance of Christianity.[15] When employed for one of these ends, religious liberty doesn't protect everyone. Those with an underlying traditionalist-Christian project often oppose protection for Muslims and are reluctant to protect claims of progressive believers; those with a progressive project often refuse to protect traditionalists.[16]

In contrast, depolarization as a goal of religious liberty supports religious liberty's status as a fundamental right for all persons, not just a contingent right for some. In Madison's historic phrasing, it is "*equal and compleat* liberty"[17] that reduces cycles of fear, retaliation, and resentment. Indeed, only religious liberty for everyone can counter those vicious cycles. In Reformation-era Europe, the cycles of resentment and retaliation spiraled when rulers supported freedom only for the Catholic Church, or only for one or more Protestant churches and groups.[18] Today, the same thing happens when (many) progressives refuse to protect traditionalist Christians or Jews or when

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[13] *See especially id.* at 130–32.
[14] Memorial and Remonstrance, *supra* note 10, at ¶ 11.
[15] *RLPA* at 55–74.
[16] *Id.*
[17] Memorial and Remonstrance, *supra* note 10, at ¶ 11 (emphasis added).
[18] *RLPA* at 122–26.

(many) evangelical Christians refuse to protect Muslims. Today, as before, only equal (and strong) liberty stands a chance of reducing conflict.

In short, the use of religious liberty as an instrument of depolarization—unlike its use for other ends—not only finds solid root in our religious-liberty tradition but also fits with its status as a fundamental value protecting everyone.

B. Limits on Religious Liberty

Reaves and Krauter's second criticism builds on their first. They say that my focus on religious liberty as a means to depolarization leads me to accept limits on religious liberty that I shouldn't—limits that might not be justified by originalist or other principled accounts of religious liberty. For example, they say that when I argue "that protections for religious liberty must be balanced against competing interests," I rest that assertion not "on an underlying theoretical or constitutional principle, but on a pragmatic necessity to achieve depolarization."[19]

I take some of their points here. In discussing the boundaries of religious liberty in the book, I could have spent more time connecting those boundaries to historical principles.

But had I said more about historical principles at that particular juncture, it would have largely reinforced the proposition that religious liberty has boundaries. The key question in recent years has concerned whether the Free Exercise Clause protects religiously motivated conduct broadly against even generally applicable laws, or more narrowly against only laws that treat religion worse than other interests. One of the strongest originalist arguments for the broader protection, articulated by Michael McConnell,[20] rests on provisions in all of the post-independence state constitutions, adopted from 1776 through the 1780s. Those provisions said generally that one has the right to follow religious conscience unless doing so interferes with public "peace" or "safety" (or, in some provisions, unless it causes "licentiousness").[21] McConnell argues, convincingly, that such a standard implies that some generally applicable laws may still violate the right to exercise religion: even though generally applicable, they fail to be necessary to promote public peace

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[19] Reaves & Krauter, *supra* note 1, at 344.

[20] Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990).

[21] *Id.* at 1456–58 & n.242 (quoting provisions).

or safety.[22] Equally convincingly, he argues that the meaning of "free exercise" in the First Amendment likely was understood to reflect this consensus found in the state provisions (since there is little indication that the federal clause was seen as a departure from accepted principles).[23] The standard of "public peace or safety" admits of limits on religious liberty. In the American tradition, "an accountability principle exists right alongside religious liberty and autonomy principles."[24] Indeed, some have claimed that the standard of the founding-era state constitutions is significantly less protective than the "compelling governmental interest" standard that governed constitutional cases before *Employment Division v. Smith*[25] and that governs under federal and state religious-freedom statutes.[26]

I disagree with that last claim above: I believe that the boundaries on religious freedom drawn from original understanding and original purposes are capacious and protective. Indeed, my book defends the "compelling governmental interest" standard for free-exercise claims based on, among other things, an application of founding-era principles to modern circumstances. I argue that laws at the founding, in limiting free exercise by concerns of "peace and safety," focused largely on "direct invasions of others' body or property," many of which would count as compelling interests today—but that "[t]he modern regulatory state declares a far broader range of legal harms."[27] The compelling-interest standard, I argue, rejects some of these broader definitions of harm as insufficiently compelling and thereby ensures that the modern expansion of government power will not simply crowd out the free exercise of religion. So, I argue, by applying original principles in today's context, that protection should be strong.

Nevertheless, the original meaning and subsequent tradition clearly call for limits on religious freedom.

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[22] *Id.* at 1462 ("The 'peace and safety' clauses identify a narrower subcategory of the general laws; the free exercise provisions would exempt religiously motivated conduct from these laws up to the point that such conduct breached public peace or safety.").

[23] *Id.* at 1456 ("[I]t is reasonable to infer that those who drafted and adopted the first amendment assumed the term 'free exercise of religion' meant what it had meant in their states.").

[24] Lael Weinberger, *The Limits of Church Autonomy*, 98 NOTRE DAME L. REV. 1253, 1305 (2023); *see generally id.* at 1292–1305.

[25] 494 U.S. 872 (1990).

[26] *See, e.g.*, Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1.

[27] *RLPA* at 207; *see generally id.* at 204–05, 207–08.

For Reaves and Krauter, the conflict between nondiscrimination laws and religious freedom is the prime case where I've trimmed religious liberty to serve pragmatic purposes:

> [R]ather than grapple with the weighty history and tradition that suggest religious liberty interests likely outweigh a government's interest in enforcing a nondiscrimination requirement, Berg elevates asserted interests in preventing dignitary harm to the same level as constitutional rights without a principled justification (just a pragmatic one).[28]

In response, I have one rejoinder and one clarification. First, I indeed say that religious liberty interests outweigh nondiscrimination interests in the large majority of cases involving nonprofit institutions that hold themselves out as religious schools, social services, etc.[29] The book supports the various forms of protection that religious organizations enjoy or arguably enjoy: the absolute right to hire, fire, or discipline ministers and make other "internal governance" decisions;[30] the Religious Freedom Restoration Act;[31] the religious-hiring exception in Title VII;[32] and others.[33] I do say that protection should be narrower for commercial providers of ordinary goods and services, such as wedding vendors objecting to providing goods or services for same-sex weddings. But I support, and defend at length, protection for the small, personal vendors—the cake designer or website designer—when, as is typically the case, multiple alternative providers are available.[34]

The clarification concerns the so-called dignitary harms that Reaves and Krauter say I elevate over religious-liberty interests. In fact, the term "dignitary harms" covers two kinds of asserted harms that the book distinguishes. One asserted harm is in the very fact that government is making any accommodation for a person who objects to facilitating same-sex marriages, since (assertedly) each and every instance of a permitted objection inflicts a serious harm. I'm quite clear in the book, however, that the interest in preventing this sort of harm—in "stigmatizing stigma, and making the pertinent prejudice into something that citizens instinctively reject"—"can't be a compelling

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[28] Reaves & Krauter, *supra* note 1, at 344.

[29] *RLPA* at 283–86.

[30] *See* Our Lady of Guadalupe School v. Morrissey-Berru, 140 S. Ct. 2049 (2020); Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, 565 U.S. 171 (2012).

[31] 42 U.S.C. § 2000bb-1–7.

[32] 42 U.S.C. § 2000e-1(a).

[33] *RLPA* at 286–90.

[34] *Id.* at 294–98.

reason to override religious conscience," since it aims to eliminate or discourage a constitutionally protected belief and its expression.[35]

But a different harm lies in the pervasive sense of insecurity that can come from the threat of repeated refusals to provide goods or services. That harm can be serious: studies show the "fear and stress" can produce "chronic pain" and multiple other effects.[36] But it comes only from threatened repeated refusals, not from isolated ones. And repeated refusals are very unlikely in any jurisdiction that is sufficiently hospitable to LGBTQ rights to enact nondiscrimination laws in the first place.[37] Objectors in such a jurisdiction are already in the minority; their numbers shrink further because for-profit businesses have economic incentives to accept paying customers rather than decline them.

In short, it is worthwhile to disentangle different harms that are all labeled "dignitary," distinguishing between those that assertedly occur with every single act of declining service and those that arise only from a recurring pattern of such acts. If only the latter generate a compelling interest, then it is possible to strike a balance that protects most of the real-world objecting vendors—the small providers of goods or services directly to a wedding or marriage—while also vindicating nondiscrimination interests in most transactions.

II. Apologetics for Religious Liberty

Although I've offered responses and clarifications in the light of Reaves and Krauter's review, I primarily want to discuss their thesis, reflected in the review's title, that my book's posture is one of "pragmatism" in advocating for religious liberty. I don't object to that characterization; the book has the pragmatic goal of increasing the effectiveness of religious-liberty advocacy to the general public and across ideological lines. But I do want to present a different concept for understanding the book's aims. It is an "apologetic" for religious liberty.

Apologetics, as a branch of theology, is defined as "the attempt to show that a faith is provable by reason, or at least consistent with reason"; "more generally," it refers to "the attempts to defend a doctrine."[38] By nature, an

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[35] *Id.* at 280.

[36] *Id.*

[37] *Id.* at 298.

[38] *Apologetics*, Oxford Dictionary of Philosophy (Simon Blackburn ed., online 2016 ed.), https://www.oxfordreference.com/display/10.1093/acref/9780199541430.001.0001/acref-9780199541430-e-220.

apologetic defends the doctrine or faith to those who do not accept it. Christian apologetics, for example, seeks "to defend and explain the core themes of the Christian faith, and communicate these effectively and faithfully *to the wider world*."[39]

Apologetics "usually uses only methods of argumentation and criteria of knowledge acceptable to the adversary"—it "rule[s] out . . . appeals to sources of authority not recognized by one side in the debate."[40] For example, Christians recognize the authority of the Bible, and Roman Catholics recognize the authority of official church documents such as papal encyclicals. But these sources do not operate as authorities in apologetics—at least, they do not operate as "*self-guaranteeing* authority sources."[41] That's because their authority will not be taken as a premise by non-Christians or non-Catholics, the audience that apologetics seeks to reach. A ground of argument that is "accepted as an authority source by only one side in the debate" will not persuade others; it will "cut no apologetical ice."[42]

Apologetics is particularly important in contexts where outsiders either lack knowledge of the faith or doctrine in question or have misconceptions about them. As Alister McGrath's textbook on the subject emphasizes, Christian thinkers began to engage in apologetics in the faith's early decades to avoid being confined to a "religious ghetto, incapable of connecting with others beyond the church, or addressing their concerns about it."[43] Today the need for Christianity to avoid "ghettoization" is again becoming acute, McGrath suggests, because of "[r]ecent developments [that] show a growing disconnection between Christianity and a wider culture."[44] In his words, Christian apologetics aims to

> explain and defend Christianity to an audience that is not familiar with its traditional vocabulary or its practices using terms and images that resonate with this audience. Apologetics is about building bridges from the community of faith to the wider culture.[45]

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[39] ALISTER MCGRATH, CHRISTIAN APOLOGETICS: AN INTRODUCTION xii (2023) (emphasis added).

[40] PAUL GRIFFITHS, AN APOLOGY FOR APOLOGETICS: A STUDY IN THE LOGIC OF INTERRELIGIOUS DIALOGUE 15 (1991).

[41] *Id.* at 83 (emphasis added).

[42] *Id.*

[43] McGrath, *supra* note 39, at 2.

[44] *Id.*

[45] *Id.*

Religious Liberty in a Polarized Age is an apologetic for religious liberty, analogous in several ways to the features of apologetics described above. The book aims to "explain and defend" strong protection of religious liberty in a context (legal, political, cultural) in which that protection has come under attack. It does not make every potential argument that supports religious liberty. It emphasizes those arguments that are likely to reach people who question religious liberty, either as a general right or in its specific applications, perhaps because they misunderstand it as a concept or can't perceive how it benefits a wide variety of people and indeed society as a whole. As I say at various places, the book aims to build bridges on religious liberty to people that I call "persuadable skeptics," by presenting arguments "that can appeal to persons of varying views, including those who disagree sharply with any view that is receiving protection."[46] I try to confine myself to arguments that "are more likely than others to appeal across the lines of a divided society."[47]

Thus, for example, I explain the importance of religious exercise in traditional believers' lives by, among other things, drawing analogies to same-sex marriage and partnership, identity-based conduct for which progressive skeptics of traditional religion will have sympathy.[48] Another chapter in the book focuses on the argument that religious freedom benefits society by creating room for religious organizations and their members to serve others while following the values that inspire that service.[49] That chapter is an apologetic "to persons who reject religion in general or specific religious beliefs or practices . . . but who nevertheless are willing to consider the contributions that organizations with those beliefs make" to the good of others.[50]

A recurring criticism against religious apologetics is that by relying only some of the rationales or criteria for the truth of a faith—those criteria "acceptable to the adversary"—the apologist will fail to convey the full meaning of the faith or will even trim that meaning to suit the adversary's perspective. McGrath describes this view, citing Charles Taylor: "Many Christian apologists [have] felt that they had to use the tools and methods of this secular age in order to engage it credibly and effectively. Yet in doing so, they often ended up buying into its wider [secular, not Christian] outlook."[51]

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[46] *RLPA* at 9, 90.
[47] *Id.* at 90.
[48] *Id.* at 95.
[49] *Id.* at 151; *see generally id.* at ch. 5.
[50] *Id.* at 154.
[51] McGrath, *supra* note 39, at 8.

Reaves and Krauter express an analogous concern about my argument for limits on religious freedom. They warn that emphasizing conflict reduction as a rationale for religious liberty might lead one to "buy[ ] into" the constraints on the content of religious liberty dictated by that rationale. As I've tried to clarify above, I don't think that conflict-reduction is the only rationale for religious liberty, nor is it the only ground for boundaries on its scope. The boundaries on religious liberty that I endorse also find support in the original understanding and other sources of interpretation, and the book says so[52]—although I acknowledge that it might have given greater emphasis to those interpretive sources in drawing the boundaries.

In any event, the history of religious apologetics counsels us that trying to persuade others based on premises they accept always runs the risk of "buying into" those premises entirely (or of appearing to buy into them). The apologist must guard against that risk, but the risk remains. Even so, the apologetic task is worth pursuing. Avery Cardinal Dulles has written, as to Christian apologetics, that the discipline does not provide a "sufficient condition for the saving act of faith," but that it does play the important role of "challeng[ing] unbelief and remov[ing] obstacles to faith itself."[53] Likewise, *religious-liberty* apologetics may not present every aspect of or argument for religious liberty. But it plays an important role today in preserving religious liberty in a legal and political culture that so often distorts or threatens it.

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[52] *See supra* notes 10-14, 20–26 and accompanying text.

[53] AVERY CARDINAL DULLES, A HISTORY OF APOLOGETICS 367 (2005).

THE MASTER IDEA OF WESTERN CIVILIZATION*

ANDREW D. GRAHAM**

A review of Graham James McAleer & Alexander S. Rosenthal-Pubul, THE WISDOM OF OUR ANCESTORS: CONSERVATIVE HUMANISM AND THE WESTERN TRADITION (University of Notre Dame Press 2023)

In *The Wisdom of Our Ancestors*: *Conservative Humanism and the Western Tradition*, authors McAleer and Rosenthal-Pubul pose three massive questions: What is conservatism? What is humanism? And what do they have to do with each other in the 21st century?

Throughout, their consideration of those questions is at once traditional and eclectic. Their central contention is that "Western conservatism is an allegiance to the humanist tradition rightly conceived."[1] Indeed, they contend that humanism, rightly conceived, is the "master idea of Western civilization."[2] As such, "humanism is the arching value that conservatism seeks to preserve"[3] and the "best lens by which to understand Western civilizational identity."[4] Correlatively, they contend that "conservatism in the twenty-first century must be a defense of humanism," and specifically a humanism that affirms the "transcendent dignity of the human person."[5]

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

** Senior Counsel and Vice President for Academic Affairs & Strategic Affairs, Alliance Defending Freedom (ADF). The views expressed herein are the author's and do not necessarily reflect those of ADF or its clients.

[1] GRAHAM JAMES MCALEER & ALEXANDER S. ROSENTHAL-PUBUL, THE WISDOM OF OUR ANCESTORS: CONSERVATIVE HUMANISM AND THE WESTERN TRADITION 23 (2023).

[2] *Id.* at xxix.

[3] *Id.*

[4] *Id.* at xxiv.

[5] *Id.*

The authors consider those three questions in light of the present historical moment. They first affirm the now-common contention that the West is undergoing a "crisis of confidence" stemming from serious and sustained attacks from within and looming threats from abroad.[6] That crisis of confidence, they contend, is existential.[7] As they see it, the crisis has left the West unmoored from a sense of self. As they say in their preface, "The modern West is no longer conscious of its identity: it no longer knows what it stands for and what it stands against."[8] In response, they contend that the West does, truly, have tremendous wisdom to offer. Consequently, they contend that "the contemporary role of conservatism is to act as the guardian of Western civilization's confidence."[9]

They also orient their thinking around today's challenges to liberalism resulting from the rise of a new nationalism.[10] Given that increasingly clear conflict, they, by their own account, seek to steer between "two extreme poles": namely, Francis Fukuyama's "liberal universalism" (or "liberal cosmopolitanism") and Aleksandr Dugin's "antiliberal particularism" (or "tribalistic nationalism").[11] Fukuyama and Dugin—neither of whom they reject *tout court*—function as framing figures throughout the book.[12]

Fukuyama is an American political scientist who has twice served as a member of the State Department's Policy Planning Staff.[13] Today, he holds several prestigious positions at Stanford University, including a senior fellowship at the Freeman Spogli Institute for International Studies.[14] Famously, in 1989, shortly before the fall of the Berlin Wall, Fukuyama proclaimed the "end of history."[15] As he posited it, history had culminated in liberalism's triumph over all other possible political ideologies. Three years later, he published *The End of History and the Last Man*, which developed the thinking of

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[6] *Id.* at xviii. In the United States, of course, this crisis has dramatic constitutional dimensions. *See* JOHNATHAN O'NEILL, CONSERVATIVE THOUGHT AND AMERICAN CONSTITUTIONALISM SINCE THE NEW DEAL 284 (2022) (pointing out that "notable liberal and Progressive theorists increasingly pronounce the Constitution a failure that should be changed wholesale, or disobeyed, or radically democratized").

[7] MCALEER & ROSENTHAL-PUBUL, *supra* note 1, at xv, 190.

[8] *Id.* at xvii.

[9] *Id.* at xxiv.

[10] *Id.* at xix.

[11] *Id.* at xxi, 125.

[12] *Id.* at xxiv ("There are elements of the Fukuyama and Dugin positions that need to be retained.").

[13] STANFORD UNIVERSITY, https://fukuyama.stanford.edu/ (last visited May 3, 2024).

[14] *Id.*

[15] Francis Fukuyama, *The End of History*, NAT'L INTEREST 16, Summer 1989, at 3–18.

his 1989 article and received international acclaim and attention. He has since published prolifically on political theory, development, and international politics. His most recent book, *Liberalism and Its Discontents*, which came out in 2022, defends classical liberalism against both the progressive left and the nationalist right.

By contrast, Dugin is a Russian political philosopher and mystic with apparent ties to Vladimir Putin. The authors present Dugin as the face of today's nationalism. The authors rightly expect readers to question their decision to feature Dugin due to his highly controversial (even infamous) reputation.[16] As they note, Dugin has been called "the most dangerous philosopher in the world" and "Putin's brain," and the United States government has sanctioned Dugin for acts against Ukraine.[17] Additionally, according to conservative media pundit Tucker Carlson's recent interview of Dugin, Dugin's books have been "banned by the Biden Administration in the United States."[18] (Whatever the truth of that claim, it is true that Dugin's books are not available on Amazon, at least in English, as of this writing.) And yet, because the authors see Dugin as the "preeminent political philosopher in Russia,"[19] and because they believe that he will be lesser known to many readers,[20] they spend substantial time on him over the course of the book, effectively making the book an introduction to his thought and wider influence.

In addition to Fukuyama and Dugin, the iconic English conservative Sir Roger Scruton functions as a third framing figure. As the authors say, "Each chapter can be seen as a commentary on themes addressed in Scruton's *The Meaning of Conservatism*."[21] As the book unfolds, their intellectual debt to Scruton becomes obvious.

Importantly, another central contention of the book is that conservatism, as a political philosophy, has its "own identity" that can be distinguished from both liberalism and nationalism.[22] According to the authors, conservatism offers a "*via media*"—a political middle—that "reconciles universal moral values and particularist loyalties."[23] Hence, the authors concurrently affirm the

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[16] MCALEER & ROSENTHAL-PUBUL, *supra* note 1, at xx.

[17] *Id.*

[18] Tucker Carlson (@TuckerCarlson), X (formerly Twitter) (Apr. 29, 2024, 5:00 PM), https://twitter.com/TuckerCarlson/status/1785066534995714067.

[19] MCALEER & ROSENTHAL-PUBUL, *supra* note 1, at xx.

[20] *Id.* at xxi.

[21] *Id.* at xxvii.

[22] *Id.* at 2.

[23] *Id.* at xxi, 56.

"universal validity of natural law" *and* the "value of particularity and attachment to localities of place, custom, and culture."[24]

Their long preface, introduction, and first chapter lay out their conceptions of "conservatism" and "humanism." The following eight chapters elaborate on and defend conservative humanism's metaphysical, institutional, moral, legal, economic, and other aspects. The final chapter culminates with what they call the "Benedict synthesis." Named for Pope Benedict XVI (Joseph Ratzinger), who ultimately emerges as the book's star, the Benedict synthesis, as the authors articulate it, is a blending of the best of classical, Christian, and modern insights about human nature and human flourishing.

Along the way, the authors discuss thinkers through the ages who have made important contributions to conservative humanism: Edmund Burke (whom they acknowledge as the "preeminent conservative figure of the English-speaking world"[25]), Adam Smith, Aristotle, Cicero, Thomas Aquinas, Aurel Kolnai, and Eric Voegelin all appear prominently.[26] Friedrich Nietzsche and Martin Heidegger, on the contrary, serve as conservative humanism's most formidable intellectual foes, with Dugin representing a continuation of certain lines of their thinking today.

To be sure, the book is an important contribution to the discussion about the relationship between conservatism and humanism.[27] Though the book is principally a work of political philosophy, the authors also offer a *cri de coeur* for the renewal of Western civilization—for the West to recall, in Burke's words, the "wisdom of our ancestors" and so regain its confidence in its rich civilizational inheritance.

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[24] *Id.* at xxiii.

[25] *Id.* at 156.

[26] Some readers, especially those in the United States, will find the authors' omission of Russell Kirk from the book to be a deficiency. *See* BRADLEY J. BIRZER, BEYOND TENEBRAE: CHRISTIAN HUMANISM IN THE TWILIGHT OF THE WEST 13 (2019) ("Most Conservatives over the past seven decades have accepted Russell Kirk's 1953 book, *The Conservative Mind*, as the touchstone of the modern movement."); ANDRÉ GUSHURST-MOORE, THE COMMON MIND: POLITICS, SOCIETY, AND CHRISTIAN HUMANISM FROM THOMAS MORE TO RUSSELL KIRK 217 (2013) ("What is uniquely vivid in the life and work of Russell Kirk is the thoroughly considered identification of Christian humanism with a conservative political philosophy.").

[27] *See* BIRZER *supra* note 26, at 3–6, 11, 21–26 (offering five "canons of humanism" and five "principles of conservatism," and declaring that "[h]umanism is the thing that conservatives must conserve").

I. CONSERVATISM

Given the many meanings in circulation today as to the principal terms of our political discourse, McAleer and Rosenthal-Pubul, quite helpfully, begin with some definitions.

By "liberalism," they do not mean modern progressivism but rather the classical liberalism associated with John Locke, Adam Smith, Thomas Jefferson, Immanuel Kant, and John Stuart Mill, which generally champions capitalism, individualism, cosmopolitanism, universal rights, the rule of law, limited government, and the idea of progress.[28] As they say, "This is the liberal doctrine that Fukuyama presents as the final and universal ideology."[29]

By "conservatism," they say, they do not mean commercial liberalism or nationalism.[30] So what are the salient features of conservatism? First, "The conservative's default attitude is one of reverence for the past on the assumption that there is a collective and accumulated wisdom in history."[31] But they immediately concede, as they must, that "not any practice is legitimate simply because it is an inherited tradition."[32] For them, Christian convictions about human dignity provide a powerful corrective. Accordingly, "Actions that offend human dignity can be rejected on substantive grounds even where they are time-honored customs."[33]

Further, because conservatives generally see the past as a reliable fund from which to draw, the authors denounce "the pride and folly of rejecting the resources of tradition on the premise that one's own generation is better and wiser than all that came before."[34] That view, of course, has enormous educational implications. It implies that the insights of age-old writers remain relevant to the issues that confront society today and thus deserve continued study and consideration (more on education anon).

Regarding inherited traditions, the authors stress three as critical for preserving the West's cultural inheritance—predictably enough, they are religion, the family, and education (in that order of importance).[35] Political

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[28] *Id.* at xv, 1.

[29] *Id.* at 2.

[30] MCALEER & ROSENTHAL-PUBUL, *supra* note 1, at xv, 190.

[31] *Id.* at 3.

[32] *Id.* at 2.

[33] *Id.* at 2–3.

[34] *Id.* at 3. Their point recalls what C.S. Lewis famously called "chronological snobbery": "the uncritical acceptance of the intellectual climate of our own age and the assumption that whatever has gone out of date is on that count discredited." C.S. LEWIS, SURPRISED BY JOY 254 (1955).

[35] MCALEER & ROSENTHAL-PUBUL, *supra* note 1, at 5–15, 21.

conservatism, they contend, is a response to the breakdown of the "normal processes of cultural transmission" effected by those "three organs of tradition."[36]

Quoting Scruton, they first affirm that "the core of common culture is religion."[37] Quoting George Washington's Farewell Address and relying on Burke generally, moreover, they see traditional religion as necessary for a sure moral order.[38] As they see it, "no secular ideology has yet proved equal to the task of constraining the wayward impulses of human nature . . . nor is there any reason to expect it will in the future."[39]

Second, they stress the importance of safeguarding the family and the institution of marriage as a means to social stability. Again quoting Scruton, they affirm that "conservatives believe, with Burke, that the family is the core institution whereby societies reproduce themselves and pass moral knowledge to the young."[40]

Third, they claim that the essential end of education is to ensure cultural continuity through the transmission of the values and stories that form the culture's particular identity.[41] As to that end, they contend that modern universities are failing miserably.[42] Yet again quoting Scruton, they decry that universities today generally promote a "culture of repudiation" regarding the West's traditional texts, heroes, and symbols.[43]

One notable subtext that emerges over the course of the book is that the West's current crisis of confidence can be traced, in no small part, to 20th-century changes to the traditional university curriculum that stretched back to the Middle Ages.[44] To summarize: Deleterious changes began after World War I, when universities first relegated the classics to a specialized field for scholars and, in their place, created the Western Civilization survey course or Great Books program (à la Robert Maynard Hutchins and Mortimer Adler).[45] That change resulted in the general loss of the study of Greek and

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[36] *Id.* at 21.

[37] *Id.* at 5.

[38] *Id.* at 6, 159.

[39] *Id.* at 8.

[40] *Id.* at 159.

[41] *Id.* at 12–13.

[42] *Id.* at xviii, 12–13.

[43] *Id.* at xviii, 42, 183.

[44] *Id.* at 30 ("A canon of exemplary Greek and Latin authors remained foundational for Western higher education until well into the twentieth century.").

[45] *Id.* at 189. To be sure, Hutchins and Adler would be horrified by the authors' implicating them in the events leading up to the West's current crisis of confidence. Together, in 1949, Hutchins and

Roman authors in their original languages. Then, beginning in the 1960s, Western Civilization survey courses and Great Books programs came under increasingly fierce attacks from progressives, causing virtually all universities eventually to drop them from the curriculum.[46]

It is obvious that the authors lament those educational developments, given what they see as the historical importance of the classics in shaping the Western mind generally and their central role in the thinking of conservativism's greatest thinkers specifically, especially Burke.[47] In response, they advocate that the revival of classical education is essential to any effort to renew Western culture.[48]

II. HUMANISM

"Humanism," like "conservatism," has many meanings in circulation today.[49] It is also a word from which most conservatives reflexively recoil.[50] Once again, quite helpfully, McAleer and Rosenthal-Pubul clarify their conception upfront.

They proceed historically. Following the traditional telling, they present "three historical iterations" (or "forms") of humanism: (1) classical humanism; (2) Christian humanism; and (3) modern humanism (sometimes appropriately, sometimes inappropriately, called "secular humanism").[51] Between the three forms, they say, "there are both tensions and possibilities of synthesis."[52] Because humanism has existed in classical, Christian, and modern forms, moreover, the authors argue that it offers the "narrative of continuity that can best make sense of the West as an integral whole."[53]

Adler founded the "Aspen Institute for Humanistic Studies" (now the Aspen Institute) to help the West *regain* its confidence in its civilizational inheritance in the wake of the horrors of World War II and the early years of the Cold War. *See generally* SIDNEY HYMAN, THE ASPEN IDEA (1975).

[46] MCALEER & ROSENTHAL-PUBUL, *supra* note 1, at 189–90.

[47] *Id.* at 14–15, 159.

[48] *Id.* at 14–15.

[49] *See* ALAN JACOBS, THE YEAR OF OUR LORD 1943: CHRISTIAN HUMANISM IN AN AGE OF CRISIS 37 (2018) ("'Humanism' is a much-vexed, highly contested word whose meaning has zigged and zagged in strange ways over the centuries, and has equally often been used to praise and damn.").

[50] *See* BIRZER, *supra* note 26, at 3 ("[W]hen I mention the term 'humanism' among conservatives, I am almost always greeted with silence, headshaking, or actual and visible disgust. Almost all conservatives, it seems, associate humanism with secularism, atheism and radicalism.").

[51] MCALEER & ROSENTHAL-PUBUL, *supra* note 1, at xxiv–xxv, 30–40.

[52] *Id.* at 25.

[53] *Id.* at xxiv.

First, classical humanism comes from the ancient Greek ideal of human excellence. It accepts Aristotle's conception of man as a rational and political animal.[54] For the Greeks, human excellence was acquired through education. That education sought the full development of human potential—moral, intellectual, and aesthetic—through the study of philosophy, poetry, rhetoric, and other topics.[55] It also sought to prepare the free, male citizen of the Greek city-state for participation in political life.[56] To the Greek ideal, the Romans added training in the seven liberal arts. For the Romans, the liberal arts had a civilizing and refining effect on human nature, the end of which they called *humanitas*. [57] And it is, of course, from the Latin word *humanitas* that the English word "humanism" derives.

Second, Christian humanism comes from Judeo-Christian teachings about the nature of human beings. Christianity, which the authors twice call "the most anthropological of all faiths,"[58] retained the classical humanist ideal of excellence acquired through education, but it added the belief that all human beings have intrinsic and transcendent dignity.[59] That intrinsic and transcendent dignity is based first on the doctrine of the *imago Dei*, the belief that all human beings are created in the "image of God," and second, on the doctrine of the Incarnation, the belief that God became man in the person of Jesus Christ.[60] Consequently, according to the authors, "Christianity, the religion of the God-man, supplied an egalitarian note affirming the singularity and unrepeatable value of each and every human being."[61] On that basis, the authors argue that Christianity serves as an "essential correction of the ancients."[62] Substantially complicating the elevated Christian conception of the human being, however, is the fact of human sinfulness, which can only be overcome by divine grace.[63]

Third, modern humanism, which the authors call "a very complex phenomenon," comes from the Enlightenment.[64] The authors immediately repudiate "atheistic liberal humanism," which includes the reduction of nature

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[54] *Id.* at 26.
[55] *Id.* at xxiv.
[56] *Id.* at xxv, 31.
[57] *Id.* at 29.
[58] *Id.* at xxv, 31.
[59] *Id.* at xxv, 31–32.
[60] *Id.* at xxv, 32.
[61] *Id.* at xxix.
[62] *Id.* at xxv.
[63] *Id.* at 32.
[64] *Id.* at xxv.

to biology, science conceived as conquest, a critique of tradition, and a denunciation of religion as intolerance and superstition.[65] Their critique draws heavily on the early 20th-century Russian philosopher Nicholas Berdyaev.[66] According to Berdyaev, though modern humanism affirms man's self-confidence and exalts him, it ultimately debases him "by ceasing to regard him as a being of higher and divine origin."[67] That leads, Berdyaev ominously concludes, to man's "own perdition."[68]

At least through the end of chapter 1, what the authors seek to retain from modern humanism as part of their synthesis is much more difficult to discern than what they reject. What is clear, however, is that they see modern humanism as "in crisis because its commitment to human dignity is not self-sufficient but depends on an older and richer inheritance."[69]

III. CONSERVATIVE HUMANISM

Over the next eight chapters, McAleer and Rosenthal-Pubul elaborate on and defend multiple aspects of conservative humanism: chapter 2 takes up metaphysics; chapter 3, establishment; chapter 4, law; chapter 5, humanistic enterprise; chapter 6, the conservative *via media*; chapter 7, liberty and history; chapter 8, conservatism without reprimitivism; and the final chapter, the Benedict synthesis.

At this point, a word to the wise is in order: The chapters—sometimes quite frustratingly—overlap substantially, and they often look ahead and circle back, so the following treatment, though it tracks the book's trajectory, necessarily draws on the book *in toto*.

A. Metaphysics

Chapter 2 addresses the "metaphysical foundations of conservatism."[70] The authors admit upfront that some readers will find the subject "needless," but they insist that it is fundamental.[71] For them, "The basic vocabulary of

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[65] *Id.*
[66] *Id.* at 23.
[67] *Id.* at 40.
[68] *Id.*
[69] *Id.* at 42.
[70] *Id.* at 45.
[71] Other readers—those inclined to follow Karl Popper in spirit if not in particulars—will find the authors' linking of politics and metaphysics to be not only needless but deeply dangerous. *See generally* KARL POPPER, THE OPEN SOCIETY AND ITS ENEMIES (1994).

politics is inescapably metaphysical,"[72] and conservative humanism is a response to the current (anti)metaphysical situation, which plays into the West's crisis of confidence.[73]

As they conceive it, conservative humanism is not only a political middle but also an "ontological middle."[74] What that ultimately means is that conservative humanism is a "defense of rational order."[75] Their argument responds to those on the left (the Frankfurt School and Jacques Derrida) and those on the right (Heidegger and Dugin) who think that rationality is a ruse created and perpetuated by the West as a tool of oppression.[76]

Conservative humanism, they contend, must also "thread its way between angelism and vitalism."[77] Their basic point is that angelism and vitalism both get human nature dangerously wrong.[78] Angelism—which they hint at from several directions but never define outright—seemingly sees human beings as having no nature. They are clearer about vitalism: "Vitalist accounts of human beings emphasize scarcity, nakedness, materialism, positivism, and disenchantment."[79] They see elements of angelism in Fukuyama's liberalism, and they discuss Heidegger's devotion to vitalism and his influence on Dugin.[80] In chapter 6, to show that metaphysics matters, they connect vitalism to practical politics, including its presence within the French New Right (*Nouvelle Droite*).[81]

Additionally, because politics is about the relationship of the individual to the group, they lay out their conception of the individual. "In its metaphysics, Western humanism has strongly affirmed personal individuality," they say.[82] Consequently, "Conservative humanism must affirm the individual as much as liberalism."[83] And yet, conservative humanism must also "take pains to account for coordination among individuals."[84]

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[72] MCALEER & ROSENTHAL-PUBUL, *supra* note 1, at 45.
[73] *Id.* at xxix.
[74] *Id.* at 56.
[75] *Id.* at 45.
[76] *Id.* at 45–47.
[77] *Id.* at xxvii.
[78] *Id.* at 47–56.
[79] *Id.* at xxv.
[80] *Id.* at 56.
[81] *Id.* at 133–34.
[82] *Id.* at 56.
[83] *Id.*
[84] *Id.*

Their account of the individual closely follows that of Aquinas. According to Aquinas, there are only individuals, but they have a nature, conform to a "pattern," and display "like attributes."[85] Thus, all over the world, people want a home, a healthy family, a sense of belonging that comes from various forms of membership, and a relationship with the divine.[86] In short, individuals want to express their singularity in the context of solidarity.

B. Establishment

Quoting Scruton, the authors affirm at the outset of chapter 3 that conservatism is a "defense of 'establishment.'"[87] Crucially, by "establishment," they do not mean the status quo or anything else with a possible negative connotation. As they use it, establishment means "institutions bearing values and offices."[88] Establishment is essential, they say, because it "transmits the character and inheritance of a civilization to future generations."[89]

Establishment includes the state and private property.[90] They approvingly note Scruton's rejection of Lady Margaret Thatcher's economic policy—she famously followed F.A. Hayek—"because it wrongly stated the scope of establishment" through its hostility toward the state.[91] They also approvingly note that Scruton, as a conservative, defended the necessity of the welfare state and even some forms of state ownership, though less radically than socialists and nationalists.[92] Establishment also notably includes "autonomous communities."[93] Autonomous communities are the family, the church, and myriad voluntary organizations, including guilds, clubs, corporations, and trusts.[94]

The authors next argue that establishment has a moral basis. To that end, they offer value theory, which they call a "critical plank in conservative humanism."[95] "Conservatives," unlike Kantian and utilitarian liberals, "do not think the world and its objects are morally neutral," they say.[96] Rather, for

[85] *Id.* at 57.
[86] *Id.*
[87] *Id.* at 59
[88] *Id.* at xxviii.
[89] *Id.*
[90] *Id.* at xxviii, 17.
[91] *Id.* at xxviii.
[92] *Id.*
[93] *Id.* at 16–17, 184.
[94] *Id.*
[95] *Id.* at 69.
[96] *Id.* at 61.

conservatives, "Values are part of the furniture of the world, and the qualities of objects and persons are constellations of values."[97]

Their argument relies heavily on the thinking of Max Scheler, an early 20th-century German philosopher who made considerable contributions to phenomenology (a method of philosophical inquiry that focuses acutely on experience), and Aurel Kolnai, an Austro-Hungarian-born antitotalitarian philosopher whom they consider to be Scheler's "greatest conservative commentator."[98]

According to the authors, Scheler's value theory, with its hierarchy of values, provides sure moral insights. As a moral theory—contrary to modern parlance about "personal values"—Scheler's is "realist, objective, and universal."[99] As such, the authors argue that it is "well suited to conservatism."[100]

According to Kolnai, values are an "autonomous, impersonal code of objective norms."[101] Those norms are "universals discerned as qualities inherent in persons, objects, and actions" through human beings' natural sympathy.[102] Values, says Kolnai, provide "a tone of warning, urging, vetoing, and commanding."[103] Some value tones function as prohibitions—e.g., "Do not kill, Do not steal, and so on." Conversely, other value tones come in the form of positive precepts—e.g., "Defend the widow and protect the lowly."[104] As their examples suggest, value theory basically arrives by intuition at Judeo-Christian moral precepts, albeit by a different route.

Again quoting Kolnai, they add that the "recognition of, and support for, values requires privilege."[105] Privilege, they say, both "populate[s] our world with values"[106] and "embodies a hierarchy of values."[107] Significantly, by "privilege," they do not mean advantage but rather "value-bearing social formations."[108] They also describe privilege as a "manifold of memberships and belonging."[109] Examples include the officer corps, the professoriate, the

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[97] *Id.* at 65.
[98] *Id.* at 60.
[99] *Id.*
[100] *Id.* at 79.
[101] *Id.* at 69.
[102] *Id.*
[103] *Id.* at 66.
[104] *Id.*
[105] *Id.* at 69.
[106] *Id.* at 58.
[107] *Id.* at xxx.
[108] *Id.* at 70.
[109] *Id.*

professions, the bench, fashion houses, and heralded sports clubs.[110] Value perception, beyond simple intuition, is aided through participation in those groups.[111] But beyond merely aiding in value perception, those groups have a political purpose. That is, privilege, as a part of establishment, "breaks up power."[112] Thus, "establishment is one necessary feature of a society with a healthy politics."[113]

C. Law

Chapter 4 takes up law—more specifically, natural law. One of the authors' aims is "to show the importance of natural law for any viable humanism."[114] Their understanding of natural law derives largely from Aquinas, and readers familiar with the Thomistic account of natural law will find their treatment of it uncontroversial.

First and foremost, they present natural law as a "realist moral theory."[115] It is unchanging: "It claims that right and wrong do not change because what it means to be a human does not change."[116] It is also universal.[117] Thus, contrary to certain forms of nationalism, "natural law is opposed to relativism and to any idea of justice reducible to national will and its history."[118] Most fundamentally, the natural moral order is one in which reason properly orders and directs the appetites.[119]

Regarding the relationship between natural law and positive law, moreover, they hold that "natural law is the measure of the rationality of the law."[120] As such, it is the law above the law. Accordingly, "If positive law clashes with the few, but socially foundational, obligations and liberties stemming from our fixed appetitive core, the law is unjust."[121] And so: "Natural law trumps human law when push comes to shove."[122]

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[110] *Id.* at xxx.
[111] *Id.* at 70.
[112] *Id.*
[113] *Id.* at 72.
[114] *Id.* at 53.
[115] *Id.* at 79.
[116] *Id.*
[117] *Id.* at 140.
[118] *Id.* at 85.
[119] *Id.* at 79.
[120] *Id.*
[121] *Id.*
[122] *Id.* at 80.

They next address five criticisms of natural law from the right. (They do not address any criticisms from the left.) They associate those five criticisms with five particular thinkers—specifically, that natural law is unnecessary (Scruton), that it is abstract (Carl Schmitt), that it is theological (Leo Strauss), that it is unnatural (Heidegger), and that it is indeterminate (Thomas Hibbs).[123]

Though the details of their responses to those five criticisms are too much to recount here, a few points are salient: Against Scruton, they argue that the common law and rights granted through history and tradition are insufficient, and they argue for liberty and property as natural rights.[124] Against Schmitt, they argue that "persons have a juridical completeness in their own right."[125] Against Strauss, they argue that natural law does not collapse into theology.[126] Against Heidegger, they argue that the rule of law is unsustainable when "persons are reduced to an existentialism of risk."[127] And against Hibbs, they argue that natural law is determinate (enough) that it can "deliver policy."[128]

Ultimately, those familiar with the natural law tradition will find the authors' presentation of it capable but unbalanced. Natural law, at least as the authors present it in chapter 4, is associated exclusively with medieval and early modern Catholic Christianity (Aquinas and Franciso de Vitoria).[129] That undersells the natural law tradition considerably. Like humanism, the natural law tradition spans the centuries.[130] It, too, has significant pre-Christian antecedents: Sophocles, Plato, Aristotle, and Cicero remain seminal figures. There are also early modern Protestant natural law thinkers such as Hugo Grotius and Samuel von Pufendorf, as well as modern Catholic, Protestant, and secular thinkers such as Jacques Maritain, C.S. Lewis, and Lon L. Fuller, respectively. To this list, of course, one can add several Jewish thinkers from the Middle Ages to the present, including Maimonides, Moses Mendelssohn, and David Novak. Indeed, for that reason, there is even a compelling case for natural law being the master idea of Western civilization

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[123] *Id.* at 84–97.

[124] *Id.* at xxxi, 84–87.

[125] *Id.* at 87–90, 97.

[126] *Id.* at 90–92, 97.

[127] *Id.* at 92–93, 97.

[128] *Id.* at 93–97.

[129] In chapter 6, the authors will weigh in on the long-running debate about Burke's views on natural law and squarely locate him in the natural law camp.

[130] SAMUEL GREGG, THE ESSENTIAL NATURAL LAW 1–11 (2021).

instead of humanism.[131] At any rate, their argument for natural law being a viable moral theory for conservative humanism would have been significantly stronger if they had given the natural law tradition a more fulsome telling.

D. Economics

Chapter 5, entitled "Humanistic Enterprise," concerns economics. The chapter title comes from the company manifesto of the Italian fashion designer Bruno Cucinelli, which stresses the dignity of work according to the monastic ideals of Saint Benedict (the founder of the Benedictine order).[132] The authors affirm the dignity of work against the classical conception, which saw work as most fitting for slaves and servants. In their words: "It took the humility of the cross to first suggest to monks to dirty their hands in the monastery garden, and it took Christian humanism to complement the *artes liberales* with the *artes mechanicae*."[133] But Cucinelli's company manifesto, they note, does not mention the division of labor, which leads them to a discussion of economic theory.

Noticeably, from the beginning of the book, the authors are generally congenial to the market economy and speak favorably of Adam Smith. They credit the market economy, as they must, with substantial gains as to both human material well-being and physical longevity.[134] More controversially, they contend that Smith's signature contribution to economics—the division of labor—makes a significant contribution to humanism.[135] That argument, of course, puts them at odds with the postliberal right and the progressive left, both of which contend that the division of labor subverts human dignity.

Surprisingly, the authors' interpretation of Smith turns on Eric Voegelin's philosophy of history. They use Voegelin to interpret Smith because they similarly see Smith's *The Wealth of Nations* as a philosophy of history. Those unfamiliar with Voegelin's thinking will find the discussion difficult to follow.[136] The authors' discussion centers on "differentiation," a recondite Voegelian term of art that they attempt to explain and apply to Smith's

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[131] *See id.* at 1 ("Few ideas have been as influential in the development of moral, political, legal, and economic thought in the broad Western tradition as the idea of natural law.").

[132] MCALEER & ROSENTHAL-PUBUL, *supra* note 1, at 99.

[133] *Id.* at 101.

[134] *Id.* at 18.

[135] *Id.* at 102.

[136] *See* BIRZER *supra* note 26, at 137 ("Of all the major non-leftist thinkers of the twentieth century, Eric Voegelin remains perhaps the most difficult to understand . . . . Indeed, even the most dedicated conservative scholars find themselves slogging through much of Voegelin's thought.").

thinking over multiple pages.[137] The authors' principal point is that differentiation allows the division of labor to be ennobling rather than debasing. In simplest terms, the division of labor allows for refinements in the arts and sciences, which enhance human life, and encourages hobbies, collecting, fascinations, and personal flair.[138]

Theirs is no laissez-faire economics, however. Following (their conception of) Catholic social thought, they hold that "politics trumps economics and thus the government administration of commerce is, sometimes, absolutely morally required."[139] They continue: "Direct [government] engagement with business, directed by the ideals of solidarity and distribution, is sometimes necessary."[140] And following Scruton, they add that "libertarians might be against regulation, but conservatives are not."[141] Following Pope Francis, moreover, they argue for a moral obligation for government to support small business, which they find implicit in the doctrine of subsidiarity.[142]

The chapter ends with an encomium to Cucinelli, whose business draws upon heritage and craft and has great solicitude for the land and its people. For them, "[Cucinelli] and his company are an enterprising embodiment of Christian humanism."[143] As the authors see it, Cucinelli's business is "evidence that profit and dignity can be drawn from the ancestral."[144]

E. The Conservative Via Media

In chapter 6, the authors focus on the tension between liberal cosmopolitanism and nationalism. They begin with Kant as the *ne plus ultra* philosopher of liberal cosmopolitanism. They next offer Dugin as Kant's *bête noire*. In their preface, they provided a lengthy discussion of Dugin's highly controversial reputation, his alleged influence on Vladimir Putin, and his disdain for liberal cosmopolitanism.[145] In chapter 2, moreover, the authors discussed Heidegger's influence on Dugin, resulting in Dugin's "mangled metaphysics" (vitalism).

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[137] MCALEER & ROSENTHAL-PUBUL, *supra* note 1, at 103–10.
[138] *Id.* at 107.
[139] *Id.* at 113.
[140] *Id.*
[141] *Id.* at 114.
[142] *Id.*
[143] *Id.* at 117.
[144] *Id.*
[145] *Id.* at xx–xxii.

Now, in chapter 6, they summarize that "Dugin is motivated by the most profound opposition to Western modernity, its claims to universality, and its narrative of historical progress."[146] To explain, they provide an extended discussion of the influence of René Guénon—a highly eclectic French philosopher and mystic—on Dugin's thinking, followed by a return to Heidegger's influence on Dugin's thinking.[147] The most important outcome of their combined influence on Dugin is that he argues for a return to a pre-Enlightenment world and the end of the West's universalizing pretensions.

Regarding practical politics, moreover, they tie Dugin's thinking to the nationalist vision of conservatism found in Viktor Orban's Hungary and the French New Right. Their principal objection to that nationalist vision is that it tends toward relativism, which subverts conservative humanism's insistence on a universal morality.[148]

They next turn to the subject of national conservatism.[149] They rightly feature Yoram Hazony as a leader of the national conservatism movement and as one of its "formidable intellectual defenders."[150] Surprisingly, however, their discussion of national conservativism as a movement and Hazony's thought leadership in support of it is sparse. They clearly situate Hazony close to Dugin in light of Hazony's own rejection of liberal cosmopolitanism's universalizing aspirations,[151] but beyond that, it is difficult to discern whether they believe that Hazony's thinking about nationalism differs from Dugin's thinking about it. And though they are concerned that Dugin's thinking about nationalism leads to relativism, they do not say whether they think Hazony's thinking necessarily leads there, too.[152]

Chapter 6 concludes with their clearest conception of the conservative *via media* between liberal cosmopolitanism and nationalistic tribalism. For support, they turn once again to Burke and Aquinas as their exemplars.[153] In their framing, Burke's thought embodies the traditional Christian teaching about the order of charity exemplified in Aquinas's teaching: that is, a legitimate

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[146] *Id.* at 125.

[147] *Id.* at 125–30.

[148] *Id.* at 134.

[149] *Id.* at 134–36.

[150] *Id.* at xix.

[151] *Id.* at 135.

[152] Hazony has been widely criticized for promoting a brand of conservatism that leads to relativism. *See, e.g.*, Will Jones, *Conservatives Are Not Relativists: Yoram Hazony and a Conservatism Built on Sand*, CHRISTIAN TODAY (Jan. 30, 2019, 8:01 AM), https://www.christiantoday.com/article/conservatives-are-not-relativists-yoram-hazony-and-a-conservatism-built-on-sand/131596.htm.

[153] MCALEER & ROSENTHAL-PUBUL, *supra* note 1, at 136–41.

preferential love for one's own kin and country, but with love moving outward to include ultimately all of humanity. That conception, they say, is consistent with the Christian concern for the dignity of the stranger found in the parable of Good Samaritan. To that, they add the guidance of natural law as providing a universally binding morality, which can trump the legitimate regard for national and cultural differences. It is here that they claim Burke for the natural law tradition and conclude: "It is no coincidence that the iconic conservative Burke, utterly steeped in Christian humanism, was also a tireless defender of human dignity whenever it was threatened."[154]

F. Liberty and History

In chapter 7, the authors aim to articulate a conservative conception of liberty distinct from a liberal one. Correlatively, they aim to critique the liberal conception of liberty while concurrently crediting its achievements.[155]

Chapter 7 begins with Fukuyama's philosophy of history. The authors show how he draws heavily on G.W.F. Hegel and Alexandre Kojève. Based on Fukuyama's reading of Hegel and Kojève, he concludes that the fundamental drive that moves history forward is the human desire for universal and equal recognition.[156] That desire for recognition finds its fulfillment in liberalism, which places a premium on individual liberty.

Against that backdrop, the authors observe that, for Fukuyama, modern liberty is the "negative liberty" that Sir Isaiah Berlin famously posited—that is, to be unencumbered by external constraint.[157] It is the familiar conception of liberty underlying the First Amendment's protection of speech, religion, assembly, and the press.

"Modern liberty," the authors notably say, is "salutary."[158] Though they accept negative liberty as an important modern achievement, they believe that it, standing alone, is deficient. For them, liberalism has failed to make a convincing case that negative liberty is an intrinsic good.[159] Negative liberty, moreover, can be used for harmful ends.

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[154] *Id.* at 141. *Accord* BIRZER *supra* note 26, at 17 ("Burke's overriding concern was the upholding of the dignity of human nature, whether for the American colonials, the Irish, Asian Indians, or Roman Catholics.").

[155] MCALEER & ROSENTHAL-PUBUL, *supra* note 1, at 144.

[156] *Id.* at 144–46.

[157] *Id.* at xxxii, 150.

[158] *Id.* at xxvii.

[159] *Id.* at 150.

To arrive at their conservative conception of liberty, they synthesize classical and Christian conceptions of liberty while retaining certain facets of negative liberty. They again begin with the ancient Greeks and Romans. From them—Socrates, Plato, Aristotle, and the Stoics—the authors derive the idea that liberty involves "virtuous self-mastery" over "self-centered passions."[160] Christianity similarly sees liberty as the release from the bondage of sin, with sin being a form of slavery. And both the classical and Christian conceptions of liberty hold that liberty is for something, and that that something is virtue.

Ultimately, Burke is the embodiment of their synthesis. As they say, "Burke's conservative conception of freedom, connecting freedom to virtue, is an inheritance of Western humanism, both classical and Christian."[161] They, like Burke, take issue with the modern conception of liberty to the extent that it allows for liberty to degenerate into license ("license" meaning a use of liberty contrary to moral excellence). On this point, they supply one of Burke's most famous statements: "What is liberty without virtue and wisdom? It is the greatest of all possible evils: for it is folly, vice, and madness, without tuition or restraint."[162] But they emphasize that Burke does not reject modern liberty entirely. He famously defended religious toleration and other modern civil liberties, they observe.[163]

They end the chapter by contending that negative liberty is only sustainable when the organs of tradition—religion, the family, and education—are sound. In light of their overall assessment as to the state of those organs of tradition today, one is left wondering if they think that conservative humanism has any real chance of renewing Western culture.

G. Conservatism Without Reprimitivism

Chapter 8 concerns reprimitivism—the descent from civilization into barbarism. The authors contend that reprimitivism remains a "real possibility" facing the West today.[164]

To frame the discussion, the authors return to vitalism and angelism, two pathologies regarding what it means to be a human being. Relying once again on Kolnai, they first show why vitalism is so destructive. They recall their earlier discussion of Dugin's deep attachment to Heidegger and Dugin's

[160] *Id.* at 151–55.
[161] *Id.* at 151.
[162] *Id.* at 157.
[163] *Id.* at 156–57.
[164] *Id.* at xxxiii.

rejection of Greek rationalism in favor of a more primordial Greek past that celebrated the chaotic and amoral. That places Dugin squarely in the vitalist camp. Dugin, moreover, embraces "tribal egoism," a phrase they take from Kolnai. For Kolnai, it was tribal egoism that led to National Socialism.[165] Thus, Dugin's vitalism risks the same abolition of humanism as under Nazism.[166]

The authors next examine the threat of angelism that they find within conservative humanism. Against angelism, they argue that "conservatives should freely own that humans are a morally precarious animal."[167] As support, they turn to an unexpected source: psychoanalysis. As they see it, "conservatism needs to take psychoanalysis more seriously."[168] Their reason: "Psychoanalysis has identified all manner of ruses by which the mind camouflages its most elaborate, and dark, strategies."[169]

Their thinking concerning psychoanalysis flows from another unexpected source: the French psychoanalyst Jacques Lacan.[170] As they rightly note, Lacan understood himself to be the most accurate interpreter of Sigmund Freud's views, and Lacan sought to develop and promote Freud's legacy. Though Lacan has been widely celebrated by the progressive left, the authors claim that he is no progressive (just as Lacan claimed that Freud was no progressive).[171] That claim seems like a significant stretch. So many of the premises of Freudian psychoanalysis are thoroughly anti-Christian, moreover. And famously, like Freud, Lacan was an avowed atheist. The authors make no effort to show how Lacan's thinking coheres with their conception of humanism, which draws so heavily on the Judeo-Christian conception of human beings being made in the image of God, so their invocation of his ideas strikes a strange chord.

Finally, and also unexpectedly, their discussion regarding angelism looks at law-and-order politics through the lens of detective fiction. Devotees of detective fiction might find that discussion interesting, while those who do not will find it quite quixotic and difficult to follow.

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[165] *Id.* at 164.
[166] *Id.* at 166.
[167] *Id.* at 167.
[168] *Id.* at xxxiii.
[169] *Id.*
[170] *Id.* at 172.
[171] *Id.*

IV. THE BENEDICT SYNTHESIS

In the book's final chapter, the authors offer Pope Benedict XVI as the contemporary thinker who has most clearly and cogently synthesized the best of classical, Christian, and modern thought.

They first stress the role of Greek rationality in Benedict's synthesis.[172] Benedict follows Socrates, Plato, and Aristotle in believing that "philosophical reason can apprehend moral truths grounded in nature."[173] Crucially, Benedict also sees harmony between Greek rationality and Christian theology. To quote him, the New Testament "bears the imprint of the Greek spirit."[174] It is of supreme significance that John's Gospel presents Christ as the *Logos*, the incarnation of reason itself.

The authors also stress, quoting Benedict, that the Enlightenment "contains important values that are essential for us, precisely as Christians, and we do not wish to do without them."[175] As they see it, "The real problem is the Enlightenment's 'modern self-limitation of reason,' evident in the positivist and materialist doctrine of the period." They continue: "Unlike Greek rationality, these doctrines exclude metaphysical speculation about persons and ethics, hoping to confine the rational to the scientific-empirical sphere alone."[176] That error—scientism—is part of what Benedict calls the "second Enlightenment."[177] The failure to accept that reason has a place in discerning moral and philosophical truth leads to "irrationalisms of religion and scientific fundamentalism."[178]

Further, the authors embrace the Enlightenment's insistence on equal human dignity. The classical world accepted human inequality as an anthropological and sociological fact. Aristotle, of course, famously posited a natural hierarchy among human beings, with men superior to women, and masters superior to slaves. The authors, however, hold human equality in high regard.[179]

But equality and dignity, like humanism, must be rightly conceived. Once again, Christianity serves as an essential correction of the classical world.

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[172] *Id.* at 176.
[173] *Id.* at 179.
[174] *Id.* at 180.
[175] *Id.* at 181.
[176] *Id.* at 178.
[177] *Id.* at 181.
[178] *Id.* at 178.
[179] *Id.* at 192–94.

Given the empirical fact of human differences in size, strength, skill, appearance, and intellect, equality has no basis in nature. Thus, as they see it, "Equality is ultimately a moral thesis that rests on the biblical Judeo-Christian faith that all human beings are created in God's image."[180] And: "It is therefore respect for equality of dignity among all human beings that conservatism defends, regardless of distinctions of sex, class, or race."[181]

Based on the notion of equal human dignity, moreover, conservative humanism has "a very broad sympathy for the classical liberal aspiration of equality of opportunity against arbitrary discrimination," though "it look[s] with great suspicion on efforts to secure a mandatory equality of outcomes."[182] They also reject equality of outcomes because of concerns regarding statism and human flourishing: "The demand for such a radical equality requires a vast bureaucracy of social control, is antimeritocratic, and is hostile to the aspirations of human excellence and freedom," they say.[183]

Though they credit Kant with contributing to human dignity based on the human capacity for high-minded rational action,[184] they are skeptical that modern notions of human dignity are sufficient: "The Enlightenment militated for equal human dignity . . . but where does the idea of dignity come from? It is only as a theological-moral proposition deriving historically from Christianity that the West's idea of human dignity assumes coherence."[185] Consequently, "Without God, man has no transcendent dignity and becomes merely a physical, natural creature."[186] The likely result: reprimitivism.

McAleer and Rosenthal-Pubul make a strong case for the tie between conservatism and humanism. They also make a strong case for the value of Western civilization at a time when it needs ardent defenders. And they also make a strong case that the recognition of the transcendent dignity of every person is necessary to preserve Western civilization from reprimitivism. All told, however, because theirs is ultimately a conservative *Christian* humanism, while the book offers strong reasons for the convinced to become even more so, those who are unconvinced at the outset will likely remain so.

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[180] *Id.* at 193.
[181] *Id.* at 193–94.
[182] *Id.* at 194.
[183] *Id.*
[184] *Id.* at 81.
[185] *Id.* at 183.
[186] *Id.* at xxix.

THE TIME IS RIPE TO DISINCORPORATE THE ESTABLISHMENT CLAUSE*

FREDERICK W. CLAYBROOK, JR.**

The Supreme Court's 1947 incorporation of the Establishment Clause[1] through the Due Process Clause of the Fourteenth Amendment in *Everson v. Board of Education of Ewing*[2] continues to command the attention of both the Court and commentators. The Supreme Court most recently addressed the subject in *Kennedy v. Bremerton School District*, in which it rebuffed the Ninth Circuit's reliance on the Establishment Clause to deny a high school football coach his right to freely exercise his religion by kneeling with his head bowed at the 50-yard-line of the field after a game.[3] And Professors Nathan S. Chapman and Michael W. McConnell have recently published *Agreeing to Disagree: How the Establishment Clause Protects Religious Diversity and Freedom of Conscience*, in which, as the title indicates, they claim that the Establishment Clause does important work to guard against government encroachment on individual liberties.[4]

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

** Attorney, Claybrook LLC. The author expresses his appreciation for the research assistance provided by David A. Bruce, Esq., with regard to the state constitutional provisions on free exercise and establishment of religion.

[1] The Establishment Clause reads, "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend I.

[2] 330 U.S. 1 (1947). While the Court in *Cantwell v. Connecticut*, 310 U.S. 296 (1940), quoted both Religion Clauses of the First Amendment and referred to them as having been incorporated through the Fourteenth Amendment, *id.* at 303, it did not specifically refer to the Establishment Clause as having been incorporated until its decision in *Everson.*

[3] 597 U.S. 507 (2022), *rev'g* 991 F.3d 1004 (9th Cir. 2021).

[4] NATHAN S. CHAPMAN & MICHAEL W. MCCONNELL, AGREEING TO DISAGREE: HOW THE ESTABLISHMENT CLAUSE PROTECTS RELIGIOUS DIVERSITY AND FREEDOM OF CONSCIENCE (2023) (hereinafter "Agreeing to Disagree"); *see also* Carl H. Esbeck, *The Establishment Clause: Its*

Professor McConnell is perhaps the academic who has most influenced the Supreme Court's turn from its former, "strict separation" interpretation of the Establishment Clause to a more "historical" reading of it.[5] The Supreme Court has repeatedly cited McConnell's work in its opinions,[6] and he has long called for the courts to interpret the meaning of "establishment of religion" in a way that would have been familiar to the Framers, including in those states that still had establishments when the states adopted the Constitution. For McConnell and Chapman, the marks of a true establishment are "(1) control over doctrine, governance, and personnel of the church; (2) compulsory church attendance; (3) financial support; (4) prohibitions on worship in dissenting churches; (5) use of church institutions for public functions; and (6) restriction of political participation to members of the established church."[7] The Supreme Court has moved substantially in this direction in

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Original Public Meaning and What We Can Learn from the Plain Text, 22 FEDERALIST SOC'Y REV. 26 (2021); THE CAMBRIDGE COMPANION TO THE FIRST AMEND. AND RELIGIOUS LIBERTY (Michael D. Breidenbach & Owen Anderson eds., 2020) (hereinafter "THE CAMBRIDGE COMPANION"); Vincent Phillip Muñoz, *The Original Meaning of the Establishment Clause and the Impossibility of its Incorporation*, 8 U. PA. J. CONST. L. 585 (2006); PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (2002); LEONARD LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT (1986); ROBERT CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1982).

[5] Professor McConnell is currently the Richard and Frances Mallery Professor and Director of the Constitutional Law Center at Stanford Law School; from 2002 to 2009, he served as a judge on the United States Court of Appeals for the Tenth Circuit. Professor Chapman is currently the Pope F. Brock Associate Professor of Professional Responsibility at the University of Georgia School of Law; he formerly worked with Professor McConnell as the Executive Director of the Stanford Constitutional Law Center. Chapman and McConnell remark with respect to the "no-aid," strict separationist line of cases, with understandable pride, "In all the annals of the U.S. Reports, there is no example of a more complete volte-face in constitutional doctrine." Agreeing to Disagree, *supra* note 4, at 137.

[6] *See, e.g.*, Our Lady of Guadalupe Sch. v. Morrissey-Berru, 591 U.S. 732, 747 n.9 (2020) (citing Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105 (2003)); *id.* at 2079 (Sotomayor, J., dissenting) (citing Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990)); Espinoza v. Mont. Dep't of Rev., 591 U.S. 464, 480-81 (2020) (citing MICHAEL W. MCCONNELL ET AL., RELIGION AND THE CONSTITUTION (4th ed. 2016)); *id.* at 2264, 2266 (Thomas, J., concurring) (citing McConnell, *Establishment and Disestablishment at the Founding, Part I*, *supra*, Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986), and Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115 (1992)); *id.* at 2276 (Gorsuch, J., concurring) (citing McConnell, *The Origins and Historical Understanding of Free Exercise*, *supra*).

[7] Agreeing to Disagree, *supra* note 4, at 18; *see* DISESTABLISHMENT AND RELIGIOUS DISSENT: CHURCH-STATE RELATIONS IN THE NEW AMERICAN STATES, 1776-1833 6-7 (Carl H. Esbeck & Jonathan J. Den Hartog, eds. 2019) (hereinafter "DISESTABLISHMENT AND RELIGIOUS DISSENT") (providing similar list of historical establishment practices).

recent years, most notably in *Town of Greece v. Galloway*, in which the Court upheld the common practice of beginning a public meeting in prayer against an Establishment Clause attack;[8] the *Bladensburg Cross Case*, in which the Court upheld a city-maintained World War I memorial cross monument against an Establishment Clause challenge;[9] and in *Kennedy*.

In *Kennedy*, the Supreme Court chided the lower courts for not recognizing that the Court had "long ago" abandoned the "ahistorical" *Lemon v. Kurtzman*[10] approach to adjudicating asserted violations of the Establishment Clause and "its endorsement test offshoot."[11] It summarized:

> In place of *Lemon* and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by "'reference to historical practices and understandings.'" "'[T]he line'" that courts and governments "must draw between the permissible and the impermissible" has to "'accor[d] with history and faithfully reflec[t] the understanding of the Founding Fathers.'" An analysis focused on original meaning and history, this Court has stressed, has long represented the rule rather than some "'exception'" within the "Court's Establishment Clause jurisprudence."[12]

This stress on the history of the Establishment Clause naturally raises the question of whether the Court should disincorporate the clause, as its incorporation was decidedly contrary to the clause's original purpose and, thus, ahistorical. It is an open secret that the Court's application of the federal Establishment Clause against the states by incorporating it in the Fourteenth Amendment was improper. Thus, it is ironic that Chapman and McConnell—while championing the historical approach to the clause the Court firmly affirmed in *Kennedy* and glorying in the Court's reversal of itself in (historically speaking) short order[13]—argue for continuing its incorporation against the states (albeit through the Privileges or Immunities Clause of the Fourteenth Amendment[14]). Their premise is that the Establishment

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[8] 572 U.S. 565, 575-77 (2014).

[9] Am. Legion v. Am. Humanist Ass'n, 588 U.S. 29 (2019).

[10] 403 U.S. 602 (1971).

[11] *Kennedy*, 597 U.S. at 510. The endorsement test was first articulated by Justice Sandra Day O'Connor in *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 630 (1989) (O'Connor, J., concurring in part and concurring in judgment).

[12] *Kennedy*, 597 U.S. at 535-36 (internal citations omitted) (quoting *Town of Greece*, 572 U.S. at 575-77 (quoting Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 294 (1963) (Brennan, J., concurring)).

[13] *See* Agreeing to Disagree, *supra* note 4, at 87-93.

[14] *See id.* at 78-79. Chapman and McConnell suggest this reinterpretation, criticizing the Supreme Court for incorporating individual, or "personal," rights through the Due Process Clause of the

Clause, to the degree it is properly applied to the states, protects important individual rights that otherwise would be jeopardized.

That premise does not withstand closer scrutiny, especially after developments in Supreme Court case law over the last two decades. This article will analyze how religious diversity and exercise are now fully protected under other provisions of the First Amendment, particularly the Free Exercise, Free Speech, and Freedom of Assembly Clauses, and how any remaining establishment concerns are adequately protected under state law.[15]

Disincorporating the Establishment Clause would require the Supreme Court to overrule precedents dating back to 1947. In considering whether to overrule a precedent or apply *stare decisis*, the Court considers (1) whether the precedent is erroneous and how significant the error is, (2) how well-reasoned the precedent is, (3) whether the rule that would supersede the overruled precedent is workable, (4) how the new rule would affect other areas of law, and (5) the effect of the change on reliance interests.[16] This article in its first section explains why the Supreme Court erred when it incorporated the Establishment Clause into the Fourteenth Amendment. Incorporation runs directly counter to one of the historical purposes of the amendment, i.e., to leave the states free to determine whether to establish a particular religion for themselves, and in what respects. As Chapman and McConnell observe, "There was no doubt or uncertainty about this: The First Amendment Establishment Clause did not restrict the power of the states to establish religion."[17]

Fourteenth Amendment, while recognizing that the Privileges or Immunities Clause covers only personal rights. It might reasonably be suggested that overturning the Supreme Court's limiting construction of the Privileges or Immunities Clause in the *Slaughter-house Cases*, 83 U.S. 36 (1873), would be a much heavier lift than overruling *Everson*'s incorporation of the Establishment Clause. Chapman and McConnell do agree that *Everson* improperly incorporated what they call the "jurisdictional" (sometimes called "structural") parts of the Establishment Clause. Moreover, constitutional privileges and immunities deal with fundamental rights, and it cannot reasonably be contended that any purported personal rights that emanate from the Establishment Clause were considered fundamental by the Constitution's framers and state ratifiers, as establishments were protected under the First Amendment and still in place to some extent when the Fourteenth Amendment was ratified. *See generally* CHESTER J. ANTIEAU, THE INTENDED SIGNIFICANCE OF THE FOURTEENTH AMENDMENT 91-111 (1997) (noting state constitutional provisions when the Fourteenth Amendment was ratified restricting political office to Protestants).

[15] Of course, disincorporation would not affect application of the Establishment Clause to actions of the federal government, to which the clause is expressly directed.

[16] *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 218-21 (2022) (citing Ramos v. La., 590 U.S. 83, 120-24 (2020) (Kavanaugh, J., concurring in part); Janus v. Am. Fed'n of State, Cnty., and Mun. Emps., 585 U.S. 878, 916-18 (2018)).

[17] Agreeing to Disagree, *supra* note 4, at 76.

Moreover, there is no indication that the formulators and ratifiers of the Fourteenth Amendment intended to incorporate the Establishment Clause. For these reasons, the first two factors—those related to the merits—support overruling *Everson*'s incorporation of the Establishment Clause against the states.

The second section of this article deals with the other factors the Court considers in determining whether to overturn one of its precedents, principally whether it would upend established reliance interests. Overruling *Everson* and disincorporating the Establishment Clause would have beneficial, not adverse, effects. Any individual or personal rights perceived to be safeguarded by the Establishment Clause are protected by other parts of the Constitution properly incorporated for protection of those rights. Moreover, the states have uniformly adopted disestablishment provisions in their own constitutions. Thus, the Court should overrule *Everson* and reestablish the federal balance provided for in the First Amendment, while giving full play to protections of individuals demanded by the Free Speech, Free Exercise, and Freedom of Assembly Clauses against state action.

I. THE SUPREME COURT IN *EVERSON* IMPROPERLY INCORPORATED THE ESTABLISHMENT CLAUSE VIA THE FOURTEENTH AMENDMENT

Since *Everson*, the Supreme Court has never wrestled with the issues of whether it properly incorporated the Establishment Clause and what effects would follow if it were to correct that mistake. Justice Clarence Thomas is the exception: he has called upon the Court to address these issues multiple times, noting several "barriers to the incorporation of the Establishment Clause."[18] Indeed, *Everson*'s incorporation of the Establishment Clause was

[18] *Town of Greece*, 572 U.S. at 606 n.1 (Thomas, J., concurring in part and concurring in the judgment); *see also, e.g.*, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 50-51 (2004) (Thomas, J., concurring) (noting that the Establishment Clause is a federalism provision designed to keep the national government out of establishment matters and that, at least on its face, it does not protect individual rights)'; Utah Hwy. Patrol Ass'n v. Am. Atheists, Inc., 565 U.S. 994, 1007 (2011) (Thomas, J., dissenting from denial of cert.); McDonald v. Chicago, 561 U.S. 741, 876 n.20 (2010) (Thomas, J., concurring in part and concurring in the judgment); Cutter v. Wilkinson, 544 U.S. 709, 726-29 (2005) (Thomas, J., concurring); Zelman v. Simmons-Harris, 536 U.S. 639, 678-80 (2002) (Thomas, J., concurring). Justice Potter Stewart, sixteen years after *Everson*, noted incorporation's incongruence with the original federalism purpose of the clause: "the Fourteenth Amendment has somehow absorbed the Establishment Clause, although it is not without irony that a constitutional provision evidently designed to leave the States free to go their own way should now have become a restriction upon their autonomy." *Schempp,* 374 U.S. at 310 (Stewart, J., dissenting).

wrong the day it was decided; incorporation is not and never was supported by sound legal reasoning.

A. A Principal Purpose of the Establishment Clause Was to Deny the Federal Government Authority over How and Whether States Established Religion

Incorporation of the Establishment Clause through the Fourteenth Amendment has many, well-noted problems. Perhaps the most obvious one is that, by incorporating it against the states, the Supreme Court upended one of the clause's main purposes: to allow states to regulate the establishment of religion as they saw fit, preventing the federal government from interfering with their preferred arrangements.

1. Prior to Adoption of the First Amendment, Political Attitudes Desired to Limit Federal, but Not State, Power over Religious Establishment

The dominant paradigm in the states when they ratified the First Amendment was still that of England: the state should encourage religion to inculcate virtues important to the body politic.[19] For instance, Virginia in its 1784 general assessment bill, in which it provided for the funding of ministers, noted, "Christian knowledge hath a natural tendency to correct the morals of men, restrain their vices, and preserve the peace of society; which cannot be effected without a competent provision for learned teachers."[20]

At the same time, there was a consensus that the religion to be advanced by the state should be some form of Protestantism that rejected the authority of the Catholic pope over temporal matters.[21] In 1774, citizens of the American Colonies were outraged when the British Parliament allowed Quebec to keep Catholicism as its official faith and permitted Catholics to practice their

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[19] *See* GLENN A. MOOTS, *Religious Exercise and Establishment in Early Am.*, *in* THE CAMBRIDGE COMPANION, *supra* note 4, at 103.

[20] "*A Bill Establishing a Provision for Teachers of the Christian Religion*" *1784*, quoted in THOMAS J. BUCKLEY, CHURCH AND STATE IN REVOLUTIONARY VIRGINIA, 1776-1787, at 188-89 (1977).

[21] An early Congress illustrated the belief that religion was a positive force on the body politic by funding Christian missionaries to educate and evangelize Native Americans. *See* MICHAEL D. BREIDENBACH, *Religious Tests, Loyalty Oaths, and the Ecclesiastical Context of the First Amendment*, *in* THE CAMBRIDGE COMPANION, *supra* note 4, at 166, 189-91. Federalists and non-conformists (who were generally anti-federalist) agreed that religion was necessary to inculcate the virtue needed to support a republic and to prevent violent revolution like France experienced. JONATHAN DEN HARTOG, *Church and State in the Nineteenth Century*, *in* THE CAMBRIDGE COMPANION, *supra* note 4, at 193, 195-96.

religion freely.[22] Concerned that Great Britain's real motive was to encourage Catholic expansion in the colonies "for the ultimate purpose of suppressing their cantankerous American cousins,"[23] Alexander Hamilton railed,

> Does not your blood run cold, to think an English Parliament should pass an act for the establishment of arbitrary power and popery in such an extensive country? . . . If they had been friends to the Protestant cause, they would never have provided such a nursery for its great enemy; they would not have given such encouragement to popery. . . . They may as well establish popery in New York, and the other colonies, as they did in Canada.[24]

To prevent such a thing happening in this country, the federal government was to be denied any authority to impose a national church on the various states and to regulate church offices and practice, leaving such matters exclusively to the states.[25] Reflecting that attitude, when Ambassador Benjamin Franklin forwarded the Vatican's request in 1783 that Congress allow a native vicar apostolic for the newly formed country, the first federal Congress, acting under the Articles of Confederation, responded that powers over spiritual appointments are "reserved to the several States, individually."[26] Indeed, at the time of the constitutional convention and the state ratifying conventions, several states had varying types of church establishments,[27] and seven

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[22] *See* Francis J. Beckwith, *Church, State, and the Abuse Crisis*, 10 J. OF CHRISTIAN LEGAL THOUGHT 21, 21-22 (2020).

[23] *Id.* at 21.

[24] ALEXANDER HAMILTON, *A Full Vindication of the Measures of Congress*, *in* THE WORKS OF ALEXANDER HAMILTON 26-27 (John C. Hamilton ed., 1850).

[25] *See generally* CHRIS BENEKE, *The Historical Context of the Religion Clauses of the First Amend.*, *in* THE CAMBRIDGE COMPANION, *supra* note 4, at 140, 141-50.

[26] Journals of the Continental Cong., 25:825-26 (Dec. 22, 1783) (Gaillard Hunt, ed.), *available at* https://tile.loc.gov/storage-services/service/ll/llscd/lljc025/lljc025.pdf. The Vatican was assuming that *ius patronatus*, the right to appoint ecclesiastical officials, would be applied by the United States. The Establishment Clause later expressly denied that right to the federal government. *See* Breidenbach, *supra* note 21, at 168.

[27] *See* DISESTABLISHMENT AND RELIGIOUS DISSENT, *supra* note 7, at ch. 1. While the widely discussed views of Roger Williams and Thomas Jefferson on church-state separation played basically no role in the drafting and adoption of the First Amendment, the historical record does show that, by 1783, a shift was underway to allow nonconformists to enjoy unimpeded public worship, even in those states with an established church. *See id.* at 16-17; Moots, *supra* note 19, at 113-14, 138; *see also* MARK DAVID HALL, DID AMERICA HAVE A CHRISTIAN FOUNDING? 59-68 (2019); McConnell, *Establishment and Disestablishment at the Founding, Part I supra* note 6, at 2145 (2003).

of the original thirteen states in their constitutions required their office holders to be Protestant.[28]

When the representatives of the various states met at the Constitutional Convention of 1787, the potential for conflict was great, but so was the need of a more effective organizing instrument. Religion, then as now, was a contentious matter, with different states having different approaches to establishment and with varying denominations being favored in varying states.[29] Attempting to put the reconstituted federal government's larger thumb into the religious pie would almost certainly have poisoned any efforts at coming to consensus on a new constitution, and, even if consensus had been attained at the convention, it would have prevented attaining ratification by the requisite number of states.[30] Simply avoiding the topic in the proposed constitution was considered inadequate in some state ratifying conventions, with states conditioning their acceptance of the proposed document on the addition of a "bill of rights" that would include a clause that would guarantee that the newly constituted federal government would keep its hands off how the states handled the establishment of religion.[31] This "hands-off" attitude was already reflected in the text of the original Constitution when the framers provided

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[28] *See* GA. CONST. of 1777, art. VI, *available at* https://avalon.law.yale.edu/18th_century/ga02.asp; MASS. CONST. of 1780, ch. VI, *available at* http://www.nhinet.org/ccs/docs/ma-1780.htm; N.H. CONST. of 1784, pt. II, *available at* http://candst.tripod.com/cnst_nh.htm; N.J. CONST. of 1776, art. XIX, *available at* https://avalon.law.yale.edu/18th_century/nhj15.asp; N.C. CONST. of 1776, art XXXII, *available at* https://avalon.aw.yale.edu/18th_century/nc07.asp; S.C. CONST. of 1778, art. III, *available at* https://avalon.aw.yale.edu/18th_century/sc02.asp; VT. CONST. of 1777, ch. I, § III; ch. II, § IX, *available at* https://avalon.aw.yale.edu/18th_century/vt01.asp.

[29] *See generally* DISESTABLISHMENT AND RELIGIOUS DISSENT, *supra* note 7, at 4, 10-11, 12; Esbeck, *supra* note 4, at 29 ("In 1787, church-government relations (as distinct from safeguarding private religious conscience) were highly divisive, were widely regarded as a state-level matter, and varied considerably from state to state.").

[30] *See* Esbeck, *supra* note 4, at 28-29; DONALD L. DRAKEMAN, *Which Original Meaning of the Establishment Clause Is the Right One?*, *in* THE CAMBRIDGE COMPANION, *supra* note 4, at 365, 393 ("The reason that congressmen with impressively diverse church-state views could agree on the clause is that its anti-establishment reach would extend only as far as the national government.").

[31] *See generally* ROBERT A. GOLDWIN, FROM PARCHMENT TO POWER: HOW JAMES MADISON USED THE BILL OF RIGHTS TO SAVE THE CONSTITUTION 36-48 (1997); *see, e.g.*, N.C. Ratification Resolution (Nov. 21, 1789) (proposing amendment that "no particular religious sect or society ought to be favoured or established by law in preference to others" by the federal government), *available at* https://avalon.law.yale.edu/18th_century/ratnc.asp (last visited Dec. 28, 2021).

that there would be no religious test for *federal* offices, while not including any similar provision for *state* office holders.[32]

2. The Drafting History and Text of the Establishment Clause Fulfilled the Original Purpose to Limit Federal, but Not State, Power over Religion

The overriding purpose of the Bill of Rights was to make explicit areas in which the reformed federal government was divested of power.[33] Madison's initial draft of the Bill of Rights for the first House of Representatives under the Constitution included, "nor shall any national religion be established."[34] The select committee to which it was referred recommended, "no religion shall be established by law."[35] After debate, the House passed, "Congress shall make no law establishing religion,"[36] and sent it to the Senate. The Senate passed a more limited clause, restricting Congress only from "establishing articles of faith or a mode of worship."[37] The Conference Committee resolved the differences in the ultimately adopted language: "Congress shall make no law respecting an establishment of Religion."[38]

The final text of the clause targets "Congress," the law-making instrument of the newly reconstituted federal government. On its face, this provision (a) does not restrain an establishment of religion by state governments but (b) expressly withholds power from Congress to pass a law relating to state establishments.[39] This plain reading is reinforced by the reason the clause was amended to target Congress: it was specifically inserted to negate any inference, as feared by Rep. Huntington during the congressional debates on

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[32] U.S. CONST. art. VI, cl. 3. This is not to say that there was not some implicit recognition of religion in the Constitution's original text, as it still required oaths, which were understood to be made in the name of God, although leeway was given for nonconformists like Quakers and Anabaptists by allowing them to affirm, rather than swear. *See id.* at art. I, § 3, cl. 6; art. II, § 1, cl. 9; art VI, cl. 3; *see generally* Breidenbach, *supra* note 21, at 166-75 (observing that religious oaths were universally required in the United Kingdom and in the States at the time).

[33] *See generally* RICHARD LUBINSKI, JAMES MADISON AND THE STRUGGLE FOR THE BILL OF RIGHTS (2006); Esbeck, *supra* note 4, at 30.

[34] 1 Annals of Cong. 450-51 (June 8, 1789).

[35] *Id.* at 699 (July 28, 1789).

[36] *Id.* at 795-96 (Aug. 20, 1789).

[37] S. JOURNAL, 1st Cong., 1st Sess. 129 (Sept. 9, 1789).

[38] H. JOURNAL, 1st Cong., 1st Sess. 121 (Sept. 24, 1789); S. JOURNAL, 1st Cong., 1st Sess. 150-51 (Sept. 25, 1789).

[39] *See* Esbeck, *supra* note 4, at 32.

the provision, that the amendment was directed at the states.[40] Indeed, given the circumstances at the time, it is impossible to imagine that the amendment would have been adopted if it were thought to encroach on the power of the states over religion.[41]

Despite the clause's original purpose and express text *restraining* federal interference with the way a state might establish religion, the Supreme Court's incorporation of the Establishment Clause through the Fourteenth Amendment gives it the opposite effect. This result could only be correct if the Fourteenth Amendment required the states to protect rights under the Establishment Clause as a liberty interest via its Due Process Clause or as a privilege or immunity.[42] As discussed in the next section, the Establishment Clause is different in kind from provisions that protect personal rights; those provisions, unlike the Establishment Clause, are properly incorporated against the states by the Fourteenth Amendment.

B. The Fourteenth Amendment Protects Individual Rights, but the Establishment Clause Does Not

As the Supreme Court has repeatedly observed, the Fourteenth Amendment demands incorporation only of individual rights that are "fundamental to our scheme of ordered liberty" and "deeply rooted in this Nation's history

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[40] 1 Annals of Cong. 758-59 (Aug. 15, 1789); *see* Esbeck, *supra* note 4, at 32-33 (noting Huntington's concern that the clause not be construed to restrain state establishment of religion). It is also how the Supreme Court consistently read the clause prior to *Everson*. *See, e.g.*, Permoli v. Municipality No. 1 of New Orleans, 44 U.S. 589, 609 (1845) ("The Constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws: nor is there any inhibition imposed by the Constitution of the United States in this respect on the states."); *see also* Timbs v. Ind., 586 U.S. 146, 150 (2019) ("When ratified in 1791, the Bill of Rights applied only to the Federal Government.") (citing Barron *ex rel.* Tiernan v. Mayor of Balt., 32 U.S. 243 (1833)).

[41] *See* Drakeman, *supra* note 30, at 392-93; Esbeck, *supra* note 4, at 32-34; Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. REV. 1385.

[42] The debate over whether incorporation is proper through the provision protecting liberty through the Due Process Clause or through the Privileges or Immunities Clause of the Fourteenth Amendment is not attempted or rehearsed here, as this article argues that incorporation of the Establishment Clause is appropriate under neither. *See generally* Steven W. Fitschen, *From Civil Rights to Blackmail: How the Civil Rights Attorney's Fees Act of 1976 (42 U.S.C. § 1988) Has Perverted One of America's Most Historic Civil Rights Statutes*, 29 WM. & MARY BILL OF RIGHTS J. 107, 150-55 (2021) (discussing scope of Privileges or Immunities Clause of the Fourteenth Amendment and marshalling evidence that the Framers did not consider the Establishment Clause to contain personal rights covered by the amendment).

and tradition."[43] This requirement must be met even when the rights in question are found in the Bill of Rights.[44]

Disestablishment at the state level cannot be understood as either fundamental to or deeply rooted in our nation's polity. Many states had religious establishments when the Constitution was ratified, and the Establishment Clause protected, rather than threatened, those establishments.[45] Thus, any proof that Congress and the ratifying states intended to incorporate the Establishment Clause against the states through the Fourteenth Amendment would have to be explicit, indeed. There is no such proof.

The legislative and ratification history contains no mention of any such intended incorporation.[46] The text of the Fourteenth Amendment on its face protects only the rights of *individuals* from interference by the states: "No State shall make or enforce any law which shall abridge the privileges or immunities of *citizens* of the United States; nor shall any State deprive any *person* of life, liberty, or property, without due process of law; nor deny to any *person* within its jurisdiction the equal protection of the laws."[47] For instance, parents have a fundamental liberty interest in the care, education, and upbringing of their children, a right which is personal to individual parents.[48] The same is true of the incorporated rights to free exercise of religion, to free speech, to free assembly, and to bear arms, which are articulated in the Constitution expressly as individual freedoms and personal rights.[49]

The Establishment Clause varies in kind from other rights incorporated through the Fourteenth Amendment. Indeed, it is not described as a freedom or a right at all. It is nonsensical to suggest that the Constitution recognized a right in an individual to either regulate a state establishment or not to establish a national religion. Establishments are by definition the work of governments, not individuals.[50] Thus, the interests protected by the

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[43] *Timbs*, 586 U.S. at 154 (internal quotation marks omitted); *see also Dobbs*, 597 U.S. at 237-39.

[44] *See id.* at 238-39.

[45] *See generally* DISESTABLISHMENT AND RELIGIOUS DISSENT, *supra* note 7, at 5-18.

[46] *See generally* Fitschen, *supra* note 42, at 150-55.

[47] U.S. CONST. amend XIV, § 1 (emphases added).

[48] *See* Troxel v. Granville, 530 U.S. 57 (2000); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).

[49] *See* U.S. CONST. amends. I, II. The Eighth Amendment's prohibitions of excessive bail and fines and cruel and unusual punishment are also individual protections, rather than federalism measures. *See Timbs*, 586 U.S. at 150-51.

[50] *See* Esbeck, *supra* note 4, at 38 ("[T]he object of the participial phrase 'respecting an establishment' is not about acknowledging an intrinsic human right, but is a reference to a discrete subject matter ('an establishment of religion') that is being placed off limits to or outside the government's

Establishment Clause do not fit neatly into the rationale supporting incorporation under the Fourteenth Amendment. That amendment, by its terms, protects *individual* rights. But the Establishment Clause is a structural provision; in other words, it is a provision directed to governments that was expressly designed to protect the rights of state governments against encroachment by the federal government.[51] To infer an individual right *not* to have a state establish a religion turns the Establishment Clause inside out, allowing that alleged individual right to override the protection the clause expressly gave to state governments to establish religion. To maintain the original meaning and purpose of the clause, any individual right emanating from the Establishment Clause would have to be limited to a right to prohibit the *federal* government from establishing a *national* religion.[52] But incorporation would not be needed to vindicate such a right. The clause itself, combined with existing standing rules, would enable complainants to sue under the federal Establishment Clause to prevent the establishment of a national religion.[53]

Nevertheless, Chapman and McConnell perceive several personal rights emanating from the Establishment Clause that, in their view, permit incorporation against the states. They acknowledge the federalism or "jurisdictional" nature of the clause in requiring the federal government to keep its hands off state establishments.[54] At the same time, they assert that the clause

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authority."); *see also Elk Grove*, 542 U.S. at 50-51 (Thomas, J., concurring) ("The Establishment Clause does not purport to protect individual rights.")

[51] *See Elk Grove*, 542 U.S. at 50-53 & n.4 (Thomas, J., concurring); *see also* Muñoz, *supra* note 4; Esbeck, *supra* note 4, at 38 ("This difference in the nature of these participial phrases [in the Free Exercise and Establishment Clauses] leads to a difference in their function: creating a structural relationship versus acknowledging an intrinsic right.").

[52] *See Elk Grove*, 542 U.S. at 51 (Thomas, J., concurring) (suggesting the Establishment Clause at most arguably contains that individual right).

[53] *See* Carl H. Esbeck, *The Establishment Clause as a Structural Restraint: Validations and Ramifications*, 18 J.L. & POLITICS (UVA) 445 (2002) (collecting Establishment Clause standing cases to vindicate it as a structural restraint).

[54] Agreeing to Disagree, *supra* note 4, at 79-80. While first acknowledging that it makes no sense to claim what they call the "jurisdictional" part of the Establishment Clause could be incorporated against the states, Chapman and McConnell then assert, without explanation and in apparent contradiction, that the Fourteenth Amendment "superseded" this aspect of the clause, but that it troubled no one at the time because the states had all disestablished by then. Obviously, the more satisfactory answer is that it troubled no one at the time because no one thought the Establishment Clause had been converted to a restriction on the states by the Fourteenth Amendment. And it is not accurate that no vestiges that Chapman and McConnell would consider Establishment Clause violations remained at the time of the Fourteenth Amendment's ratification. *See* Antieau, *supra* note

protects individual freedoms insofar as its purposes include preventing the national government from establishing religion by regulating any particular doctrine or requiring attendance at a denominational observance.[55]

But that approach does not solve the "special problem" of incorporating the Establishment Clause, as they phrase it.[56] Concededly, the Establishment Clause, when it prohibited the *federal* government from specifying a favored national church, at the same time disallowed the *federal* government from doing that indirectly by favoring one denomination over another or dictating religious doctrine or practice. However, the key point is that, when it restricted *federal* action in (indirectly or directly) establishing a national religion, the clause *allowed* the *state* governments to continue to do so at the state level and prevented the federal government from regulating "respecting" them. Splitting up the clause between direct and indirect establishments does nothing to advance Chapman and McConnell's argument. Conceding that incorporation is illogical for direct establishments necessarily concedes the same for indirect ones. Chapman and McConnell's argument boils down to the fact that people are affected by indirect establishments of religion, such as a state compelling attendance once a year at a favored church.[57] But that proves too much. People are affected by direct establishments just as they are by indirect establishments, and all structural provisions of the Constitution—not just the Establishment Clause—ultimately affect individuals. The point remains that the Establishment Clause is different in kind from other provisions of the Bill of Rights in the very way that makes those other rights amenable to incorporation: they expressly protect freedoms and rights of individuals, while the Establishment Clause does not.[58]

The Establishment Clause with respect to the *federal* government was wholly anti-establishment. It prohibits the national government from replicating England's practices of, for example, demanding adherence to published doctrinal statements, ordering personal attendance at a particular church, or legislating that taxes be given for support of certain ministers and

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14, at 91-111 (discussing remaining establishment provisions at the state level when the Fourteenth Amendment was drafted and ratified).

[55] Agreeing to Disagree, *supra* note 4, at 80-81.

[56] *Id.* at 79.

[57] *Id.* at 80.

[58] *See* Drakeman, *supra* note 30, at 393 (observing that the Establishment Clause "differed from the remainder of the First Amendment, which was a series of statements in favor of the general principles of free exercise of religion, freedom of speech, freedom of the press, and so on. There was no equivalent nonestablishment value underlying the establishment clause").

not others. But it simply does not follow that, because the federal government cannot do such things, the states may not, either. In fact, the purpose of the Establishment Clause was to provide just such a distinction. All the Establishment Clause did with respect to the *states* was to set up a structural block to prevent the national government from regulating what the states did in this area, whether the states were pro- or anti-establishment or a mixture of both.

That is not to say that the ratification of the Fourteenth Amendment made no difference. The type of individual or personal rights Chapman and McConnell find implicit in the Establishment Clause for protection against overreach by the *federal* government overlap with rights protected by the Free Exercise, Free Speech, and Freedom of Assembly Clauses, which have been properly incorporated through the Fourteenth Amendment as fundamental, personal rights and so reach state action as well as federal.[59] As will be discussed further below, because of the incorporation of these clauses, there are no individual or personal rights of the type even arguably protected by the Establishment Clause that are not already protected against incursion by the states.

Finally, the unsuccessful federal Blaine Amendment provides some inferential support for the argument that the Fourteenth Amendment does not incorporate the Establishment Clause. The federal Blaine Amendment, which passed the House by the requisite two-thirds majority but fell just short in the Senate, in its opening phrase provided, "No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof . . . ."[60] A logical inference is that, if the sponsors and ratifiers of the Fourteenth Amendment thought that it had already incorporated the Establishment Clause less than a decade earlier, they would not have tried to do it in the Blaine Amendment. However, that inference is admittedly weak: incorporation was not yet in its heyday in 1876, and the amendment also expressly

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[59] *See Elk Gove*, 542 U.S. at 51 (Thomas, J., concurring).

[60] 4 Cong. Rec. 5453 (1876). Chapman and McConnell brush off this language and its inference that, shortly after ratification by the Fourteenth Amendment, the Establishment Clause was not understood to be incorporated to the states, by describing it as a "rhetorical strategy" and "sideshow" to aid the amendment's real purpose to deny state funding to "sectarian," i.e., mainly Catholic, schools. Agreeing to Disagree, *supra* note 4, at 81-84.

calls for incorporation of the Free Exercise Clause, which everyone agrees is properly incorporated through the Fourteenth Amendment.[61]

C. The Everson *Court Could Not, and Did Not, Support Its Incorporation Holding*

The *Everson* Court made the Establishment Clause applicable to the states through the Fourteenth Amendment. It did so without principled analysis, first in its conclusory statement that "The First Amendment, as made applicable to the states by the Fourteenth, commands that a state 'shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .'"[62] The Court went on a few pages later:

> The meaning and scope of the First Amendment, preventing establishment of religion or prohibiting the free exercise thereof, in the light of its history and the evils it was designed forever to suppress, have been several times elaborated by the decisions of this Court prior to the application of the First Amendment to the states by the Fourteenth. The broad meaning given the Amendment by these earlier cases has been accepted by this Court in its decisions concerning an individual's religious freedom rendered since the Fourteenth Amendment was interpreted to make the prohibitions of the First applicable to state action abridging religious freedom. There is every reason to give the same application and broad interpretation to the "establishment of religion" clause. The interrelation of these complementary clauses was well summarized in a statement of the Court of Appeals of South Carolina, quoted with approval by this Court in *Watson v. Jones*, 13 Wall. 679, 730: "The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority."[63]

These passages simply assume their predicate that the Establishment Clause is identical in character to the other First Amendment protections and so should receive identical treatment with respect to incorporation.[64] The

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[61] Montana's version of the Blaine Amendment as applied to deny religious schools generally available tax funds was declared unconstitutional in *Espinoza v. Montana Department of Revenue*, 591 U.S. 464, discussed further *infra.*

[62] *Everson*, 330 U.S. at 8 (citing Murdock v. Pa., 319 U.S. 105 (1943)). While the *Murdock* Court used basically the same words, 319 U.S. at 108, that case dealt with restrictions on door-to-door evangelization protected by the Free Exercise Clause.

[63] *Everson*, 330 U.S. at 14-15 (footnotes omitted).

[64] The dissenting Justices did not discuss the incorporation issue. While the majority upheld the challenged state law under the incorporated Establishment Clause, the dissenters argued that the

Everson Court avoided discussion of the text or drafting history of the clause and cited in support only Free Exercise Clause cases.[65] But those free exercise cases protected only individual rights, most of them invalidating restrictions against door-to-door evangelism by individuals and *West Virginia State Board of Education v. Barnette* protecting school children from being forced to salute the flag.[66] Ironically, the Supreme Court in *Everson* recognized all of these as dealing with "an *individual's* religious freedom."[67] And the very language the *Everson* Court quoted from *Watson v. Jones* recognized that the Establishment Clause provided, not an individual right, but a *structural* restraint.[68] The Court certainly did not grapple with the central issue: when a major purpose of the Establishment Clause was to keep the *federal* government's hands off how the *states* dealt with establishing religion—i.e., when it was required to allow pro-establishment actions by the states—how could it possibly be proper to convert that shield for the states into a sword granting the federal government jurisdiction to forbid their establishments?[69] And the Supreme Court since *Everson* has neither attempted to answer that fundamental

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state law in question violated the Establishment Clause. *Id.* at 18 (Jackson, J., dissenting), 28 (Rutledge, J., dissenting).

[65] Many have critiqued the *Everson* Court's slanted use of the history of the formation of the Establishment Clause. *See, e.g.*, Hall, *supra* note 27, at 59-85 (discussing the errors of the "*Everson* syllogism" and the exaggerated weight and misconstructions given to the views of Jefferson and Madison).

[66] *See Everson*, 330 U.S. at 15 n.22 (citing *Cantwell*, 310 U.S. 296 (door-to-door evangelization by individuals); Jamison v. Tex., 318 U.S. 413 (1943) (same); Largent v. Tex., 318 U.S. 418 (1943) (same); *Murdock*, 319 U.S. 105 (same); Follet v. McCormick, 321 U.S. 573 (1944) (same); Marsh v. Ala., 326 U.S. 501 (1946) (same); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (forced flag salute by individuals struck down as compelled speech)). The *Everson* Court also cited for support *Bradfield v. Roberts*, 175 U.S. 291 (1899), with a "*cf.*" signal. *Bradfield* upheld incorporation of a Catholic hospital by the District of Columbia against an Establishment Clause attack; of course, D.C. is a federal territory, not a state, and so is irrelevant to the incorporation question.

[67] *Id.* at 15 (emphasis added).

[68] *Id.* (recognizing that the "structure of our government" provides for separate spheres of civil and religious authority).

[69] *See Schempp*, 374 U.S. at 310 (Stewart, J., dissenting) ("[I]t is not without irony that a constitutional provision evidently designed to leave the States free to go their own way should now have become a restriction upon their autonomy."). Justice Joseph Story in his *Commentaries* wrote that an attempt by the federal government to disallow the states to favor Christianity officially—as many of them did when the Establishment Clause was adopted—would have "created universal disapprobation," and that "the general, if not universal, sentiment" at the time was "that Christianity ought to receive encouragement from the state." 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 78 (1833).

question nor made any principled defense of its incorporation of the Establishment Clause.

The most important of the *stare decisis* factors are those which ask whether the decision under challenge was right—or at least well-reasoned—in the first place. *Everson*'s incorporation of the Establishment Clause is very difficult to justify on the merits; indeed, the decision itself barely even tried to justify that landmark constitutional development, and incorporation is starkly inconsistent with the federalism principle that is at the core of the clause itself. Therefore, the most important *stare decisis* factors cut against maintaining incorporation of the Establishment Clause and in favor of overruling *Everson*.[70]

II. DISINCORPORATING THE ESTABLISHMENT CLAUSE WOULD HAVE BENEFICIAL, NOT ADVERSE, EFFECTS, AND NO SUBSTANTIAL RELIANCE INTERESTS MILITATE AGAINST IT

Professor Carl Esbeck recognizes that *Everson* wrongly incorporated the Establishment Clause through the Fourteenth Amendment, but he would leave it be, as it has proven sometimes efficacious to religious liberty. He summarizes as follows:

> *Everson*'s incorporation of the Establishment Clause was a mistake if one follows the interpretive rules of original public meaning. Nonetheless, [we] should accept incorporation as settled law by virtue of *stare decisis*. Americans have already worked their way through incorporation's many difficulties, many citizens have come to rely on it, and its reversal would be disruptive. Moreover, such a proposition is not a one-sided bargain; the Establishment Clause often serves to protect religious freedom when it comes to matters such as the prohibition on courts becoming entangled in religious questions and the resurgent protection of church autonomy.[71]

Contra Esbeck, it is not too late to turn back, to correct *Everson*'s error, and to disincorporate the Establishment Clause. *Stare decisis* does not require adherence to *Everson*, as disincorporation would not upset substantial reliance interests or cause significant disruption of expectations built on the edifice of the concededly improper incorporation in *Everson*. The Supreme Court

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[70] *See Janus*, 585 U.S. at 916-17 (listing *stare decisis* factors). *Cf. Dobbs*, 597 U.S. at 218 (finding *Roe* "egregiously wrong and . . . on a collision course with the Constitution from the day it was decided").

[71] Esbeck, *supra* note 4, at 39 (footnote omitted).

demonstrated this somewhat dramatically when, in *Kennedy*, it overruled (without expressly saying it was doing so) the infamous *Lemon* test that supported a strict separationist view of the Establishment Clause.[72] The Court chided the Ninth Circuit for applying the *Lemon* test when the Court itself had not applied it for over a decade and had exclusively used a historical analysis (championed by McConnell, Esbeck, and others) in several recent decisions.[73] The Court made no mention of the *stare decisis* factors when parking *Lemon* at the curb, and no great wail of disappointed reliance has erupted since it did so.

The *stare decisis* factors do not include, "We like the results the erroneously decided decision produces."[74] Thus, Esbeck's contention that *Everson*'s improper incorporation of the Establishment Clause has not been "a one-sided bargain"[75] is not a persuasive reason to retain *Everson*'s error. In a similar vein, the Supreme Court in *Engel v. Vitale* pointed to its view of a favorable result to justify striking down New York State's prayer for public school children as violative of the Establishment Clause.[76] It recounted the multiple state establishments during the colonial period and labeled it "an unfortunate fact of history" that the states, often founded by nonconformists persecuted in their native lands, would almost uniformly favor by law their own religious beliefs when they achieved political power in the colonies, a favoritism that continued in most nascent states.[77]

But simply liking the anti-establishment result does not provide a principled basis for overriding the purpose of the clause to protect state prerogatives. The Establishment Clause, while preventing the *federal* government from putting its weight behind any particular denomination, also protected the rights of the states to make up their own minds on the matter. And the inference that disincorporating the Establishment Clause would upset substantial expectations or reliance interests in this area is also unfounded. As will be discussed further below, where compulsion is involved, the results praised by Esbeck, as well as by Chapman and McConnell,[78] can be

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[72] *Kennedy*, 597 U.S. at 530-42 (criticizing the *Lemon* test as "ahistorical" and "atextual" and declaring that it is no longer used by the Court).

[73] *Id.*

[74] *See Janus*, 585 U.S. at 916-18 (identifying *stare decisis* factors).

[75] Esbeck, *supra* note 4, at 39.

[76] 370 U.S. 421 (1962).

[77] *Id.* at 426-29.

[78] Chapman and McConnell, like Esbeck, argue that the Court should leave incorporation alone because it produced what they consider to be a positive result in *Engel*, i.e., advancing toleration in

accomplished by the protections afforded by the properly incorporated Free Speech, Free Exercise, and Freedom of Assembly Clauses of the First Amendment.

State neutrality on religious matters, rather than favoritism of a particular denomination, may well be the most prudent political decision in our country's current political and social circumstances—and, in fact, that is how all the states currently see the matter—but that decision is reserved to the states by the Establishment Clause. The Supreme Court in *Engel* provides no further argument, but only assumes, along with *Everson*, that the Fourteenth Amendment incorporated the clause against the states. *Engel*'s point that what the state was doing would violate the clause if done by the federal government begs the question,[79] and a personal preference for anti-establishment policies does not cure the legal problem.[80]

Any upset of reliance interests or other negative effects from overruling *Everson* and disincorporating the Establishment Clause would be minimal and offset by significant advantages: the clause would still operate in full with respect to the actions of the federal government; both institutional and individual religious liberty interests are robustly protected by the Free Exercise Clause (and often by the Free Speech and Freedom of Assembly Clauses as well); and the federal courts would be relieved of state and local religious display cases and the like brought by "offended observers" who suffer no compulsion but are only intolerant of religious views being expressed in the public square. Undergirding all, and further undercutting any reliance-type

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our society. They point out that there was no early precedent for religious observance in public schools because, at the founding, there were no public schools. Agreeing to Disagree, *supra* note 4, at 146. They admit that, when the "common school" movement began, it had as a purpose to inculcate a common set of generally held views of morality and religious truths, but they observe that that purpose generated contention from the start with Catholics and others, and then they applaud *Engel*'s rationale that "Government in this country, be it state or federal, is without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity." *Id.* at 146-47 (quoting *Engel*, 370 U.S. at 430). But, once again, their approval of the result and its perceived effect does not solve the *legal* problem of incorporating the Establishment Clause to take away a decision from state and local authorities that the clause was designed to *allow* them to make.

[79] *See Engel*, 370 U.S. at 430.

[80] Chapman and McConnell criticize one aspect of *Engel*—its incorrect dicta that compulsion never is a factor in Establishment Clause analysis and always is in Free Exercise Clause analysis. Agreeing to Disagree, *supra* note 4, at 147-51 (quoting *Engel*, 370 U.S. at 430). With respect to non-coercive official prayers involving adults—e.g., prayers opening government sessions—they argue that coercion is required before it is an Establishment Clause violation. *Id.* at 151-54.

argument, is that no state now has an established religion and that, instead, state constitutions uniformly have their own anti-establishment provisions.

A. The Disincorporated Establishment Clause Would Still Protect Against Federal Incursions into Religious Matters

Consistent with its original design, a disincorporated Establishment Clause would still have full operation against the federal government and all its components. It would continue to apply to federal territories as well.[81] For instance, under the Establishment Clause, the federal government could not require devotional recitations of prayers and religious literature in federally operated schools, such as those on military bases.[82]

B. The Religious Question Doctrine Is Adequately Supported by the Incorporated Free Exercise Clause

The religious question doctrine prevents secular courts from attempting to resolve issues that are, at their base, religious in character, including adjudicating the importance or centrality of those beliefs to a faith.[83] In a leading decision articulating the doctrine, *Thomas v. Review Board*,[84] the Supreme Court based the doctrine firmly in the Free Exercise Clause:

> the guarantee of *free exercise* is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.[85]

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[81] *See, e.g.*, Gonzalez v. Roman Cath. Archbishop of Manila, 280 U.S. 1 (1929); *Bradfield*, 175 U.S. 291.

[82] It is important to note that, even in the federal sphere in which the Establishment Clause properly operates, the clause is not anti-religion, as it has so often been assumed to be. It does not prevent government action "about" or "concerning" or "respecting" religion generally, but only about an *establishment* of religion. Thus, as the Supreme Court has repeatedly held, it does not violate the Establishment Clause for Congress to exempt religious organizations and individuals from otherwise applicable laws and regulations, i.e., to leave them alone. *See, e.g.*, Corp. of Presiding Bishop v. Amos, 483 U.S. 327 (1987) (upholding religious organization exception to Civil Rights Act of 1964); Walz v. Tax Comm'n, 397 U.S. 664 (1970) (upholding charitable deduction in tax code); Selective Draft Law Cases, 245 U.S. 366 (1918) (upholding religious exemption from draft laws); *see generally* Hall, *supra* note 27, at 133-46 (discussing historical accommodations exemptions for religious views).

[83] *See Our Lady*, 591 U.S. at 751 n.10; *see, e.g.,* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 843-44 (1995); Widmar v. Vincent, 454 U.S. 263, 269-70 n.6, 272 n.11 (1981); *Walz*, 397 U.S. at 674; *Cantwell*, 310 U.S. at 305-07.

[84] 450 U.S. 707 (1981).

[85] *Id.* at 715-16 (emphasis added).

Thus, incorporation of the Establishment Clause is not required for maintaining the religious question doctrine.

C. The Church Autonomy Doctrine Is Adequately Supported by the Incorporated Free Exercise and Freedom of Assembly Clauses

An important aspect of religious freedom is protected by the "church autonomy" doctrine. This doctrine protects against government interference in the internal affairs of religious organizations. The Supreme Court in *Kedroff v. St Nicholas Cathedral of Russian Orthodox Church in North America* observed that the Constitution provides "a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[86]

The Court in *Kedroff* identified the constitutional font for the doctrine solely as the Free Exercise Clause. Looking back to *Watson v. Jones*,[87] the progenitor of the doctrine that applied federal common law, the *Kedroff* Court observed that *Watson*

> radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine. Freedom to select the clergy, where no improper methods of choice are proven, we think, must now be said to have federal constitutional protection as a part of the *free exercise* of religion against state interference.[88]

This, the Supreme Court later observed, "converted the principle of *Watson* . . . into a constitutional rule."[89]

While some of the Court's later church autonomy cases identified the constitutional locus of the church autonomy doctrine more generally as the

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[86] 344 U.S. 94, 116 (1952) (footnote omitted); *see also* Serbian E. Orthodox Diocese for U.S. and Can. v. Milivojevich, 426 U.S. 696, 713-14, 724 (1976). *Milivojevich* also did away with the ability of courts to determine whether an internal church decision was "arbitrary," as it would intrude into religious questions beyond a secular court's ken, leaving courts only able to review church decisions for collusion and fraud. *See id.* at 712-16.

[87] 80 U.S. (13 Wall.) 679 (1872). The Court's more recent decision in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* also relied on *Watson v. Jones*. 565 U.S. 171, 185 (2012).

[88] 344 U.S. at 116 (footnote omitted) (emphasis added); *see also* Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 446 (1969) (noting that *Watson* had "a clear constitutional ring").

[89] *Presbyterian Church*, 393 U.S. at 447.

"First Amendment,"[90] the fact remains that the Court in *Kedroff* found the Free Exercise Clause wholly sufficient to support the doctrine. And there is no reason why the Free Exercise Clause would be inadequate for this task, especially as it is augmented by the incorporated Freedom of Assembly Clause, which protects the associational rights of individuals and institutions.[91] Indeed, *Watson* itself echoed the protections of those clauses:

> Laws then existed upon the statute-book [in England] hampering the *free exercise* of religious belief and worship in many most oppressive forms, and though Protestant dissenters were less burdened than Catholics and Jews, there did not exist that full, entire, and practical freedom for all forms of religious belief and practice which lies at the foundation of our political principles. . . .
>
> In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. . . . The *right to organize voluntary religious associations* to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith *within the association* . . . is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed.[92]

In the church autonomy context, the incorporated Free Exercise and Freedom of Assembly Clauses operate in tandem. These cognate freedoms[93] do not need an incorporated Establishment Clause to protect religious associations from state interference.

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[90] *See, e.g.*, *Milivojevich*, 426 U.S. at 712; *Presbyterian Church*, 393 U.S. at 449.

[91] *See* DeJonge v. Ore., 299 U.S. 353, 364 (1937); *compare id. with* Bouldin v. Alexander, 82 U.S. 131, 139-40 (1872) ("[W]e cannot decide who ought to be members of the church, nor whether the excommunicated have been regularly or irregularly cut off."); *see generally* Nikolas Bowie, *The Constitutional Right of Self-Government*, 130 YALE L.J. 1652 (2021); JOHN D. INAZU, LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY (2012).

[92] *Watson*, 80 U.S. at 728-29 (emphasis added). Of course, even without a constitutional underpinning, the *Watson* church autonomy privilege would remain the law and not need incorporation of the Establishment Clause to support it, as *Watson* predated *Everson*.

[93] *See DeJonge*, 299 U.S. at 364 ("The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental.").

D. Ministerial Exception Cases Are Adequately Supported by the Free Exercise Clause

The "ministerial exception" is a subset of the church autonomy doctrine, which shields from governmental interference "internal management decisions that are essential to the institution's central mission," including "the selection of the individuals who play certain key roles."[94] It is not confined to those styled "ministers" or the chiefs of religious organizations, but is available to anyone who functions as a "messenger or teacher of its faith,"[95] at the very least.[96]

In its two decisions embracing the ministerial exception, *Hosanna-Tabor* and *Our Lady*, the Supreme Court stated that the doctrine is supported by both the Establishment Clause and the Free Exercise Clause.[97] This raises the question of whether the Establishment Clause is a necessary support for the exception. It is not, for three basic reasons.

First, the ministerial exception is a subset of the church autonomy doctrine. As noted earlier, that doctrine is adequately undergirded by the incorporated Free Exercise and Freedom of Assembly Clauses of the First Amendment.[98] Indeed, before the Supreme Court took up the issue, the First, Third, and Fifth Circuits grounded their recognition of the exception in the Free Exercise Clause alone.[99]

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[94] *Our Lady*, 591 U.S. at 746.

[95] *Id.* at 751-52 (quoting *Hosanna-Tabor*, 565 U.S. at 199 (Alito, J., concurring)). The Seventh Circuit has highlighted this point by suggesting that the ministerial exception is better termed the "'internal affairs' doctrine." Schleicher v. Salvation Army, 518 F.3d 472, 474 (7th Cir. 2008).

[96] The Court has not fully resolved how to define those who are covered by the exception and how much weight courts should give to the claim of the religious organization that its employee should qualify for it. *See Hosanna-Tabor*, 565 U.S. at 190-91 (refusing to determine full contours of the exception); *id.* at 196-97 (Thomas, J., concurring) (arguing that an organization's assertion that the employee should adhere to the ministry's faith and practice should be conclusive if sincere); *id.* at 199, 204-05 (Alito, J., concurring) (describing those who qualify as "key" employees, but also noting the inability of secular courts to second-guess an organization's assertion); *Our Lady*, 591 U.S. at 757 ("[J]udges cannot be expected to have a complete understanding and appreciation of the role played by every person who performs a particular role in every religious tradition. A religious institution's explanation of the role of such employees in the life of the religion in question is important."), 2069 ("Here, as in *Hosanna-Tabor,* it is sufficient to decide the cases before us.").

[97] *Hosanna-Tabor*, 565 U.S. at 184, 188-89; *Our Lady*, 591 U.S. at 745-47.

[98] *See supra* notes 86-93 and accompanying text.

[99] *See* Natal v. Christian & Missionary Alliance, 878 F.2d 1575, 1578 (1st Cir. 1989); Petruska v. Gannon Univ., 462 F.3d 294, 307 (3d Cir. 2006); Combs v. Central Tex. Annual Conf. of the United Methodist Church, 173 F.3d 343, 345 (5th Cir. 1999).

Second, the Court in deciding *Hosanna-Tabor* and *Our Lady* did not have to ask whether the Establishment Clause was needed as a support for the ministerial exception, and it did not decide the question. It only recognized that the Establishment Clause shares the Free Exercise Clause's purpose of prohibiting the federal government from dictating who will be a church's ministers, and it implicitly assumed that the clause was incorporated against the states. However, a closer analysis of how the Court used the Establishment Clause for support demonstrates that the same support is supplied by the Free Exercise and Assembly Clauses.

In *Hosanna-Tabor*, the Court stated, "The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own."[100] Similarly, it later said in the same opinion:

> By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.[101]

It repeated in *Our Lady*, "State interference in that sphere would obviously violate the free exercise of religion, and any attempt by government to dictate or even to influence such matters would constitute one of the central attributes of an establishment of religion."[102] One immediately notices the overlap. When the Free Exercise Clause "prevents [the government] from interfering with the freedom of religious groups to select their own" key employees, it necessarily stops the government from "appointing" them, even though the Court characterizes the Establishment Clause as the source of the latter prohibition.[103] When the Free Exercise Clause forbids the government from imposing an "unwanted" employee on the religious organization, the Establishment Clause does no more when it "prohibits government involvement in such ecclesiastical decisions"[104] or from "dictat[ing]" or "influenc[ing]"

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[100] 565 U.S. at 184. In this and other language recognizing a religious organization as being a "group" or "association," the Court implicitly acknowledged that the ministerial exception is also supported by the Freedom of Assembly Clause.

[101] *Id.* at 188-89.

[102] 591 U.S. at 745-47.

[103] *Hosanna-Tabor*, 565 U.S. at 184.

[104] *Id.* at 188-89.

them.[105] The incorporated Establishment Clause plays a duplicative, not a necessary, role in such a case.

Third, as also noted earlier, the church autonomy doctrine found sufficient support—before incorporation of any of the First Amendment through the Fourteenth—in principles of general law that acted as a type of immunity that religious organizations could assert.[106] In essence, a "constitutional" or "free exercise immunity" similar to that recognized as running in favor of state officials in actions alleging unconstitutional conduct by them.[107] To allow the secular courts to become involved with religious voluntary associations and their employment decisions necessarily would involve the secular courts in matters of doctrine and religious practice that they lack the competence to determine, and it would influence the way such organizations operate.[108] But these dangers are fully protected against by the incorporated Free Exercise and Assembly Clauses, which also adequately support the church autonomy doctrine of which the ministerial exception is one facet.[109]

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[105] *See Our Lady*, 591 U.S. at 745-47.

[106] In *Hosanna-Tabor*, the Court explained that a religious organization is to assert the ministerial exception as an affirmative defense, consistent with the exception's grounding in the Free Exercise Clause, rather than as a jurisdictional defense, which would have been more consistent with grounding the exception in the Establishment Clause. 565 U.S. at 195 n.4 ("the exception operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar"); *see* Agreeing to Disagree, *supra* note 4, 178-79; Esbeck, *supra* note 4, at 38-39 (noting that, because the Establishment Clause is structural, it serves as a jurisdictional bar).

[107] *See, e.g.*, Imbler v. Pachtman, 424 U.S. 409 (1976) (state prosecuting attorney has absolute immunity when acting within the scope of his duties). As should be the case when a religious organization asserts the ministerial exception as a defense, in § 1983 cases, initial discovery may be limited to the immunity question, and a court's determination that immunity does not lie is immediately appealable. *See* Mitchell v. Forsyth, 472 U.S. 511 (1985). This immunity is absolute, but only in the area covered by the church autonomy doctrine; it is not a general immunity from all civil laws. *See Our Lady*, 591 U.S. at 746 ("This does not mean that religious institutions enjoy a general immunity from secular laws, but it does protect their autonomy with respect to internal management decisions.").

[108] *See Hosanna-Tabor*, 565 U.S. at 196-97 (Thomas, J., concurring).

[109] *See id.* at 196 ("When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us."); *see generally* Michael W. McConnell, *Religion & Constitutional Rights: Why Is Religious Liberty the "First Freedom"?*, 21 CARDOZO L. REV. 1243, 1245-46 (2000); Robert J. Renaud & Lael D. Weinberger, *Spheres of Sovereignty: Church Autonomy Doctrine & the Theological Heritage of the Separation of Church & State*, 35 N. KY. L. REV. 67, 71-72 (2008).

E. Religious Discrimination Cases Are Adequately Supported by the Properly Incorporated Free Exercise Clause

The Supreme Court in a recent series of cases has reaffirmed that the government may not discriminate against a religious organization solely because of its religious nature. In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, it disallowed the state from barring a church school from receiving a public benefit solely because of its religious nature.[110] In *Espinoza v. Montana Department of Revenue*, the Court held that the state could not deny tax credits for participation in a school scholarship program solely because religious schools would benefit.[111] In *Fulton v. Philadelphia*, it prohibited the city from refusing to allow Catholic Social Services to continue to serve foster care needs because of its religious beliefs about same-sex marriage when the city could make exceptions, in its discretion, for other perceived violations of its anti-discrimination laws.[112] And in *Tandon v. Newsom*[113] and *Roman Catholic Diocese of Brooklyn v. Cuomo*,[114] the Court instructed, in the context of Covid-19 restrictions, that governments may not treat secular activity more favorably than comparable religious activity.

In none of these cases was the Establishment Clause a necessary pillar supporting the decision; indeed, in some cases, that clause was rejected as a defense to the free exercise violations. The Court based its decisions in *Fulton, Tandon*, and *Brooklyn Diocese* expressly and solely on the Free Exercise Clause.[115] In *Trinity Lutheran*, it held that the Free Exercise Clause does not allow a state to deny a generally applicable benefit due to an individual's or organization's religious status; it overrode a state Establishment Clause defense in the process, even citing *Everson* for the proposition.[116] Similarly, in *Espinoza*, the Court relied on the Free Exercise Clause to override the state's Blaine Amendment that prohibits aid to sectarian schools,[117] noting that the

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[110] 582 U.S. 449 (2017).

[111] 591 U.S. 464.

[112] 593 U.S. 522 (2021).

[113] 593 U.S. 61 (2021).

[114] 592 U.S. 14 (2020).

[115] *Fulton*, 593 U.S. at 532-36; *Tandon*, 593 U.S. at 62-64; *Brooklyn Diocese*, 592 U.S. at 16.

[116] *Trinity Lutheran*, 582 U.S. at 455-61.

[117] 591 U.S. at 474-78 (citing Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 449 (1988) (The Free Exercise Clause protects against laws that "'penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens.'"); Sherbert v. Verner, 374 U.S. 398, 405 (1963) (same)).

Establishment Clause "is not offended when religious observers and organizations benefit from neutral government programs."[118]

In short, disincorporating the Establishment Clause would not undercut the freedom of religious organizations not to be discriminated against due to their religious nature and practice. Those freedoms are independently and adequately supported by other First Amendment protections properly incorporated against the states through the Fourteenth Amendment.

F. Unwinding the Improper Incorporation of the Establishment Clause Would Eliminate the False Tension Between It and the Free Exercise Clause Found in Some Cases While Leaving Properly Incorporated Clauses as a Check Against State Action Coercing Religious Observance

It has become almost a hackneyed expression that the Establishment and Free Exercise Clauses sometimes work at cross-purposes.[119] This perceived tension was not perceived until the Court began incorporation under the Fourteenth Amendment, for the simple reason that both the Free Exercise and Establishment Clauses negated federal power.[120] Once the Court incorporated those clauses (and the Speech and Assembly Clauses) against the states, however, some potential for conflict arose. It became especially acute during the reign of "strict separation," as that theory interpreted any government recognition of religion or religious observance as a forbidden "establishment," even as it encroached on free exercise and evenhanded treatment of religious organizations when it came to otherwise available public benefits. With disincorporation of the Establishment Clause, some tension would remain between state anti-establishment interests and the properly incorporated Free Exercise, Speech, and Assembly Clauses, but the resolution of that tension will hardly ever be in doubt: the federal provisions will trump state

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[118] 591 U.S. at 473-75. The same is true when there is discrimination against religious speech, press, and assembly. *See Widmar*, 454 U.S. 263 (speech); *Rosenberger*, 515 U.S. 819 (press); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (assembly).

[119] *See, e.g.*, *Hosanna-Tabor*, 565 U.S. at 181 (citing *Cutter*, 544 U.S. at 719, and Tilton v. Richardson, 403 U.S. 672, 677 (1971) (plurality opinion)) ("Numerous cases considered by the Court have noted the internal tension" between the clauses.).

[120] *See generally* Esbeck, *supra* note 4, at 37-38.

ones when there is conflict,[121] as "strictest scrutiny" will be applied.[122] The stringency of that test is demonstrated in *Espinoza*, where the Court brushed aside as unworthy of consideration the state's proffered interest in having a greater-than-constitutionally-required separation between church and state by enforcing its "no aid to religion" provision: "An infringement of First Amendment rights, however, cannot be justified by a State's alternative view that the infringement advances religious liberty. Our federal system prizes state experimentation, but not 'state experimentation in the suppression of free speech,' and the same goes for the free exercise of religion."[123] Thus, any so-called balancing of free exercise and anti-establishment interests will be largely pro forma, as even state laws championing anti-establishment interests carry no weight against the First Amendment's free exercise protections.

The key to proper interpretation in these contexts is to recognize the following balance struck by our constitutional design: (a) we live in a diverse society and must practice tolerance toward each other, even when that means being exposed to people and ideas with which we differ, especially if we are in a minority; and (b) the properly incorporated clauses of the First Amendment prohibit compelled or coerced speech, religious exercise, and assembly. The Supreme Court in *Kennedy* made the toleration point, while rejecting a strict separation view:

> Respect for religious expressions is indispensable to life in a free and diverse Republic—whether those expressions take place in a sanctuary or on a field, and whether they manifest through the spoken word or a bowed head. Here, a government entity sought to punish an individual for engaging in a brief, quiet, personal religious observance doubly protected by the Free Exercise and Free Speech Clauses of the First Amendment. And the only meaningful justification the government offered for its reprisal rested on a mistaken view that it had a duty to ferret out and suppress religious

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[121] U.S. CONST. art VI, para. 2 (Supremacy Clause). It appears that this potential tension was observed by Congress during its consideration in 1875 of the federal Blaine Amendment. The House version incorporated against the states the language of both the Establishment and Free Exercise Clauses: "No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof . . . ." The Senate amended the proposal to prohibit it from being "construed to prohibit the reading of the Bible in any school or institution." *See* Agreeing to Disagree, *supra* note 4, at 82-83.

[122] *See Espinoza*, 591 U.S. at 484 (citing *Trinity Lutheran*, 582 U.S. at 458; Church of Lukumi Babalu Aye v. Hialeah, 508 U.S. 520, 546 (1993); McDaniel v. Paty, 435 U.S. 618, 628 (1978)).

[123] *Espinoza*, 591 U.S. at 484 (quoting Boy Scouts of Am. v. Dale, 530 U.S. 640, 660 (2000)).

> observances even as it allows comparable secular speech. The Constitution neither mandates nor tolerates that kind of discrimination.[124]

Of course, if the Establishment Clause had not been incorporated improperly in *Everson*, in Coach Kennedy's case there would have been no "tension" with the Free Exercise Clause to be manufactured, even if unsuccessfully, by the school district and the lower courts.[125] The school district took no direct action when he knelt at midfield after games; it only allowed individual religious speech on an evenhanded basis, and so no compulsion was present. If the school district had required all team members to pray with Coach Kennedy upon pain of benching, the Free Speech Clause and Free Exercise Clauses would have come into play to prohibit the school district from compelling speech and religious exercise. The fact that people voluntarily joined Coach Kennedy on the field to show their support after the school district threatened to fire him did not convert his practice into state action.[126]

This brings into focus Chapman and McConnell's assertion that incorporation of the private or individual rights protected by the Establishment Clause is proper. As discussed above, the Establishment Clause is a structural, or federalist, provision that, as originally intended, prohibited certain actions by the *federal* government, such as compelling church attendance, but that *preserved* the power of the states to take such actions. Chapman and McConnell list personal rights that emanate from the Establishment Clause, but, putting to one side that the Establishment Clause does not speak in terms of personal rights, the rights they list all overlap with those protected by other, incorporated clauses that do guard individual freedoms. For example, they

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[124] *Kennedy*, 597 U.S. at 542-44; *see also Town of Greece*, 572 U.S. at 566-67 ("From the Nation's earliest days, invocations have been addressed to assemblies comprising many different creeds, striving for the idea that people of many faiths may be united in a community of tolerance and devotion, even if they disagree as to religious doctrine."). This result was nascent in the Court's approach in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), in which it rejected an Establishment Clause challenge based on an assertion that allowing a religious club after-school use on the same basis as other clubs would constitute a prohibited "endorsement": "we cannot say the danger that children would misperceive the endorsement of religion is any greater than the danger that they would perceive a hostility toward the religious viewpoint if the Club were excluded from the public forum." *Id.* at 118.

[125] *Bronx Household of Faith v. Board of Education of the City of New York*, 750 F.3d 184 (2d Cir. 2014), is another example of a manifestly incorrect decision defeating free exercise rights by use of supposed Establishment Clause concerns. In *Bronx Household*, New York City refused to allow a church to rent school facilities for worship services after school hours when the facilities were generally available for rent by others.

[126] *See Kennedy*, 597 U.S. at 540-42.

refer to a right not to have the state "compel religious attendance or support."[127] But any such compulsion would be in violation of the Free Exercise, Speech, and Assembly Clauses.[128] And any state attempt to "control religious doctrine or personnel"[129] would also be prohibited by the Free Speech and Free Exercise Clauses, as neither speech nor religious expression may be compelled.[130]

Chapman and McConnell point to the "school cases" first and foremost as examples of why the Court should preserve incorporation of the Establishment Clause, arguing they have promoted tolerance among our nation's citizenry. This is where Chapman and McConnell believe that incorporation of the Establishment Clause has done its best work, labeling it, in Churchillian fashion, the Court's "finest hour."[131] In particular, they praise *Engel* and *School District of Abington Township v. Schempp*, in which the Court used the incorporated clause to stop compulsory religious practices such as prayer[132] and Bible reading[133] in the public schools.

Several of the school cases the Supreme Court decided under the incorporated Establishment Clause reached the right result by the wrong rationale. As the *Kennedy* Court pointed out, in *Lee v. Weisman,*[134] school officials coerced students to attend a public recital of prayers by clergy '"as part of [an] official school graduation ceremony' because the school had 'in every practical sense compelled attendance and participation in' a 'religious exercise.'"[135] Forcing someone to participate in a religious exercise violates both the Free Exercise and Assembly Clauses; resort to the Establishment Clause was

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[127] Agreeing to Disagree, *supra* note 4, at 80.

[128] While laws requiring financial assistance to specific religious organizations are a thing of the past, they would be a violation of the Free Speech Clause under the reasoning of *Janus*. 585 U.S. 878 (finding a state law forcing public employees to subsidize a union, even if they choose not to join, violates the free speech rights of nonmembers by compelling them to support private speech to which they object).

[129] Agreeing to Disagree, *supra* note 4, at 80.

[130] Chapman and McConnell also list "favoring one religion over another," *id.*, but that cannot properly be construed as a personal right. They concede that several Establishment Clause prohibitions do not involve individual rights, such as the state declaring an official religion, proclaiming holy days, and displaying religious symbols. *Id.* at 80-81. They only imply the logical conclusion from that: that such features of the Establishment Clause are not properly incorporated.

[131] Agreeing to Disagree, *supra* note 4, at 145.

[132] *Engel,* 370 U.S. at 422-23.

[133] *Schempp*, 374 U.S. at 205-08.

[134] 505 U.S. 577 (1992).

[135] *Kennedy*, 142 U.S. at 2431 (quoting *Lee,* 505 U.S. at 598).

unnecessary. With respect to *Santa Fe Independent School District v. Doe*,[136] the *Kennedy* Court noted that the school district broadcasted a prayer over the public address system before each football game, with required attendance of "cheerleaders, members of the band, and the team members themselves."[137] Again, the compulsion in the situation violated the Free Exercise and Freedom of Assembly Clauses.

Barnette provides another example of compelled speech in a school setting. There, in the midst of a time of nationalistic fervor during World War II, schools in West Virginia mandated that all students recite the pledge of allegiance and physically salute the flag. Jehovah's Witnesses objected to this "idolatry" on religious grounds, and the failure of their children to obey led to unexcused expulsion, which resulted in truancy and criminal violations by the parents.[138] Despite their objection being rooted in religious belief, the case was not decided on free exercise grounds, but on free speech principles. Finding not only the pledge but the flag salute "a form of utterance,"[139] the Court, eschewing reliance on the religious nature of the objection,[140] struck down the requirement based on the Free Speech Clause prohibiting a government from compelling utterance of a belief.[141]

The compelled speech principle of *Barnette*, most recently applied in *303 Creative LLC v. Elenis*,[142] would obviously apply if a public school required students, as a devotional exercise, to recite the Lord's Prayer or read Bible or Koran passages. And there is no doubt that students or teachers who objected to reciting New York's "Regents' Prayer" at issue in *Engel*[143] or reading the Bible passages or reciting the Lord's Prayer challenged in *Schempp*[144] could

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[136] 530 U.S. 290 (2000).

[137] *Kennedy*, 142 U.S. at 2431-32 (quoting *Santa Fe*, 530 U.S. at 294, 311).

[138] *Barnette*, 319 U.S. at 625-30.

[139] *Id.* at 632.

[140] *Id.* at 634-35.

[141] *Id.* at 633-35, 642.

[142] 600 U.S. 570 (2023) (prohibiting application of state's public accommodations law to require web site designer to prepare and publish material objectionable to her); *see also* Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos., 515 U.S. 557 (1995) (holding that state's public accommodations statute could not be used to force veterans organizing a parade to include a group of gay, lesbian, and bisexual individuals because the parade was protected speech). The result in *303 Creative* was not just dictated by the state compelling her to create her own speech, but by the state compelling her to associate with and foster the speech of the same-sex wedding ceremony participants.

[143] 370 U.S. at 422-23.

[144] 374 U.S. at 205.

not be *compelled* to do so under the reasoning of *Barnette*. Compulsion is the key.

Engel and *Schempp* present much closer questions, as the laws challenged there both allowed students to opt out.[145] In *Engel*, students did not have to recite the prayer, only listen to it, and they could be excused from the room when it was read if they or their parents so desired.[146] In *Schempp*, children also could be excused by their parents from being present during the Bible reading and recitation of the Lord's Prayer.[147] However, as Chapman and McConnell point out, mandatory school attendance laws add a level of compulsion that might make such activities compelled religious exercise,[148] in which case they would violate the Free Exercise Clause. By excusing a child from a class, the child might be viewed by her peers as acting "differently" and be considered an "odd ball."[149] Moreover, teachers and school administrators could overtly or subtly exert influence on the child. The age and disposition of the particular child is also relevant. These cases, then, are better suited for case-by-case factual development on the issue of coercion, rather than a one-size-fits-all rule.[150]

Torcaso v. Watkins,[151] which considered Maryland's constitutional requirement that state office holders declare a "belief in the existence of God,"[152] provides another example of the right result but wrong reasoning. In 1961, the Supreme Court was in the heyday of its strict separationist period, and it relied on the following language from *Everson* explaining the reach of the Establishment Clause: "we have staked the very existence of our

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[145] *See* Ill. ex rel. McCollum v. Bd. of Educ., 333 U.S. 203, 232-33 (1948) (Jackson, J., concurring) (expressing view that humiliation from being perceived as different because of opting out of a religious exercise does not equate to unconstitutional coercion); *see also Lee*, 505 U.S. at 597-98 (remarking that, absent compulsion, "social isolation or even anger may be the price of conscience or nonconformity").

[146] *Engel,* 370 U.S. at 430.

[147] *Schempp*, 374 U.S. at 205, 211-12.

[148] *See* Agreeing to Disagree, *supra* note 4, at 145; *see also Lee*, 505 U.S. at 592-97; *id.* at 643-44 (Scalia, J., dissenting). Obviously, if a state or locality adopted a full-bodied voucher system, permitting voluntary choice as to which school children attend, the compulsion would be greatly diminished, if not eliminated. *Cf. Zelman,* 536 U.S. 639 (upholding public school voucher program against Establishment Clause challenge).

[149] Agreeing to Disagree, *supra* note 4, at 145.

[150] Of course, state anti-establishment provisions will likely also be relevant in each case.

[151] 367 U.S. 488 (1961).

[152] *Id.* at 489 (quoting MD. CONST. DECL. OF RIGHTS art. 37). This provision has not been removed from the Maryland Declaration of Rights. *See* https://ballotpedia.org/Declaration_of_Rights,_Maryland_Constitution.

country on the faith that complete separation between the state and religion is best for the state and best for religion."[153] Religious tests for office, however, were widely used by the states at the time of the ratification of the Constitution and the Bill of Rights, and the Establishment Clause was designed to give the states full leeway over them, not to discredit them. Indeed, the same intent can readily be seen in the Constitution's Oath Clause.[154] It extends the duty to support the federal Constitution to state officials: "Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . . ."[155] But the Constitution declaims religious tests only for *federal* officials: "but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."[156] The latter clause leaves the states free to require religious tests for their own officials. Thus, the *Torcaso* Court improperly read the Establishment Clause to proscribe what it historically had protected.

However, in *Torcaso*, there was no need to rely on an improper incorporation and overly broad reading of the Establishment Clause to strike down Maryland's religious test. The properly incorporated Free Exercise Clause was available to do the job, as the Court made obvious several years later in *McDaniel v. Paty*.[157] Tennessee by its constitution prohibited clergy from serving as state legislators, foreclosing a minister who won election as a delegate to a constitutional convention from serving.[158] After what it termed a "brief" (and unnecessary) review of the pros and cons of clergy disqualification provisions in the colonial period,[159] the Court turned to the by-then-incorporated Free Exercise Clause. It noted that McDaniel's free exercise of religion as a minister was conditioned on his giving up a right generally available to other state citizens to serve in the legislature for which he otherwise qualified, effectively penalizing his free exercise without any compelling

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[153] *Torcaso,* 367 U.S. at 494 (quoting *McCollum*, 333 U.S. at 232 (quoting *Everson*, 330 U.S. at 59)).

[154] U.S. CONST. art VI, cl. 3.

[155] *Id.*; *see generally* Hall, *supra* note 27, at 50-53 (describing debates over the clause in the Constitutional Convention).

[156] U.S. CONST. art VI, cl. 3.

[157] 435 U.S. 618 (1978).

[158] *Id.* at 621-22.

[159] *Id.* at 622-25.

justification.[160] The religious test challenged in *Torcaso* would have fallen under the same reasoning—even without the incorporated Establishment Clause.[161]

Not all cases decided under the Establishment Clause would come out the same way if it were disincorporated. For example, the Supreme Court held in *Wallace v. Jaffree* that a law that required a one-minute period of silence by students for "meditation or voluntary prayer" violated the incorporated Establishment Clause.[162] While it seems doubtful that the Supreme Court would have decided *Wallace* the same way if it had applied its current, historical approach to interpreting the Establishment Clause, a "moment of silence" law does not compel speech or religious exercise or give a leg up to any sect or belief system. Thus, it would be constitutional if the Establishment Clause were disincorporated.

Incorporation of the Establishment Clause against the states also led the Supreme Court astray in *Locke v. Davey*,[163] in which it upheld a state anti-establishment practice that should have been repudiated under the anti-discrimination principles of the Free Exercise Clause.[164] At issue was Washington State's refusal, pursuant to its Blaine Amendment, to provide otherwise generally available scholarship assistance to a student for the sole reason that he had chosen to study "devotional theology" to prepare for pastoral ministry.[165] The majority upheld application of the state's Blaine Amendment,

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[160] *Id.* at 626-29 (citing *Sherbert*, 374 U.S. at 406).

[161] The Court in *McDaniel* said *Torcaso* "does not govern," *id.* at 626, but construed it as being decided under the Free Exercise Clause and only distinguishable because Maryland's prohibition was based on *beliefs*—which made it automatically invalid per *Cantwell*, 310 U.S. at 304—while Tennessee's prohibition was based on actions, which could be justified if the state pursued a compelling interest in the least restrictive manner. *McDaniel*, 435 U.S. at 627-29 (citing Wisconsin v. Yoder, 406 U.S. 205, 215 (1972)). Three concurring Justices in *McDaniel* found the clergy restriction to violate both the Free Exercise and Establishment Clauses and to be controlled by *Torcaso*. *See id.* at 629-35 (Brennan, J., concurring); *id.* at 642-43 (Stewart, J., concurring). Justice White concurred on the grounds of the Equal Protection Clause of the Fourteenth Amendment. *See id.* at 643-46 (White, J., concurring).

[162] 472 U.S. 38 (1985).

[163] 540 U.S. 712 (2004).

[164] *See Espinoza*, 591 U.S. at 490-93 (Thomas & Gorsuch, JJ., concurring) (noting that *Locke* was wrongly decided).

[165] *See Locke*, 540 U.S. at 716-17 (citing WASH. CONST. art I, § 11 and implementing laws).

finding no religious animosity in its anti-establishment provisions and only a "slight" burden on the student's free exercise rights.[166]

The Supreme Court has backpedaled from *Locke* ever since, limiting it to its facts, while striking down under the incorporated Free Exercise Clause state discriminations against religious institutions in the distribution of public benefits such as funds for playgrounds[167] and school tuition aid;[168] it has also recognized the anti-religious animosity and discrimination baked into the Blaine Amendments.[169] Having said that, the Court should either overrule *Locke* explicitly or "*Lemon*-ize" it.[170] The Court in *Locke* wrongly failed to apply strict scrutiny in spite of the Free Exercise Clause violation, and its supposed historical justification—whereby it found Washington had a longstanding, anti-establishment interest against funding ministers that overcame the student's federally guaranteed free exercise interests—simply doesn't withstand scrutiny. Under that rationale, the case would have come out differently if it had arisen in Virginia or Massachusetts, as they both have a history of funding ministers.[171]

In truth, there is no real balancing to be done in cases of this type: the incorporated Free Exercise Clause prevails, whatever the pro- or anti-establishment interests of the state. As the Supreme Court stated in *Carson v. Makin*, "[a] State's antiestablishment interest does not justify enactments that exclude some members of the community from an otherwise generally available public benefit because of their religious exercise."[172] Disincorporating the

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[166] *Id.* at 722-25; *see generally Blaine Info Central*, BECKET, https://www.becketlaw.org/research-central/blaine-amendments-info-central/ (last visited June 11, 2024) (discussing state Blaine Amendments).

[167] *See Trinity Lutheran*, 582 U.S. at 464 (distinguishing *Locke* on the theory that it withheld the scholarship funds because of what the student did, rather than who he was, a status/use distinction later found to be no real distinction by the Court in *Carson v. Makin*, 596 U.S. 767 (2022)).

[168] *See Espinoza*, 591 U.S. at 479-81 (distinguishing *Locke* based on status/use distinction); *Carson*, 596 U.S. at 770 (applying neutrality principle to use as well as status, and limiting *Locke* to its facts because it involved the "historic" state interest in not using tax funds for ministry education).

[169] *See Espinoza*, 591 U.S. at 482-83; *see also* Mitchell v. Helms, 530 U.S. 793, 828 (2000) (plurality opinion).

[170] To "*Lemon*-ize" a precedent is to abandon it without explicitly overruling it, as the Court did when it declared it had abandoned use of the *Lemon* test without expressly overruling the case. *See Espinoza*, 591 U.S. at 493. The Court has since referred to *Lemon* as "abrogated." *See* Groff v. DeJoy, 600 U.S. 447, 460 (2023).

[171] *See* CARL H. ESBECK, *Disestablishment in Virginia, 1776-1802*, *in* DISESTABLISHMENT AND RELIGIOUS DISSENT, *supra* note 7, at ch. 8; JOHN WITTE JR. & JUSTIN LATTERELL, *The Last American Establishment*, *in id.*, at ch. 21.

[172] 596 U.S. at 768.

federal Establishment Clause will make that point, and *Locke*'s justified demise, even clearer. The Court in *Locke* based its rationale on the notion that the Free Exercise and Establishment Clauses are "frequently in tension" but that there is "play in the joints" between them,[173] giving them equal weight in a balancing.[174] Notably, with a disincorporated Establishment Clause, the properly incorporated Free Exercise Clause would have supremacy in such cases, along with the benefit of strict scrutiny analysis. Overruling *Everson* in this respect would be a boon to freedom of religion, not a disadvantage.

G. State Religious Displays and Similarly Non-Coercive Cases Would Be Resolved by the States

The principal effect of disincorporating the Establishment Clause would be to leave the regulation of religious establishment matters that don't involve infringement of individual rights exactly where the Constitution left them: with the states. That will get the federal courts out of the business of evaluating the appropriateness of displaying the Ten Commandments in county courthouses,[175] having Christmas crèches on city grounds,[176] and conducting prayers in state legislative chambers.[177] In these instances, there is no compelled speech or compelled association or coerced religious exercise. Such practices recognize that general exposure to religious history, artifacts, people, and ideas is simply part and parcel of living in a pluralistic society.[178] Disincorporating the Establishment Clause recognizes that the United States Constitution does not give the non-religious the right to require that the state purge the public square of anything smacking of religious sentiment or require that the religious shelve their beliefs and practices when going out in the open. And while it may not be as universally true today as it was at the

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[173] 540 U.S. at 718-19 (citing Norwood v. Harrison, 413 U.S. 455, 469 (1973); *Tilton*, 403 U.S. at 677; and *Walz*, 397 U.S. at 669).

[174] The *Locke* majority also "took sides" in the establishment battles among the states. It pointed out that, in many states, citizens oppose the funding of ministers with tax dollars. This was meant to buttress Washington State's antiestablishment interest in the case at hand. *Id.* at 722-23. The purpose of the federal Establishment Clause, however, was to keep the national government neutral in that discussion, and the U.S. Supreme Court, as a federal institution, may not properly weigh in on one side of the debate—pursuant to the Establishment Clause itself.

[175] *See* McCreary Cnty. v. ACLU of Ky., 545 U.S. 844 (2005); *see also* VanOrden v. Perry, 545 U.S. 677 (2005) (adjudicating whether display of a Ten Commandments monument on the state capitol grounds violated the Establishment Clause).

[176] *See* Lynch v. Donnelly, 465 U.S. 668 (1984); *see also Allegheny Cnty.*, 492 U.S. 573.

[177] *See* Marsh v. Chambers, 463 U.S. 783 (1983). Adults, of course, are not as easily "coerced" to engage in religious exercises as are children in a public school setting.

[178] *See Kennedy*, 597 U.S. at 542-44.

founding or when the Supreme Court made the statement in 1952, it remains true that "[w]e are a religious people whose institutions presuppose a Supreme Being."[179]

H. Disincorporating the Establishment Clause Would Not Disturb Reliance Interests Because the States Have Uniformly Adopted Anti-Establishment Provisions, Almost All by Constitution

Disincorporating the Establishment Clause will not harm any reliance interests or instigate a regime of "anything goes" at the state level, for the simple reason that all the states currently have their own religious freedom protections. When the original states adopted the First Amendment, several of them still had church establishments of one variety or another.[180] The trend was against them, though, and in 1833 Massachusetts became the last state to disestablish formally.[181] Now, all states have religious freedom protections in their constitutions, including non-establishment provisions.[182]

For example, Massachusetts in its constitution now contains a provision that tracks the Free Exercise Clause—"No law shall be passed prohibiting the free exercise of religion"[183]—and one that serves as an anti-establishment clause—"no such grant, appropriation or use of public money or property or loan of public credit shall be made or authorized for the purpose of founding, maintaining or aiding any church, religious denomination or society."[184] Its courts interpret these provisions generally in conformity with the U.S. Supreme Court's interpretations of the federal Religion Clauses.[185]

Alabama and other states prohibit establishment in phraseology that closely tracks the historical understanding and examples as expounded by Chapman and McConnell.[186] And Alaska and other states simply track the

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[179] Zorach v. Clauson, 343 U.S. 306, 313 (1952); *see generally* Hall, *supra* note 27.

[180] *See generally* DISESTABLISHMENT AND RELIGIOUS DISSENT, *supra* note 7, at 3-17.

[181] *See* Witte & Latterell, *supra* note 171, at 399-424.

[182] This survey does not include state statutes. In some cases, despite some anti-establishment provisions in the constitution, other types of establishments were still practiced in the state. *See, e.g.*, BRIAN FRANKLIN, *Towns and Toleration: Disestablishment in N.H.*, *in* DISESTABLISHMENT AND RELIGIOUS DISSENT, *supra* note 7, at ch. 18.

[183] MASS. CONST. art. XVII, § 1 (as amended by art. XLVI); *see also id.* art. II.

[184] *Id.* at § 2. Maryland's Declaration of Rights in Article 36 provides another example of a state non-establishment provision: "nor ought any person to be compelled to frequent, or maintain, or contribute, unless on contract, . . . any place of worship, or any ministry."

[185] *See* Atty. Gen. v. Desilits, 636 N.E.2d 233 (Mass. 1994) (noting close correspondence of the Massachusetts and federal Free Exercise Clauses).

[186] Agreeing to Disagree, *supra* note 4, at 18.

Religion Clauses of the federal Constitution.[187] Alabama also has enacted, as have several other states, a state "Religious Freedom Restoration Act" to repudiate by legislation the U.S. Supreme Court's holding in *Employment Division v. Smith*[188] that laws of general applicability that impose a burden on the free exercise of religion must only meet a rational basis, rather than a compelling interest, test to survive a free exercise challenge.[189] Other states have refused to follow *Smith* when interpreting their religious freedom constitutional provisions.[190]

The anti-establishment provisions in the state constitutions are practically uniform and cut out of the same cloth.[191] However, some might object that

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[187] Alaska Const. art. I, § 4, *available at* https://ballotpedia.org/Article_I,_Alaska_Constitution.

[188] 494 U.S. 872 (1990).

[189] *See* ALA. CONST. amend. 622 ("Alabama Religious Freedom Amendment"), *available at* https://ballotpedia.org/Amendments_501_through_900,_Alabama_Constitution. *See generally State Religious Freedom Restoration Acts*, WIKIPEDIA, https://en.wikipedia.org/wiki/State_Religious_Freedom_Restoration_Acts#States (last visited June 12, 2024) (collecting state-level RFRA statutes and similar state judicial decisions).

[190] *See, e.g.*, Vlaming v. West Point Sch. Bd., 895 S.E.2d 705, 717-18 (Va. 2023); State v. Mack, 249 A.3d 423, 441-42 (N.H. 2020); *Desilits*, 636 N.E.2d at 233.

[191] *See* ALA. CONST. art. I, § 3 ("Religious Freedom"); ALASKA CONST. art. I, § 4 ("Freedom of Religion); ARIZ. CONST. art. 2, § 12,; *id.* art 20, § 1; ARK. CONST. art. 2, § 24 ("Religious Liberty"); CAL. CONST. art. I, § 4; COLO. CONST. art. II, § 4 ("Religious Freedom"); CONN. CONST. art. VII ("Of Religion"); *id.* at art. I, § 3; DEL. CONST. art. I, § 1 ("Freedom of Religion"); FLA. CONST. art I, § 3 ("Religious Freedom"); GA. CONST. art. I, para. 1, § III ("Freedom of Conscience"); *id.* at § IV ("Religious Opinions; Freedom of Religion"); HAW. CONST. art. I, § 4 ("Freedom of Religion, Speech, Press, and Assembly"); IDAHO CONST. art. I, § 4 ("Guarantee of Religious Liberty"); ILL. CONST. art. I, § 3 ("Religious Freedom"); IND. CONST. art I, §§ 2, 3, 4; IOWA CONST. art. I, § 3 ("Religion"); KAN. CONST. Bill of Rights, § 7 ("Religious liberty; property qualification for public office"); KY. CONST. § 1 ("Rights of life, liberty, worship, pursuit of safety and happiness, free speech, acquiring and protecting property, peaceable assembly, redress of grievances, bearing arms"); *id.* at § 5 ("Right of Religious Freedom"); LA. CONST. art. I, § 8 ("Freedom of Religion"); ME. CONST. art I, § 3 ("Religious Freedom; Sects Equal; Religious Tests Prohibited; Religious Teachers"); MD. CONST. DECL. OF RIGHTS arts. 36, 37; MASS. CONST. art XI, art. XVIII, § 1; MICH. CONST. art I, § 4 ("Freedom of worship and religious belief; appropriations"); MINN. CONST. art. I, § 16 ("Freedom of Conscience; No Preference to Be Given to Any Religious Establishment or Mode of Worship"); MISS. CONST. art. III, § 18 ("Freedom of Religion"); *id.* at art. VIII, § 208 ("Control of Funds by Religious Sect; Certain Appropriations Prohibited"); MO. CONST. art. I, §§ 5 ("Religious Freedom—Liberty of Conscience and Belief—Limitation"), 6 ("Practice and Support of Religion Not Compulsory—Contracts Therefor Enforceable"), 7 ("Public Aid for Religious Purposes—Preferences and Discriminations on Religious Grounds"); MONT. CONST. art. II, § 5 ("Freedom of Religion"); NEB. CONST. art. I, § 4 ("Religious Freedom"); NEV. CONST. art. I, § 4 ("Liberty of Conscience"); N.H. CONST. pt. 1, arts. 4 ("Rights of Conscience Unalienable"), 5 ("Religious Freedom Recognized"), 6 ("Morality and Piety"); N.J. CONST. art. I, §§ 3, 4; N.M. CONST. art. II, § 11 ("Freedom of Religion"); N.Y. CONST. art. I, § 3 ("Freedom of worship; religious liberty"); N.C. CONST. art. I, §§ 13 ("Religious Liberty"), 19 ("Law of the Land; Equal Protection of the Laws");

returning establishment concerns to the various states for treatment under their own laws might result in similar cases having different results. One answer to that concern is that state anti-establishment provisions are practically uniform, but there are three more answers. First, almost all the states give strong weight to United States Supreme Court decisions in the religious liberty arena (although, as has been noted, that Court has modified its jurisprudence concerning establishment concerns recently). Second, it is unlikely that any differences that do eventuate will be major or of any significant concern. Although it is beyond the scope of this article, a survey of state precedent in the area would likely show some existing differences among the states, but none has provoked any widespread angst. Third, it is built into a federal system that there may be different results on similar issues arising in the various states. Indeed, that was exactly what the federal Establishment Clause was designed to allow. It can hardly be considered a weighty objection that permitting states to handle their own establishment concerns is a negative result when that was a purpose of the clause.

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No tremors will disturb the constitutional landscape if the Supreme Court disincorporates the Establishment Clause; no substantial reliance interests will be disturbed. The properly incorporated federal Free Exercise, Speech, and Assembly Clauses will police state action that discriminates against religion or compels religious observance or support, and the Establishment Clause will still safeguard the federal sphere. Moreover, all the states have free exercise and anti-establishment provisions. Disincorporation of the federal Establishment Clause will return the constitutional landscape to the

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N.D. CONST. art. I, § 3; OHIO CONST. art. I, § 7 ("Rights of conscience; education; the necessity of religion and knowledge"); OKLA. CONST. art. I, § I-2 ("Religious liberty—Polygamous or plural marriages"); *id.* at art. II, § 5 ("Public Money or Property—Use for Sectarian Purposes"); ORE. CONST. art. I, §§ 2 ("Freedom of Worship"), 3 ("Freedom of religious opinion"), 5 ("No money to be appropriated for religion"); PA. CONST. art. I, § 3 ("Religious Freedom"); R.I. CONST. art I, § 3 ("Freedom of Religion"); S.C. CONST. art. I, § 2 ("Religious freedom; freedom of speech; right of assembly and petition"); S.D. CONST. art. VI, § 3 ("Freedom of religion—Support of religion prohibited"); TENN. CONST. art. I, § 3; TEX. CONST. art. I, §§ 6-a, 6 ("Freedom of Worship"), 7 ("Appropriations for Sectarian Purposes"); Utah Const. art. I, § 4 ("Religious Liberty"); VT. CONST. ch. I, art. 3 ("Freedom in religion; right and duty of religious worship"); VA. CONST. art. I, § 16 ("Free exercise of religion; no establishment of religion"); WASH. CONST. art. I, § 11 ("Religious Freedom"); W. VA. CONST. art. III, § 15 ("Religious freedom guaranteed"); WIS. CONST. art. I, § 18 ("Freedom of worship; liberty of conscience; state religion; public funds"); WYO. CONST. art. 1, §§ 18 ("Religious Liberty"), 19 ("Appropriations for sectarian or religious societies or institutions prohibited").

condition in which it should be, with the states policing their own, non-coercive expressions of religion.

III. CONCLUSION

Everson's incorporation of the Establishment Clause, seven decades ago, has the benefit of age. But it was wrong from the start, and it has not aged gracefully. Instead, it has involved the federal courts in a multitude of state-action cases that state courts are well equipped to handle under their own religious freedom and anti-establishment principles. Moreover, the First Amendment's Free Exercise, Speech, and Assembly Clauses provide oversight on improper coercion or discrimination by the states, as the Supreme Court has demonstrated repeatedly and recently in *Espinoza*, *Carson*, *Tandon*, and *Kennedy*. The time is ripe for the Court to overrule *Everson* and to disincorporate the Establishment Clause.

Other Views:

- Carl H. Esbeck, *The Establishment Clause: Its Original Public Meaning and What We Can Learn from the Plain Text*, 22 FEDERALIST SOC'Y REV. 26 (2021), *available at* https://fedsoc.org/commentary/publications/the-establishment-clause-its-original-public-meaning-and-what-we-can-learn-from-the-plain-text.
- Frederick Mark Gedicks, *Incorporation of the Establishment Clause Against the States: A Logical, Textual, and Historical Account*, 88 IND. L.J. 669 (2013), *available at* https://digitalcommons.law.byu.edu/faculty_scholarship/283/.
- Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Non-Establishment Principle*, 27 ARIZ. ST. L.J. 1085 (1995), *available at* https://core.ac.uk/download/pdf/232786337.pdf.

A Response to the Constitution's Critics*

Johnathan O'Neill**

A review of Dennis Hale and Marc Landy, Keeping the Republic: A Defense of American Constitutionalism (2024)

Keeping the Republic: A Defense of American Constitutionalism defends the Constitution against historical and recent critics who reject its constraints on simple majority rule and its alleged inability to resolve deep conflicts in American society. The co-authors are political scientists at Boston College, so their treatment of the subject is more in the realm of political theory and political culture than constitutional law as such. There is no sustained treatment of courts or jurisprudence (although the Supreme Court receives some attention).

The book's title is taken from the famous anecdote about the question posed to Benjamin Franklin after the Philadelphia Convention: "'What kind of government have you given us, Dr. Franklin?' To which Franklin replied: 'A republic, madam, if you can keep it.'"[1] Dennis Hale and Marc Landy show that a true constitutional republic is a rare and somewhat fragile thing, and most certainly not a machine that would go of itself absent citizens' informed understanding of its purposes and limits and their own responsibilities. The American republic was designed to protect human liberty and local self-government in a diverse and far-flung federal polity—not to empower a national

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

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[1] Dennis Hale and Marc Landy, Keeping the Republic: A Defense of American Constitutionalism 21 (2024).

numerical majority to enforce whatever conception of justice or progress the zeitgeist happens to announce.

The book first lays out the positive case for the Constitution as a successful approach to governance of a large geographic area under the conditions of post-Enlightenment modernity. Next, it relates the history of attacks on the Constitution up to the present, and then it rebuts the critics via reference to the initial defense and with additional data. A final section considers the distinction between governance in accord with established constitutional norms and the typical contemporary practice of ignoring or reversing them. This review will follow the same general pattern of the book, with the preponderance of attention to the first part.

I. THE POSITIVE CASE FOR THE CONSTITUTION

The first part of the book briefly explores modern political theory and how it informed the creation of the Constitution. It argues that the more one understands the bases and boundaries of politics since the Enlightenment, the more one will see why the Constitution has endured and why it is worth keeping. To this end, in the first part, the authors focus on the social contract theory of Thomas Hobbes and John Locke as the most proximate philosophical influence on the American founders, though they show an awareness of earlier figures such as Machiavelli. The rudiments of this theory will be familiar to educated readers. What is most valuable in this treatment is the authors' sophisticated explication of how modernity presented grave, even dangerous challenges for popular, consent-based government—especially government on the massive scale of the modern state. These challenges must be understood to fully appreciate how the Constitution was a wise and measured response to them.

Philosophically, modern thought demoted both the Christian religion and the Aristotelian understanding of human beings as naturally social and political, capable of both prideful self-assertion and of virtue. Hobbes was a materialist who taught that human beings were essentially solitary and afraid for their own security and well-being. They agreed to create the Leviathan whose rules would bring order and protection, ending the "war of all against all" in the postulated "state of nature" and thereby securing the "natural right" to self-preservation. On this view, the government protected individuals and allowed them to enjoy peace and material prosperity by being "powerful enough to keep human striving out of the danger zones (religion, the love of

glory) and confined to the zones of private pleasures and enchantments."[2] Building on Hobbes, Locke emphasized that property, commerce, and material accumulation would absorb the efforts of human beings and that the purpose of government by consent was to protect the individual's rights to life, liberty, and property. Human reason thus counseled consent to a power strong enough to assure security and comfort. People were made safe and allowed to prosper, but the aims of politics were truncated and lowered, redirected away from religious disagreement, but also away from the human capacities for justice, virtue, and self-denial.

Hale and Landy argue that the American founders accepted this modern understanding of human beings and politics, but not wholly or simplistically. The founders acknowledged that the lower, self-interested, and appetitive aspects of human beings are an ineradicable part of our nature. Yet they also insisted that the premodern understanding had not been thereby refuted. By nature, human beings were social and rational and remained capable of noble ambition, virtue, self-restraint, and public-spirited action. The authors describe as "the central argument of the book" the "need that the Constitutional Framers understood to both adapt to modernity and, at the same time, to discipline modernity to make it compatible with republican government and human nature."[3] The most fundamental part of the positive case for the Constitution, then, is that it proceeds from a correct understanding of human nature, accepting both its base and better components. Contrary to later philosophical developments, the founders did not think human nature could be remade by modern science or that it was determined by historical circumstance. Critics who condemn the supposed failures of politics and constitutionalism too often fall into "the most dangerous of all modern conceits, namely, that *there is no such thing as human nature*."[4]

Since the "constitutional framework succeeds in allowing these multivariate dimensions of human nature to coexist," the book shows how crucial but familiar constitutional structures and attributes appear with a deeper philosophical meaning that makes them more thoroughly defensible.[5] A prime example is federalism. Americans' colonial experience and the inheritance of the common law schooled them in local self-government and fostered the respect for custom, tradition, and love of one's own that is natural to human beings.

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[2] *Id.* at 5.

[3] *Id.* at 18. *See also id.* at 31.

[4] *Id.* at 31 (emphasis in original).

[5] *Id.* at 34.

Citizens insisted on retaining control of local affairs via the traditional police power left to them by the Constitution. From colonial times until today, Americans have remained suspicious of distant, less familiar authority—a fact about the polity that does much to explain why people do not automatically accept the latest bright idea that emanates from some bureaucracy in Washington, DC, that they have never heard of. Local officials can also be known and held accountable—be made to answer to the principle of consent—much more easily than those far away.

Only through federalism could the nation meet the challenge of governing such a large and diverse geographic area based on consent. Differences in circumstances, resources, customs, and preferences can be accounted for at the state and local levels in a way that is impossible for distant officials who lack what Friedrich Hayek called "local knowledge." Officials who have this knowledge will have a much better sense of what policies are appropriate and tolerable and much more success in implementing them. On this point, Hale and Landy conclude that "federalism's approach to the problem of diversity is not to try to solve it but to develop ways of living with it. Live and let live! Accept that the social fabric is made up of many different threads and that it can be kept from tearing only if the threads are loosely woven together."[6] As one recent example of success in this area, the authors offer states' varying responses to the Covid-19 pandemic. A one-size-fits-all mandate from the federal government likely would have led to disaster, but states were able to respond with different approaches that comported with their own individual situations (including differing tolerances for risk). Similarly, once the Supreme Court overturned *Roe v. Wade*, the contentious issue of abortion was thrown back to the states.[7] Whatever one thinks of abortion, large swaths of the polity could never quite comprehend the Court's invention of the right nor accept its constitutional legitimacy. Understood in this way, *Dobbs v. Jackson Women's Health Organization* "opens up public deliberation about abortion and ensures that this will take place in the appropriate deliberative forum: state legislatures."[8] And states are arriving at different and sometimes surprising regulatory regimes, as we would expect them to do in regard to a deeply controversial issue in such a diverse federal polity.

There is another aspect of the states that the founders relied on to ensure republican government on a large scale: their ability to nurture civic virtue

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[6] *Id.* at 128.

[7] *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

[8] HALE AND LANDY, *supra* note 1, at 136.

and morality through education and citizens' involvement in local affairs. The Constitution makes no provision for education and the First Amendment forbids any federal religious establishment, but everyone at the time of the framing understood that the duty of making responsible and ethical citizens would reside at the local level. States and localities created and funded schools, and several states had established churches well into the 19th century. People learned how to be self-governing citizens through service on juries and by taking responsibility for everyday local matters like school boards, fire departments, libraries, and roads. Citizenship was thus cultivated by learning and doing in one's own community, not by adhering to the dictates of a distant power. As the authors put it at one point, "no federal government program ever created a good father, mother, or neighbor. This is the responsibility of schools, religious congregations, extended families, voluntary associations, and other forms of civic and social life."[9] That so many of these institutions have atrophied in contemporary America is not the fault of the Constitution. To the extent that we ask federal programs and officials to stand in for our own responsibilities as citizens, this book argues, we foist onto the Constitution a weight it was never designed to carry. The people who wrote it understood that a republican government could not survive without a virtuous citizenry, even as they realistically accounted for human self-interest.

The problem of scale also led to the necessity of representation, which similarly accounted for the high and the low in human nature. Here, the authors succinctly and insightfully recapitulate James Madison's logic in the rightly famous *Federalist* 10. Once it is understood that the days of direct democracy are long gone, we must appreciate how the institution of representation can conduce to good government. When popular views are "refined" and "enlarged" by representatives the people have chosen for their "patriotism and love of justice," the inevitable, prideful assertion of short-term "passions" will be reoriented to more reasonable consideration of common and longer-term "interests." Representatives chosen from large districts will confront others with whom they must deliberate and form coalitions in order to get anything done (including the development of a record that can get them re-elected). Again, the reality is that people are made up of pride and passion, reason and public spirit, and the goal is to account for and harness this multifaceted nature in the interests of good government. But an institution brilliantly oriented to facilitate reasonable political deliberation cannot

[9] *Id.* at 200.

guarantee that it will occur. We know this deliberation has happened in the past, even though today it is difficult for Congress to deliberate as it should. Congress cannot create agreement where there is none; rather, it was designed to encompass the nation's myriad passions and interests and to cohere them with as much reason and comity as circumstance and human imperfection allow. If the nation is divided or unsettled, Congress will be too. This fact about democratic politics and contemporary American life cannot be blamed on the Constitution. Ultimately, the authors argue (quoting the *Federalist*), "the success of representation rests on the capacity of citizens to make 'honorable determinations' of those who will represent them."[10] A running theme of this book, here as elsewhere, is that the Constitution has too often been condemned for failings that really are those of citizens and the larger political culture we have created.

The book's brief treatment of the separation of powers and checks and balances also reflects on their roots in the founder's view of human nature. These aspects of the Constitution are not manifestations of a simpleminded, "mechanistic" conception of politics, as critics have so often claimed. Rather, they are based on a "compelling argument about the *psychology of ambition*" natural to human beings and how it could be deployed both for the public good and to protect citizens from an overreaching government.[11] Because, as the *Federalist* observes, "men are not angels" and "enlightened statesmen will not always be at the helm," limitations on government are needed. They are best effectuated by a structure that arrays the powers of ambitious officeholders against one another so that each will jealously guard his own and monitor those of others. Powers thus separated have to interact and then recombine according to procedures that give no one official complete or ultimate control. This is an approach to power which understands that ambitious people want to have it, and that we need them to exercise it, but that we can never wholly trust them with it. Constitutional systems that do not account for human nature in this way are known frequently to devolve into tyrannies of one kind or another.

The last component of the positive case for the Constitution turns from direct consideration of human nature to a brief analysis of how the Constitution prepared America to succeed as a modern state. For example, it was crucial to secure "energy" in the executive, which was accomplished by making the president a single person continually re-electable (originally) and with

[10] *Id.* at 43.

[11] *Id.* at 45 (emphasis in original).

vaguely defined powers ("the executive power" as opposed to Congress's "all legislative powers herein granted"). The president was given the leeway to defend the nation and to lead it toward large and long-term goals. While the authors are sympathetic to the claim that the presidency has become too powerful in general, they are convinced that the founders were correct to establish it as an office that could contend with future dangers and unpredictable contingencies. It is necessarily the most dangerous branch because there is no guarantee that its vast power and discretion will not be misused. Yet, for a republic to survive, it must have an executive that can perform tasks that only it is able to do. One limitation of this book is the authors' decision not to plumb this topic any further by, for example, engaging the debate surrounding the "unitary executive." But, as they are aware, to wade into the relationship between executive power and constitutional government is to enter waters that run quite deep. So after registering their dissatisfaction with Donald Trump and noting that (at least so far) the republic has survived him, they leave off consideration of the presidency with the admonition that "we can do no better than to repeat the old wisdom that democracy requires eternal vigilance."[12] While this might sound like a cop-out, it is not. The constitutional order can keep executive power in check, if only after the fact of its exercise. But a self-governing people that wishes to remain so must be willing to use the resources at its disposal for this purpose.

This same idea informs the authors' brief attention to the administrative state in the book's first part, a topic they return to toward the end. Here, the founders do not get quite as high of a grade as elsewhere. As discussed in *Federalist* 68, for example, they certainly were aware of the need for good administration, and yet they were properly leery of too much bureaucratic discretion. But they did not address the issue head-on. The president's power of removal evolved by implication and has always been contested and limited by Congress, while Congress's own power of the purse has not been used to discipline bureaucrats as much as it might be. The authors describe the latter as a "failure" of Congress, "but the fault does not rest with the Constitution," they say.[13] To keep bureaucracy answerable to the people's representatives and the rule of law remains one of the great constitutional problems of our time, given the reality that any modern state will need experts who understand

[12] *Id.* at 56.
[13] *Id.* at 58-59.

complicated issues to administer inevitably general laws. The authors rightly observe that keeping the republic will require ongoing attention to this issue.

Just as the issue of administration cannot be evaded in a large modern state, so too did the founders recognize that modern government must facilitate commerce and protect private property. The Constitution was created for a "commercial republic" whose "citizens would demand that the state enable them to be prosperous."[14] This goal that in earlier times might have been considered crass materialism has, in modernity, become routinely accepted, if not considered noble. Philosophers and priests were not proscribed by the Constitution, but neither did they retain the influence they once had. Drawing limits on the reach of commerce was left largely to the states via the police power. To the extent that things like Sunday closing laws or prohibitions on gambling have eroded, it is because citizens in some states have acquiesced to the change, not because the Constitution has required it. At the federal level, the Constitution can accommodate "a sensible level of regulation" of the economy and a "well-crafted safety net [that] is a necessary complement to free economy."[15] But it cannot make virtuous citizens. As noted above, that task was left to states, localities, families, and civil society. In returning to this point with some frequency, Hale and Landy gently but firmly insist that many of our contemporary problems are not the fault of the Constitution, but result from our failure to use the space it gives us for self-government to govern ourselves well.

II. Anti-Constitutional Critics

Upon concluding the initial explanation and defense of the Constitution, the book has a long chapter that examines the history of anti-constitutional criticism from the Anti-Federalists to today's law professors and political scientists. This chapter includes treatment of 19th century abolitionists, utopians such as Edward Bellamy, Progressives, New Deal advocates, and members of the New Left of the 1960s. These critics are presented sensitively and fairly, with the goal of explaining why they opposed the Constitution or called for its overthrow or reform. Most varieties of criticism center on the claim that the Constitution is insufficiently democratic—that it improperly impedes majority rule. Others involve what the authors call "critiques of an American 'way of life.'" The Constitution is said to foster or allow such nasty things as

[14] *Id.* at 59.
[15] *Id.* at 200.

"excessive individualism, greed, inequality, and corruption." It is also said to be "insufficiently protective of rights; it was founded in slavery and exploitation; it is excessively fixed and rigid; and it forces the present to be governed by the past."[16]

The force and insight of the authors' rebuttals to each of these attacks cannot be fully reconstructed here—one really needs the book for that. An overarching theme is the concept of constitutionalism as "mitigated popular government" (adopted from Herbert Storing). America is a democracy based on the consent of the governed, but the Constitution allows the majority to have its way only when that majority is durable enough to assert itself through established institutions and procedures. Political action and decision-making are slowed down so that policies can be deliberated and refined and so that coalitions can be formed. The majority must be sufficiently broad, and often sufficiently federally dispersed, to pass through the gamut of checks and balances. When considered in this light, "the case against the Constitution involves not a defense of democracy but a defense of *impulsive* democracy, the idea that majorities should obtain their goals in real time, no matter what those goals are, and no matter how narrow the majority."[17] Appeal to mitigated democracy is at the root of the authors' defense of the Senate and the Electoral College, for example. Both institutions compel the creation of a governing majority that is not merely numerically superior at a given moment, but that has been cohered over time and space. This model is far more likely to result in moderate policy and relative social cohesion than the quick swings in direction that would result from unmitigated majoritarianism.

While majoritarians likely would not follow their logic so far as to suspend the Bill of Rights, their ire is often directed at capitalism and private property as the basis of the income inequality they so revile. Hale and Landy go somewhat far afield from constitutional analysis classically understood to defend capitalism and American entrepreneurialism against the social democracy and wealth redistribution that critics claim would benefit the majority. This defense is largely empirical, involving measures of such things as living standards, taxation levels, wealth creation, and employment patterns. It also makes the philosophical point that, aside from matters of good taste and just plain envy, "no objective standards exist to discriminate between the deserving and undeserving rich."[18] Likewise, government control of property and wealth, as

[16] *Id.* at 106.
[17] *Id.* at 107 (emphasis in original).
[18] *Id.* at 116.

exemplified by any modern socialist regime, has not been notably successful in creating an egalitarian society, or indeed in feeding its own citizens at an adequate level.[19]

Perhaps the most fundamental criticism of the Constitution is that it failed to abolish slavery in 1787. To rebut the claim that therefore the Constitution and the nation are basically evil, Hale and Landy wisely call on the Declaration of Independence, Frederick Douglass, and Abraham Lincoln. As the authors explain, the union would not have endured if the founders had not compromised on slavery. But in the no-compromise scenario, slavery would still have continued and been positively affirmed in a separate pro-slavery republic. Instead, slavery was put on the course of ultimate extinction because it was incorporated into a regime whose founding principles condemned it—natural rights and "all men are created equal." Moreover, nowhere did the Constitution positively authorize slavery. It simply tolerated it as a creation of state law and gave the federal government the power to prevent its expansion (as Lincoln insisted). It is telling that everywhere the document references slavery—and in each place one would expect to see the word—instead the term used is "person." Indeed, this was a point Douglass made in his famous attack on slavery and the Fugitive Slave Act that had been secured as part of the Compromise of 1850. Americans were to be condemned for having chosen to pass this law via their representatives in Congress, he argued, but the Constitution had not made them do it. Rather, the document had

> neither warrant, license, nor sanction of the hateful thing, but interpreted as it *ought* to be interpreted, the Constitution is a glorious liberty document. Read its preamble, consider its purposes. Is slavery among them? . . . Now, take the Constitution according to its plain reading, and I defy the presentation of a single pro-slavery cause in it.[20]

The solution, short of civil war, was for Americans to understand the evil of slavery and vote into office people who would abolish it—precisely the effort Douglass was engaged in advancing.

III. GOVERNMENT "IN THE CONSTITUTIONAL GRAIN"

The book's last part distinguishes modes of governance that are "in the constitutional grain"—meaning those that are compatible with basic

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[19] *Id.* at 117.

[20] *Id.* at 71 (emphasis in original) (quoting Frederick Douglass, What to the Slave is the Fourth of July? (1852)).

principles and structures of the Constitution—from those that are not. We need a return to this kind of governance, argue Hale and Landy, because of the current paradoxical situation wherein people want the government to do more to improve their lives but are also consistently dissatisfied with its actions. The authors describe this as a crisis in representative government. The root of the problem, they argue, is that since the New Deal government has become overambitious and overcommitted, while also becoming more opaque and incomprehensible to everyday citizens. Using a term adopted from James Q. Wilson, they say that the "legitimacy barrier" has been breached. This was a line that, for most of American history, separated the responsibilities of the states from those of the the federal government and the public from the private. Since the New Deal, "not only would the government subsidize citizens, it would now attempt to fix whatever appeared to need fixing." As the government's ambitions increased, so did "the chances that it would fail. Hence, the growing distrust and disenchantment with the *results* of government, even as citizens continued to enjoy the fruits of the entitlement state."[21] The opacity and unaccountability result from the manner in which governance now so often occurs—the "stealth government" of the administrative state, where courts, bureaucracies, and interest groups operate largely outside the reach and understanding of the citizenry.[22]

The New Deal's infrastructure building and regulation of interstate commerce are described by the authors as "in the grain" because no single state could have accomplished them and because they were plausibly related to commerce. But the fateful redefinition of rights that began at the same time was decidedly not in the grain. The traditional idea of rights as inherent in individuals and as things that must be protected *from* government ("negative rights") was transformed. Rights came to be understood as tangible benefits that the government *provided* to individuals or groups ("positive" or "programmatic" rights). Hale and Landy are sympathetic to the argument that rights to labor union organization and Social Security, while novel, were in the grain. These new rights arose from the unique challenges of the modern industrial economy that only the federal government could address. But the authors also see that the New Deal established the precedent for rights as entitlements overseen by the administrative state, and they see that as the beginning of the breakdown of the legitimacy barrier. The authors describe how

[21] *Id.* at 149 (emphasis in original).
[22] *Id.*

this dynamic was elaborated in the Great Society of the 1960s and how it has continued into our own time, noting that the result is increasingly fiscally unstainable and politically uncontrollable. The lesson here is that keeping the republic will require some retrenchment of the government's responsibilities and spending before insolvency descends.

To take another example, Hale and Landy describe the Civil Rights Act of 1964 as well within the constitutional grain. The product of careful and extended deliberation in Congress, it finally ended legal racial discrimination by requiring equal treatment in public accommodation, employment, and education. Together with the Voting Rights Act of 1965, the 1964 Act began to realize, in fact, the principles of the post-Civil War Reconstruction Amendments. Nevertheless, with the encouragement of President Lyndon Johnson, federal courts and bureaucracies soon instituted race-based affirmative action policies that abandoned the concept of equality before the law. The transmogrification of the plain meaning and original intent of the 1964 Act into the demand for equality of result and proportional representation is perhaps the most glaring example of how stealth government has inverted constitutional principles. Hale and Landy pull no punches in marking the costs to race relations and civic comity. They do not analyze *Students for Fair Admissions*, but that decision seemingly augurs a return to a more constitutionally sound approach.[23]

The authors do analyze the rebuke to the administrative state represented by *West Virginia v. EPA*.[24] In that decision, the Supreme Court prohibited the Environmental Protection Agency from using its discretion to regulate carbon dioxide from coal plants in a fashion that would have decimated the industry and hence the economies of several states. Such a momentous move, said the Court, could not be undertaken without more explicit authorization from Congress. Hale and Landy describe this decision as "the most powerful blow dealt to stealth government since the New Deal."[25] They applaud the Court's attempt to defend the separation of powers by directing the responsibility for governing back to Congress. Similar is their treatment of the proposed Regulations from the Executive in Need of Scrutiny (REINS) Act. It would decrease bureaucratic discretion by requiring agencies that propose regulatory rules with costs over $100 million per year to obtain the approval of Congress before implementing those rules. They lament that Congress has abdicated its

[23] 600 U.S. 181 (2023).
[24] 597 U.S. 697 (2022).
[25] HALE AND LANDY, *supra* note 1, at 188.

duty by failing to pass the law. Here, a theme from the book's beginning reemerges with the reiteration that, because America is a modern state, it will need bureaucrats with some discretion to regulate the complexities of modern life. But in our separation of powers system, this cannot be allowed to mean the cession of all control to the executive branch (or to "independent" agencies in a supposed fourth branch). Congress must tap into the ambitions of its own members to check such aggrandizement. On this point, Hale and Landy conclude that "the future of the republic rests on the willingness of Congress to reassert that noble ambition."[26]

Citizens can help push Congress toward its duty by returning to "thinking constitutionally" (the title of the book's last chapter). This entails a deeper appreciation of the kind of people Americans are and the kind of politics the Constitution both recognized and was designed for. America is a vast and diverse land made up of people who are generally zealous for their liberty and suspicious of authority, especially distant and impersonal authority. They are capable of and should be encouraged to actively participate in government at the state and local levels. But the size of the national territory means that people cannot participate directly in government at the national level and instead must rely on the very real power of choosing who will represent them and deliberate on their behalf. Another fact about the combination of the nation's diversity and its scale is that, in the authors' *sub silentio* quotation of the world's greatest octogenarian rock band, "you can't always get what you want." Other people have interests that are legitimate even when we dislike them. Politics is about finding some *modus vivendi* in the public interest that can be made from the ongoing clash of more particular and local interests. The willingness to win some and lose some without wrecking the entire constitutional enterprise is absolutely necessary for self-government in America. And this means that Congress must reassert its own constitutional authority to deliberate and legislate on behalf of the nation, and to reclaim ground it has too frequently ceded to other actors. The authors make this point repeatedly, though not in great detail. Their insistence about the nature of the problem and the site of its solution should cue all of us to attend to the prospects for reforming and emboldening Congress.[27]

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[26] *Id.* at 189.

[27] Deeper engagement with this issue can be found in PHILIP A. WALLACH, WHY CONGRESS (2023); IS CONGRESS BROKEN? THE VIRTUES AND DEFECTS OF PARTISANSHIP AND GRIDLOCK (William F. Connelly Jr., John J. Pitney Jr., & Gary J. Schmitt eds., 2017); CONGRESS

The Constitution has endured for so long because heretofore the American people have successfully taken up the burden of democratic self-government the document assumes we want to carry. If, instead, conflicting groups and interests come to believe that the government can solve any and all social problems as they see fit—no matter the expense and damn the opinions of their neighbors—self-government in America will be impossible. This book counsels us to see that the Constitution is best understood not so much as a recipe or rulebook that tells us what to do, "but a framework that encourages a particular way of governing, one that privileges deliberation, compromise, restraint, and respect for federalism and the separation of powers."[28] Officeholders and citizens must recapture this more modest, forbearing, and limited conception of politics that the Constitution grew from and was meant to order and facilitate. *Keeping the Republic* goes a long way to show where we should put our thought and effort if American constitutionalism is to last for generations to come.

Other Views:

- ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? (2d ed. 2003), *available at* https://yalebooks.yale.edu/book/9780300095241/how-democratic-is-the-american-constitution/.
- SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION (2008), *available at* https://global.oup.com/academic/product/our-undemocratic-constitution-9780195365573?cc=us&lang=en&.
- Jeffrey Toobin, *Our Broken Constitution*, THE NEW YORKER (Dec. 1, 2013), https://www.newyorker.com/magazine/2013/12/09/our-broken-constitution.
- *The 1619 Project*, THE N.Y. TIMES MAGAZINE, Aug. 18, 2019, *available at* https://pulitzercenter.org/sites/default/files/full_issue_of_the_1619_project.pdf.

OVERWHELMED: THE DECLINE IN CONGRESSIONAL CAPACITY AND THE PROSPECTS FOR REFORM (Timothy M. LaPira, Lee Drutman, & Kevin R. Kosar eds., 2020).

[28] HALE AND LANDY, *supra* note 1, at 194.

INTEGRITY OR INTERFERENCE?: EVALUATING THE CONSTITUTIONALITY OF GEORGIA'S ELECTION INTEGRITY ACT*

RALPH ERIC CRISS**

Recent political earthquakes such as the assassination attempt against former president Donald Trump and President Joe Biden's withdrawal from the 2024 campaign quickly overshadowed the various court proceedings involving the former president. Tucked even further back in the corner of the electoral process is the litigation involving Georgia's controversial election law, the Election Integrity Act (EIA). Nevertheless, issues such as absentee voting—a key element of the EIA litigation—are likely to reemerge. While many polls show Donald Trump leading Kamala Harris, the race remains tight, with most polls showing the candidates inside the margin of error. Winning the competition for absentee ballots in battleground states like Georgia could mean the difference between winning and losing the entire election in 2024.

Georgia's Election Integrity Act, passed in the wake of the 2020 presidential election, was an immediate source of controversy.[1] News outlets and corporate leaders pounced on the law, conflating justifications for the EIA with Donald Trump's claims that the Georgia election was stolen.[2] Major League

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

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[1] Press Release, Office of Georgia Governor Brian Kemp, Governor Kemp Responds to President Biden's Attack on Election Integrity Legislation (Mar. 26, 2021), https://gov.georgia.gov/press-releases/2021-03-26/governor-kemp-responds-president-bidens-attack-election-integrity.

[2] Sanya Mansor & Madeleine Carlise, *Companies Condemn Georgia's Restrictive Voting Law Amid Pressure from Advocates*, TIME MAG. (Apr. 2, 2021), https://time.com/5952337/corporations-condemn-georgia-voting-law/.

Baseball even pulled the All-Star Game from Atlanta. And yet, both Governor Brian Kemp and Georgia Secretary of State Brad Raffensperger denied that widespread voter fraud occurred in 2020—a stance that created a rift between Kemp and Trump.[3] Nonetheless, President Joe Biden described the EIA as "Jim Crow in the 21st Century" and "an atrocity," announcing the Justice Department was "taking a look" at the measure.[4]

Soon after Kemp signed the EIA, a series of lawsuits challenged multiple provisions of the law, alleging violations of the Fourteenth Amendment of the United States Constitution and the Voting Rights Act. These cases were consolidated into *In re Georgia Senate Bill 202*.[5] The plaintiffs asserted discrimination, undue burden on the right to vote, and abridgment of free speech and expression.

After two years of back and forth, a federal district judge declined to issue a preliminary injunction halting enforcement of key provisions of the EIA.[6] In his opinion, U.S. District Judge J.P. Boulee stated that, "After weighing the factors [allegedly indicating that the Legislature intended to discriminate against black voters when it passed S.B. 202], the Court cannot find that Plaintiffs are substantially likely to succeed on their claims pursuant to the Fourteenth and Fifteenth Amendments."[7] The still pending case raises a host of sensitive issues.

Plaintiffs, including the United States Department of Justice, sought to enjoin, among others, four absentee ballot related provisions: (1) limitations on the number of drop boxes allowable in each county; (2) limitations on the location of the drop boxes and the hours of drop box accessibility; (3) the deadline for submitting applications to vote absentee; and (4) the

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[3] Richard Luscombe, *Governor Brian Kemp tells Trump Georgia's 2020 election 'was not stolen,'* THE GUARDIAN (Aug. 15, 2023), https://www.theguardian.com/us-news/2023/aug/15/georgia-governor-brian-kemp-trump-2020-election-not-stolen.

[4] Maegen Vazquez and Kate Sullivan, *Biden calls Georgia law 'Jim Crow in the 21st Century' and says Justice Department is 'taking a look,'* CNN POLITICS (Mar. 26, 2021), https://www.cnn.com/2021/03/26/politics/joe-biden-georgia-voting-rights-bill/index.html.

[5] *In re* Ga. S. Bill 202, No. 1:21-MI-55555-JPB, 2023 U.S. Dist. LEXIS 182482, at *32 (N.D. Ga. Oct. 11, 2023). These cases include *New Ga. Project v. Raffensperger*, *Sixth Dist. of the Afr. Methodist Episcopal Church v. Kemp*, and *VoteAmerica v. Raffensperger*. Among the plaintiffs are the New Georgia Project, the Black Voters Matter Fund, the Georgia State Conference of the NAACP, the Urban League of Greater Atlanta, and the United States of America. Defendants include Governor Kemp, Georgia Secretary of State Raffensperger, the Republican National Committee, and the National Republican Congressional Committee.

[6] *In re Ga. S. Bill 202*, 2023 U.S. Dist. LEXIS 182482, at *92.

[7] *Id.*

requirement that voters applying for an absentee ballot provide their driver's license or state identification card number.[8]

Plaintiffs allege the EIA imposes severe and significant burdens on eligible Georgia voters' right to vote.[9] Specifically, they charge that the law's increased regulation of absentee voting and mobile voting units, its prohibition of line relief, and other new rules will burden disabled voters, voters of color, and others who attempt to vote.[10] After the district court denied their request for a preliminary injunction, plaintiffs indicated their determination to persevere. The ACLU of Georgia asserted that it would "never stop advocating on behalf of our clients and voters across the state."[11] Raffensperger praised the ruling. A staunch advocate of the statute, he asserted the law "strengthens election integrity while increasing the opportunity for Georgia voters to cast a ballot."[12]

Notably, the United States Constitution does not guarantee the right to vote by absentee ballot. Nor does it guarantee the right to vote in a manner that is easy or convenient.[13] But while states are given a wide berth in administering their elections, the Constitution and the federal courts forbid states from intentionally discriminating against certain voters in regulating their electoral processes. This limitation stems primarily from the Equal Protection Clause of the Fourteenth Amendment. The justification for the EIA, as noted in the General Assembly's findings and declarations, was that the 2018 and 2020 elections stressed Georgia's electoral system, causing voters of all political ideologies to lose confidence in the system.[14] Supporters of the law argue the EIA does not discriminate against any group of eligible voters.[15]

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[8] *Id.* at *42-60.

[9] *Id.*

[10] *Id.*

[11] Kate Brumback, *A Judge Has Declined to Block Parts of Georgia's Election Law, As Legal Challenges Play Out*, ASSOCIATED PRESS (Oct. 13, 2023), https://apnews.com/article/georgia-voting-rights-5c977dd933560cc7118c954ef5193e60.

[12] Press Release, Off. of Ga. Sec'y of State Brad Raffensperger, Court Rejects Biden Administration Challenge to Georgia's Election Integrity Act (Oct. 11, 2023), *available at* https://sos.ga.gov/news/court-rejects-biden-administration-challenge-georgias-election-integrity-act.

[13] *See also* Lyle Denniston, *Constitution Check: Is there a right to vote before election day?*, NATIONAL CONSTITUTION CENTER (Sept. 30, 2014), https://constitutioncenter.org/blog/constitution-check-is-there-a-right-to-vote-before-election-day.

[14] Election Integrity Act of 2021, 2021 Ga. SB 202 § 2(1).

[15] *Id.*

Opponents insist the legislation is a form of voter suppression and blatant discrimination.[16]

This article considers opposing viewpoints regarding the constitutionality of the EIA's absentee voting provisions under the Equal Protection Clause of the Fourteenth Amendment. Section I assesses the history of voting rights and defines absentee voting. It also describes the complex social and political landscape that led to the passage of the EIA. Section II analyzes judicial interpretations of the Equal Protection Clause in the context of voting rights and ballot access. The Fifteenth Amendment and the Voting Rights Act (VRA) are addressed only to the extent they highlight the central role of the Fourteenth Amendment and its Equal Protection Clause. Section III considers the scholarly debate surrounding absentee voting, the Fourteenth Amendment, and voting rights generally. Section IV pulls together the various threads of the debate over the EIA and absentee voting. In doing so, it contemplates how the debate evolved and how it might proceed in the future, while also considering how the Equal Protection Clause might best be applied to such debates.

I. RATIONALE FOR AND PROVISIONS OF THE EIA

The Georgia legislature passed the EIA during a period of growing voter skepticism about the legitimacy of national elections. This broader landscape is worthy of closer examination. Before the Florida recount in 2000, approximately 3 percent of Americans didn't think their vote was counted.[17] After the razor thin margins of the 2000 and 2004 elections, along with the Florida recount and hanging chad debacle, pollster John Zogby found that 9 percent of Americans didn't trust the vote count or had some doubts.[18] Breaking the data down further, 18 percent of blacks didn't trust the vote count, and neither did 13 percent of Latinos.[19] And in 2008, 40 percent of voters told Rasmussen Reports that there was fraud or voter suppression of some kind during the election.[20] Prior to the 2020 election, a 2019 Gallup poll registered an increase in voter mistrust of elections. According to the survey, only 40 percent of respondents were confident that U.S. elections were conducted

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[16] Brumback, *supra* note 11.

[17] JOHN FUND, STEALING ELECTIONS: HOW VOTER FRAUD THREATENS OUR DEMOCRACY 13 (2008).

[18] *Id.*

[19] *Id.*

[20] *Id.*

honestly; 59 percent were not.[21] Heading into 2024, the Public Affairs Council has registered yet another drop in confidence, with only 37 percent of Americans believing "the 2024 elections will be both 'honest and open.'"[22] Thus, dating back to 2000, the trend is clear. The republic is suffering from a growing crisis of confidence in the fundamental machinery of its democratic process.[23] Although widely criticized, the Georgia legislature and Governor Kemp sought to address this problem by passing and implementing the EIA.

A. Reasoning Behind the EIA

Much of the asserted need for the EIA revolved around problems with absentee voting. One challenge that arises in analyzing absentee voting issues is that states may define the term "absentee voting" differently. Each may have its own unique rules for registering, voting, and counting absentee ballots. Some states have massive vote by mail elections where all voters are mailed ballots. In most states, however, and for the purposes of this article, absentee voting occurs when a voter requests an absentee ballot and then returns the ballot, either by mail or by dropping it off directly at a local election official's office.[24]

In crafting the Election Integrity Act, the Georgia legislature posited the idea that there was a "significant lack of confidence in Georgia election systems."[25] It cited as problematic both "allegations of rampant voter suppression and many electors concerned about allegations of voter fraud."[26] The

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[21] R.J. Reinhart, *Faith in Elections in Relatively Short Supply in U.S.*, GALLUP (Feb. 13, 2020), https://news.gallup.com/poll/285608/faith-elections-relatively-short-supply.aspx.

[22] *Few Americans Believe 2024 Elections Will Be 'Honest and Open,'* PUB. AFFS. COUNCIL, (Oct. 2023), https://pac.org/impact/few-americans-believe-2024-elections-will-be-honest-and-open.

[23] A long history of attacks on black voting rights exacerbates the problem. These took the form of, first, literacy tests, and later, the understanding and grandfather clauses in state constitutions. The understanding clause allowed a voter registrar to read part of the state constitution to a potential voter, who, if he could appropriately interpret what had been read to him, would be allowed to vote. The grandfather clause eliminated property and literacy requirements only for people who had been able to cast a legal ballot prior to Reconstruction, permitting illiterate whites to vote while disenfranchising illiterate and non-property-owning black citizens who were not permitted to vote until after the Civil War. *See* RALPH ERIC CRISS, THE BOSS OF NEW ORLEANS: MARTIN BEHRMAN AND MACHINE POLITICS IN THE CRESCENT CITY 38 (2023).

[24] Atanu Das, *Mitigating Potential Vote-By-Mail Fraud*, 34 HARV. J.L. & TECH. DIG. 1-2 (2020), *available at* https://jolt.law.harvard.edu/digest/mitigating-potential-vote-by-mail-fraud-while-simultaneously-increasing-vote-by-mail-ballot-acceptance-by-utilizing-facial-recognition-and-multi-factor-authentication-technology.

[25] Election Integrity Act of 2021, § 2(1).

[26] *Id.*

many court challenges from "all sides" were also noted as problematic.[27] In an effort to address these issues, the legislature passed and Governor Kemp signed S.B. 202, the Election Integrity Act. The goal, they said, was to make it "easy to vote and hard to cheat."[28]

Among other things, the legislature sought to address local problems processing absentee ballots—a challenge compounded by special interest groups seeking to influence the election.[29] These groups—both liberal and conservative—often mail to registered voters multiple absentee ballot applications with pre-filled voter information that is incorrect.[30] The legislature sought to clarify other rules related to absentee ballot applications.[31] The length of the absentee ballot process, it said, contributed to confusion.[32] This led in some cases to voters showing up to vote for what they allegedly believed was the *first time*, when in fact they had *already* voted.[33] In addition, the legislature asserted that many absentee ballots issued in the last days leading up to an election were either invalid, not returned, or returned late.[34] These concerns yielded a desire for a more tightly regulated, easier to understand absentee ballot process. Solutions included a more definite period of absentee voting to assist electors in understanding the election process "while also ensuring that opportunities to vote are not diminished."[35]

Another absentee voting problem was drop boxes—a pandemic-era solution for the challenge of social distancing.[36] The drop boxes had been created by an emergency rule that no longer existed post-pandemic.[37] Unfortunately, in some counties, the process of counting absentee ballots was both messy and untimely.[38] Nevertheless, the legislature permanently extended a

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[27] *Id.* at § 2(2). For examples of electoral controversy, see Press Release, Off. of Ga. Sec'y of State Brad Raffensperger, State Election Board Refers Voter Fraud Cases for Prosecution, (Sept. 11, 2020), *available at* https://sos.ga.gov/news/state-election-board-refers-voter-fraud-cases-prosecution-0.

[28] Election Integrity Act of 2021, § 2(17).

[29] *Id.* at § 2(8).

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.* at § 2(9).

[34] *Id.*

[35] *Id.*

[36] *In re Ga. S. Bill 202*, 2023 U.S. Dist. LEXIS 182482, at *42-43; Election Integrity Act of 2021, §§ 2(3), 2(10), & 2(17).

[37] *In re Ga. S. Bill 202*, 2023 U.S. Dist. LEXIS 182482, at *44.

[38] Election Integrity Act of 2021, §§ 2(5)-(6).

manageable form of the drop box process.[39] It created a plan to process and scan absentee ballots more efficiently, count votes more quickly and accurately, and hopefully boost confidence in Georgia's electoral process among all voters.[40] Another controversial change included new absentee ballot voter identification rules.[41]

B. Absentee Ballot Drop Boxes

As lawsuits against the above changes mounted, the district court consolidated them into a single action, *In re Georgia Senate Bill 202*.[42] Plaintiffs soon requested a temporary injunction to prevent implementation of the EIA's new drop box regulations.[43] The pandemic-era emergency measures were implemented to accommodate voting at a time when many were fearful about gathering in crowds. They became popular among civil rights groups and many in the Democratic Party, who wanted to make the temporary changes permanent.[44] The State Election Board's emergency rule had allowed local election officials to launch drop box programs at multiple locations without limitation on the number or placement of drop boxes, other than a requirement that they be located on "generally accessible" property owned by county or city government.[45] The emergency drop box rule also allowed drop box locations to open forty-nine days before Election Day, up to and including Election Day.[46] Lastly, the emergency rule required the surveillance of drop boxes, along with mandates for sufficient lighting and video monitoring.[47]

The new rules under the Election Integrity Act stipulate that either "a board of registrars or an absentee ballot clerk shall establish at least one drop box as a means for absentee by mail electors to deliver their ballots to the

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[39] *Id.* at § 26(c)(1).

[40] *Id.* at §§ 2(3)-(4).

[41] *In re Ga. S. Bill 202*, 2023 U.S. Dist. LEXIS 182482, at *42-46; Election Integrity Act of 2021, § 25(C)(i).

[42] *In re Ga. S. Bill 202*, 2023 U.S. Dist. LEXIS 182482.

[43] *Id.* at *60.

[44] Mark Niesse, *How Georgia's voting law works,* AJC POLITICS, May 6, 2021, https://www.ajc.com/politics/how-georgias-new-voting-law-works/GF6PLR44PNESPKR5FXCBE7VEOY/ (last accessed on July 13, 2024); Election Integrity Act of 2021, § 2(10).

[45] *In re Ga. S. Bill 202*, 2023 U.S. Dist. LEXIS 182482, at *42-44.

[46] *Id.*

[47] Election Integrity Act of 2021, § 26(c)(1).

board of registrars or absentee ballot clerk."[48] The number of drop boxes is subject to a numerical limitation: the lesser of the number of early voting locations in the county or one drop box for every 100,000 active registered voters.[49] Additional drop boxes are required to be distributed evenly by population across a county. In other words, the number and location of drop boxes cannot be manipulated to give a strategic advantage to any party or group. Finally, the law requires that drop boxes be located inside the office of the board of registrars, absentee ballot clerk, or advance voting locations.[50] Moreover, drop boxes are available only during early voting hours and must be under constant surveillance by a person. Video surveillance alone is not sufficient to comply with the law.[51]

Other rules regulate labeling of drop boxes, security of drop boxes, orderly and secure ballot collection from drop boxes, and procedures for reporting irregularities to the secretary of state.[52] Plaintiffs argued that these changes disproportionately impact black voters because voters in counties with larger black populations would see the greatest reduction in the number of drop boxes under the EIA as compared with the number available under the emergency rule.[53]

In arguing for their preliminary injunction, plaintiffs asserted that drop boxes were popular, often located outside of the physical buildings on government property, and mostly available 24 hours a day and seven days a week.[54] This popularity came with a price, however, because the former drop box rules resulted in many voter fraud complaints.[55] Issues raised in these complaints included poor security and lack of monitoring.[56] Some of the alleged misconduct involved ballot harvesting.[57] Notably, the defendants did not allege widespread voter fraud. Rather, they argued the EIA was necessary to address these substantial complaints from both sides, restore confidence in Georgia's electoral processes, and preserve limited resources allocated to investigate and address the issues.[58]

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[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] Election Integrity Act of 2021, §§ 26(c)(2)-(4).
[53] *In re Ga. S. Bill 202*, 2023 U.S. Dist. LEXIS 182482, at *44-45.
[54] *Id.* at *43.
[55] *See* State Election Board Refers Voter Fraud Cases for Prosecution, *supra* note 27.
[56] *Id.*
[57] *Id.*
[58] Election Integrity Act of 2021, §§ 2(1), (3), & (4).

C. Third Party Interference

Absentee ballot applications are often sent to voters through the mail by third party groups attempting to mobilize Republicans or Democrats for a specific candidate or slate of candidates. These direct mail packages are sometimes designed to look and feel as if they come from an official government source. Receiving multiple absentee ballot applications may create confusion among younger, less experienced voters and among seniors who may have already requested a ballot or even cast their vote. While this may be manageable in small counties or low turnout elections, it can be a significant burden on local elections officials in larger counties, especially in high turnout situations such as a presidential election. To address this issue, the legislature tightened the state's absentee ballot application rules, mandating that:

> All persons or entities, other than the Secretary of State, election superintendents, boards of registrars, and absentee ballot clerks, that send applications for absentee ballots to electors in a primary, election, or runoff shall mail such applications only to individuals who have not already requested, received, or voted an absentee ballot in the primary, election, or runoff.[59]

Such entities are required to compare their mailing list with "the most recent information available about which electors have requested, been issued, or voted an absentee ballot in the primary, election, or runoff and shall remove the names of such electors from its mail distribution list."[60]

D. Identification and Verification of Absentee Voters

Georgia's absentee ballot statute formerly required that,

> In order to be found eligible to vote an absentee ballot by mail, the registrar or absentee ballot clerk shall compare the identifying information on the application with the information on file in the registrar's office and, if the application is signed by the elector, compare the signature or mark of the elector on the application with the signature or mark of the elector on the elector's voter registration card.[61]

The new language in SB 202 requires that, "Upon receipt of a timely application for an absentee ballot," the appropriate local official must verify the identity of the applicant and determine their eligibility.[62] This must be done

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[59] *Id.* at § 25(a)(3)(A).
[60] *Id.*
[61] *Id.* at § 25(b)(1) (stricken from the statute in mark-up).
[62] *Id.*

by comparing the information on the applicant's driver's license or identification card with the information "on file in the registrar's office."[63]

Another provision plaintiffs targeted is the requirement that voters applying for an absentee ballot provide their driver's license or state identification card number.[64] Prior to passage of the EIA, Georgia's absentee voters had to provide two things to fulfill identification requirements: (1) their date of birth and (2) their signature. Both of these had to match what was in the voter file.[65] This signature-match requirement generated many lawsuits.[66] To resolve the situation, the EIA eliminated the signature match and substituted a requirement that an absentee voter provide his or her Georgia driver's license number or identification card number on the absentee ballot application.[67] Other options include providing a current utility bill, bank statement, government check, paycheck, or other government document showing the voter's name and address.[68] An individual who does not possess a valid ID may obtain one free of charge.[69] The second step in the process is providing the identification number on the absentee ballot envelope when it is submitted.[70] Here too, an exception is made. If a voter lacks such identification, he need only write the last four digits of his Social Security number to confirm his identity.[71]

Defendants justify the identification requirements based on the state's interests in (1) administering its elections, (2) preventing fraud, and (3) increasing voter confidence.[72] According to defendants, the signature-match process took election officials three to four minutes per voter, while the more

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[63] *Id.*

[64] *Id.* at § 25(a)(1)(C)(i).

[65] *In re Ga. S. Bill 202*, 2023 U.S. Dist. LEXIS 182482, at *58-59 (explaining the pre-EIA process of verifying a voter).

[66] Press Release, *Georgia Largely Abandons Its Broken "Exact Match" Voter Registration Process*, CAMPAIGN LEGAL CENTER (Apr. 5, 2019), *available at* https://campaignlegal.org/press-releases/georgia-largely-abandons-its-broken-exact-match-voter-registration-process.

[67] Election Integrity Act of 2021, §§ 2(1)-(2).

[68] *Id.* at § 29(a)(1)(D).

[69] *Id.* Furthermore, the Georgia Secretary of State's website states, "If you do not have one of the six acceptable forms of photo ID, the State of Georgia offers a free ID card. An ID card can be issued at any county registrar's office or Department of Driver Services Office free of charge." *Voter Identification Requirements*, OFF. OF GA. SEC'Y OF STATE BRAD RAFFENSPERGER, https://sos.ga.gov/page/georgia-voter-identification-requirements (last visited July 14, 2024).

[70] Election Integrity Act of 2021, § 29(a)(1)(D).

[71] *Id.*

[72] *In re Ga. S. Bill 202*, 2023 U.S. Dist. LEXIS 182482, at *56.

objective ID verification takes less than one minute.[73] But plaintiffs argue that the new identification rules unfairly impact black voters because approximately 55 percent of the registered voters lacking a driver's license are black.[74]

E. Application Deadlines

In Georgia, voters have long been required to complete an absentee ballot application for each election in which they wish to vote absentee. Previously, a voter could request an absentee ballot 180 days prior to the date of the election.[75] To reduce the pressure on local elections officials and allow for faster processing of both applications and ballots, this was reduced to 78 days prior to the election. In addition, the request must now be made no less than 11 days prior to the election (increased from 4 days prior to the election).[76] There is no special excuse or reason required to obtain an absentee ballot.[77] The court noted that many local elections officials supported these changes.[78]

In requesting a preliminary injunction, plaintiffs asserted that more black voters returned their absentee ballots between eleven and four days before an election after early voting hours concluded, and therefore that because the EIA reduced the number of days in which absentee ballots could be returned, black voters would be more impacted than others.[79] In opposition, defendants argued that the tighter timeframe eliminates inefficiencies, reducing complaints from county election officials who are increasingly overwhelmed by the number and timing of absentee ballots.[80] Many officials reported that absentee ballots requested toward the end of the allowable timeframe often went unused because the application simply could not be processed in time for the voter to receive it, vote, and return it.[81] Defendants therefore argued that Georgia's legislature enacted the provision to ensure that more ballots were properly cast and counted and to improve the state's electoral system for all voters regardless of race.[82] The new rules, they believed, would restore

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[73] *Id.*
[74] *Id.* at *57.
[75] Election Integrity Act of 2021, § 25(a)(1)(A) (note stricken text in final bill mark-up).
[76] *Id.*
[77] *Id.*
[78] *In re Ga. S. Bill 202*, 2023 U.S. Dist. LEXIS 182482, at *90.
[79] *Id.* at *69-72.
[80] *Id.* at *72.
[81] *Id.* at *51.
[82] *Id.*

voter confidence in Georgia's electoral system by eliminating inefficiencies and allowing local election officials to focus on other early voting activities.[83]

Plaintiffs also argued that the EIA's combination of a shorter return window with a shorter application period disproportionately impacted black voters, who use absentee voting more than whites. Moreover, they asserted, black voters are more likely than white voters to submit applications late in the election cycle. Defendants argued that only a tiny number of absentee ballot requests were rejected for being late, regardless of race. Both sides presented expert testimony supporting their respective positions.[84]

Taking each of these arguments into consideration, the district court denied plaintiffs' motion for summary judgment.[85] Judge Boulee reasoned that the plaintiffs had not demonstrated a substantial likelihood of success on the merits—the standard for a preliminary injunction—on their claims that the EIA intentionally discriminated against black voters in violation of the Fourteenth Amendment, Fifteenth Amendment, and Section 2 of the VRA.[86] Because of this, the court did not reach consideration of irreparable harm and whether the balance of equities favored injunctive relief.[87] Based on the case law in this area, Judge Boulee's application of the Equal Protection Clause of the Fourteenth Amendment was on target.

III. APPLICABLE CONSTITUTIONAL LAW

Case law related to the Fourteenth Amendment and absentee voting—and thus to the constitutionality of Georgia's EIA—addresses four main issues: (1) the fundamental right to vote, (2) intentional discrimination on the basis of race, (3) balancing undue burdens on ballot access with a state's interest in administering orderly elections, and (4) the political question doctrine.

A. Fundamental Voting Rights

Both the United States Supreme Court and lower federal courts have ruled on several absentee ballot-related cases. In *McDonald v. Board of Election Commissioners of Chicago*, the Supreme Court held that the right to vote

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[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.* at *54 (quoting Church v. City of Huntsville, 30 F.3d 1332, 1342 (11th Cir. 1994)).

absentee is discretionary and that laws may vary, even within a state.[88] Plaintiffs—unsentenced prisoners awaiting trial—contended that a county's statutory scheme violated the Equal Protection Clause of the Fourteenth Amendment because a distinction allowing absentee balloting to those physically incapacitated but not to those judicially incapacitated was not reasonable.[89] Moreover, other pretrial jail inmates incarcerated in different counties could qualify for an absentee ballot.[90] The Court upheld the county regulations, reasoning that neither race nor wealth was a factor, the inmates were not prohibited by the statute from voting, and many other classes of persons were not entitled to receive absentee ballots.[91] The Fifth Circuit Court of Appeals has relied on the holding in *McDonald* to distinguish between "the right to vote," which is protected by the Equal Protection Clause and "a claimed right to receive absentee ballots," which is not.[92]

B. Intentional Discrimination

If the Georgia legislature acted in an intentionally discriminatory manner against black voters, the EIA must be held unconstitutional. In *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, the Supreme Court of the United States identified the following non-exhaustive list of factors that a court should consider when assessing a facially neutral law for allegedly racially discriminatory intent: (1) the impact of the challenged law, (2) the historical background, (3) the specific sequence of events leading up to its passage, (4) the procedural and substantive departures, and (5) the contemporary statements and actions of key legislators.[93] "The Eleventh Circuit has supplemented the *Arlington Heights* list to include the following additional factors: (6) 'the foreseeability of the disparate impact;' (7) 'the knowledge of that impact;' and (8) 'the availability of less discriminatory alternatives.'"[94]

Equal protection under the Fourteenth Amendment is a prominent feature of this thread of jurisprudence. For example, in *Department of Homeland Security v. Regents of the University of California*, the Court noted that to plead

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[88] 394 U.S. 802, 803 (1969).

[89] *Id.* at 802.

[90] *Id.* at 806.

[91] *Id.* at 802.

[92] *See* Tex. Democratic Party v. Abbott, 978 F.3d 168 (5th Cir. 2020).

[93] *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 253 (1977).

[94] Greater Birmingham Ministries v. Sec'y of State for State of Ala., 992 F.3d 1299, 1322 (11th Cir. 2021).

forbidden animus for purposes of an equal protection claim, "a plaintiff must raise a plausible inference that an 'invidious discriminatory purpose was a motivating factor' in the relevant decision."[95] "Possible evidence includes disparate impact on a particular group, 'departures from the normal procedural sequence,' and 'contemporary statements by members of the decision making body.'"[96] The Court further stated, "'The wisdom' of those decisions 'is none of our concern.'"[97] In *Crawford v. Marion County Election Board*, the Court held that "a state 'violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard.'"[98] The term "invidiously discriminate" has been used to describe conduct prohibited under that standard.[99]

This Fourteenth Amendment jurisprudence features prominently in the present litigation in Georgia, which concerns absentee voting laws that make no explicit mention of race. In rejecting plaintiffs' request for an injunction, Judge Boulee noted the important case of *Greater Birmingham Ministries v. Alabama*, which requires that "claims brought pursuant to the Fourteenth and Fifteenth Amendments are subject to a two-prong burden-shifting test."[100] Under the first prong, a plaintiff must prove that "the law will have a discriminatory impact and that it was adopted with discriminatory intent."[101] Plaintiffs must establish *both* intent *and* effect were discriminatory, or else their constitutional claims fail.[102] The second prong moves the burden to the defendant, who must demonstrate that the law would have been enacted *without* the allegedly discriminatory component. In the Georgia lawsuit, the plaintiffs failed to show that the law had a discriminatory intent *or* effect, so there was no need to shift the burden to the defendants, and Judge

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[95] 140 S. Ct. 1891 (2020). For a discussion of the similarities and differences between "animus" and "discriminatory intent," see William Araiza, *Regents: Resurrecting Animus/Renewing Discriminatory Intent*, 51 BROOKLYNWORKS 983, 1032-33 (2021) (noting that "animus can be understood as a direct pathway to ultimate constitutional conclusions about the invidiousness of government action challenged as violating equal protection.").

[96] *Dep't of Homeland Sec.*, 140 S. Ct. at 1915.

[97] *Id.*

[98] 553 U.S. 181, 189 (2008) (quoting Harper v. Virginia Bd. of Elections, 383 U.S. 663, 666 (1966)).

[99] *Id.*

[100] *See In re Ga. S. Bill 202*, 2023 U.S. Dist. LEXIS 182482, at *62-63 (quoting *Greater Birmingham Ministries*, 992 F.3d at 1321).

[101] *Id.* (quoting League of Women Voters of Fla. Inc. v. Fla. Sec'y of State, 66 F.4th 905, 922 (11th Cir. 2023)).

[102] *Id.* (quoting *Greater Birmingham Ministries*, 992 F.3d 1299.).

Boulee thus refused their request for a preliminary injunction. In coming to this conclusion, he considered each of the factors identified in *Village of Arlington Heights*.[103]

C. Balancing States' Interests and Burdens on Ballot Access

What was the intent behind the EIA? If Georgia's goal was to create more efficient election processes, and the law is facially race-neutral, the Supreme Court may allow such a goal to overcome incidental disparate impacts because the two are balanced against each other.[104] There is a caveat, however. Such a law cannot unduly burden voting rights; if it does, the disparate impact will outweigh the state's goal. In *Storer v. Brown*, the plaintiffs were a group of congressional and presidential candidates who appealed a district court's dismissal of claims that restrictions on ballot access for independent candidates violated the Qualifications Clause of the United States Constitution and their rights to free association and equal protection under the First and Fourteenth Amendments of the Constitution.[105] The Supreme Court held that, "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes."[106] The Supreme Court affirmed in part, holding that California's law did not violate the Qualifications Clause or the First and Fourteenth Amendments because

> It appears obvious to us that the one-year disaffiliation provision furthers the State's interest in the stability of its political system. We also consider that interest as not only permissible, but compelling and as outweighing the interest the candidate and his supporters may have in making a late rather than an early decision to seek independent ballot status.[107]

Two of the most important cases in this area are *Anderson v. Celebrezee* and *Burdick v. Takushi*. These two cases created the *Anderson-Burdick* framework, a test used to assess the balance between a state's interest in regulating elections and the burden it places on voters. In *Anderson v. Celebrezee*, the Court struck down an Ohio statute requiring independent candidates for president to file a statement of candidacy no later than March in order to

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[103] *Id.* at *63.
[104] *See* Storer v. Brown, 415 U.S. 724 (1974).
[105] *Id.*
[106] *Id.* at 730.
[107] *Id.* at 736.

appear on the general election ballot in November.[108] The Court described the law as an unconstitutional burden on voting and on the associational rights of candidates' supporters, reasoning that voters' freedom of choice and freedom of association in a nationwide election outweighed the state's interest in setting an early deadline for independent candidates.[109] In *Burdick v. Takushi*, on the other hand, the Supreme Court held that a prohibition on write-in voting, enacted as part of the state's comprehensive election scheme, did not impermissibly burden the right to vote because the legitimate interests asserted by the state were sufficient to outweigh the limited burden that the write-in voting ban imposed upon state voters.[110]

Under *Anderson* and *Burdick*, courts weigh the nature and scope of the burden a statute imposes on the right to vote against the interests that supposedly justify that burden.[111] This requires courts to consider the state's apprehensions themselves and whether they create a need to impose such a burden.[112] Moreover, the *Anderson-Burdick* framework follows a categorical approach, requiring plaintiffs to prove that legislation such as the EIA discriminates against a broad swath of voters if it is to be held unconstitutional.[113] A court cannot take into account the individual circumstances of a small number of random voters. An entire category of voters must be impacted.[114]

Finally, in one of the cases immediately involving the EIA, *New Georgia Project v. Raffensperger*, the Eleventh Circuit held that "the district court misapplied the *Anderson-Burdick* framework when it enjoined the State

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[108] Anderson v. Celebrezze, 460 U.S. 780 (1983).

[109] *Id.* at 782.

[110] Burdick v. Takushi, 504 U.S. 428 (1992).

[111] *See* Andrew Maxfield, Note, *Litigating the Line Drawers: Why Courts Should Apply* Anderson-Burdick *to Redistricting Commissions*, 87 U. CHI. L. REV. 1845, 1864 (2020), *available at* https://lawreview.uchicago.edu/print-archive/litigating-line-drawers-why-courts-should-apply-anderson-burdick-redistricting.

[112] *Id.*

[113] *Id.*

[114] *Crawford*, 553 U.S. at 204 (Scalia, J., concurring). *See also* Clingman v. Beaver, 544 U.S. 581 (2005) (holding "that states may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder," and that "the Constitution grants states broad power to prescribe the time, place and manner of holding elections for senators and representatives, which power is matched by state control over the election process for state offices"); Common Cause/Georgia v. Billups, 554 F.3d 1340 (11th Cir. 2009) (holding "legitimate state interests" justified requiring photo identification "in detecting and deterring voter fraud").

defendants' enforcement of a long-standing Georgia absentee ballot deadline."[115] The statutory deadline required absentee ballots received by 7:00 p.m. on Election Day to be counted.[116] The lower court had substituted its own deadline, mandating that any ballot postmarked by and received within three days of Election Day be counted.[117] This lower court ruling was overturned because Georgia's long-standing absentee ballot deadline was reasonable and nondiscriminatory.[118] Furthermore, its interest in maintaining that deadline once absentee voting had already begun was at least "important" and more likely "compelling."[119]

D. Political Question Doctrine

The political question doctrine is relevant in considering the EIA because federal courts sometimes refuse to hear challenges to government action affecting elections and voting, reasoning that elections are to be left to the democratic branches and that judicial interference would therefore be improper. Certainly, mere political motivation does not invalidate an election law. In *Rucho v. Common Cause*, for example, the Supreme Court held that partisan gerrymandering claims present political questions beyond the reach of the federal courts.[120] The Court reasoned that "[f]ederal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions."[121] It emphasized that the judicial branch must not engage in the factional politics of the major parties, but instead must create rational rules and measurable standards anchored in the Constitution or laws derived from it.[122] The Supreme Court nonetheless accepts judicial review as the norm rather than the exception, even where election laws are concerned.[123] In other words, while political questions are beyond the reach of federal courts, as a practical matter, not all election-related questions are political questions lying outside the scope of judicial review.

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[115] New Ga. Project v. Raffensperger, 976 F.3d 1278, 1280 (11th Cir. 2020). *See* Ga. Code Ann. §§ 21-2-386(a)(1)(F), 21-2-403 (West 2024).

[116] *New Ga. Project*, 976 F.3d at 1280.

[117] *Id.*

[118] *Id.*

[119] *Id.* at 1281.

[120] 139 S. Ct. 2484 (2019).

[121] *Id.* at 2487.

[122] *Id.*

[123] *See* Moore v. Harper, 143 S. Ct. 2065, 2069 (2023).

The mere fact that a suit seeks protection of a political right does not mean it presents a political question.[124] In *Baker v. Carr*, the Court held that under the Constitution, citizens of all states must be allowed to vote without restraint, making judicial review appropriate where necessary to apply the constitutional guarantees of equal protection to election laws.[125] Nevertheless, in a more recent case, *Jacobson v. Florida Secretary of State*, the Eleventh Circuit found that a complaint related to the placement of candidates' names on the ballot presented a nonjusticiable political question.[126] The court reasoned there were "no judicially discernable and manageable standards or objective measures to identify violations" of the candidates' First and Fourteenth Amendment rights.[127] This was true even if candidates who appear first on the ballot enjoy an advantage.[128] "Partisan motivations," the court said, "do not doom a racially *nondiscriminatory* election law if 'valid neutral justifications' also support the law."[129]

IV. SCHOLARLY COMMENTARY

In October 2023, when Judge Boulee declined to enjoin the EIA absentee ballot provisions described above, he stated that "the Court cannot find that Plaintiffs are substantially likely to succeed on their claims pursuant to the Fourteenth and Fifteenth Amendments."[130] Fourteenth Amendment and absentee voting case law support Boulee's decision. Moreover, his application of the Equal Protection Clause to the EIA is reinforced by most election law

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[124] Baker v. Carr, 369 U.S. 186 (1962) (holding that "a state statute effected an apportionment that deprived plaintiffs of equal protection of the laws in violation of the Fourteenth Amendment presented a justiciable constitutional cause of action, and the right asserted was within reach of judicial protection under the Fourteenth Amendment, and did not present a nonjusticiable political question").

[125] *Id.* at 211. Here the court explained that:

> The nonjusticiability of a political question is primarily a function of the separation of powers . . . whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.

Id.

[126] 974 F.3d 1236 (11th Cir. 2020).

[127] *Id.* at 1242.

[128] *Id.*

[129] *Id.* (emphasis added) (quoting *Crawford*, 553 U.S. at 204).

[130] *See In re Ga. S. Bill 202*, 2023 U.S. Dist. LEXIS 182482, at *92.

scholarship. It is noteworthy, however, that while many scholars agree on the substance and meaning of current election law jurisprudence, several find the Fourteenth Amendment an inadequate tool for protecting voting rights in the 21st century.

For example, Professor Edward Foley, Director of Election Law at the Moritz College of Law at Ohio State University, asserts that "the judicial evaluation of electoral rules under the prevailing Fourteenth Amendment jurisprudence is woefully indeterminate."[131] This is "problematic," he says, because it opens the door to judges' "partisan preferences" in deciding controversial cases, including those related to absentee voting.[132] According to Foley, the judiciary's challenge in curtailing excessive partisanship in the application of election laws is due to an over-reliance on equal protection as the applicable constitutional standard for judicial review.[133]

In a recent article, Foley notes that judges' reliance on equal protection and historic Warren Court victories makes sense given their early effectiveness in safeguarding voting rights.[134] But, he says, equal protection is inadequate to protect against legislation that reduces voting rights for all voters—that is, legislation like the EIA that reduces ballot access for all—not just for certain classes of voters.[135] Foley therefore advocates a switch from the *Anderson-Burdick* framework to a due process balancing in situations in which "retrogression" is the constitutional concern, as opposed to discrimination against a particular group.[136] Retrogression, says Foley, may include a broad backslide in voting rights among all voters—one that is not limited to a specific group or class of voters.[137]

Professor Foley's recommended solution for partisan over-reaching is the Due Process Clause of the Fourteenth Amendment which, he asserts, "can work to invalidate both partisan gerrymanders and legislative changes

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[131] Edward B. Foley, *Voting Rules and Constitutional Law*, 81 GEO. WASH. L. REV. 1836 (2013).

[132] *Id.* at 1836.

[133] *Id.* at 1836.

[134] Edward B. Foley, *Due Process, Fair Play, and Excessive Partisanship: A New Principle for Judicial Review of Election Laws*, 84 U. CHI. L. REV. 655, 747 (2017).

[135] *Id.* at 660 ("Due process, instead, provides a more promising basis for constraining partisan overreach.").

[136] *Id.* at 747 ("When the constitutional concern is one about retrogression—the legislative rollback of previously existing rights—and does not involve the unequal treatment of individuals, as an adjustment in the available days for early voting does not, then the proper constitutional analysis lies in due process, and not equal protection.").

[137] *Id.*

to voting laws aimed at securing an unfair partisan advantage."[138] In the context of the EIA litigation, applying Foley's proposal would mean that plaintiffs would not have to show intentional discrimination against a specific class of citizens to invalidate the law, as is required under the Equal Protection Clause of the Fourteenth Amendment.[139] Instead, they would have to show only that changes to absentee voting procedures had the broad effect of reducing opportunities to vote for all Georgia citizens.[140] This analysis would eliminate the balancing of the burden of new absentee rules against the state's interest in administering elections under *Anderson-Burdick*. There would be no consideration of the state's interest in administering elections.[141] Foley would suggest, however, that this balancing of burdens is a "poor doctrinal vehicle in considering the constitutionality of laws that cut back on the availability of voting opportunities."[142] Under any circumstance, however, the plaintiffs would be required to overcome the political question doctrine.

One scholar, Ben Wallace, writes that the Court has "consistently recognized that voting in federal elections and having that vote counted is a fundamental right," but he opines that this fundamental right is left with the individual states.[143] Wallace notes that, "Regardless of what process states are constitutionally required to afford to voters, the actual process of registering, voting, administering elections, and counting ballots has become quite complex."[144] He argues that this complexity causes thousands of voters every year to lose out on the opportunity to vote or to have their votes counted.[145] Precinct rules, identification laws, and provisional ballots can all create problems, even if fashioned with the best of intentions.[146] Here, Wallace argues, procedural due process could assist in preserving voting rights.[147] As applied to voting rights, procedural due process requires that a state ensure ballots are fairly

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[138] *Id.* at 661.
[139] *Id.*
[140] *Id.*
[141] *See Burdick*, 112 S. Ct. at 2059.
[142] Foley, *Due Process, Fair Play, and Excessive Partisanship*, *supra* note 134, at 686.
[143] Ben F.C. Wallace, *Charting Procedural Due Process and the Fundamental Right to Vote*, 77 OHIO ST. L.J. 647, 648–49 (2016).
[144] *Id.* at 649.
[145] *Id.* at 648.
[146] *Id.*
[147] *Id.*

treated and, upon reasonable consideration of their eligibility, included in the total vote count.[148]

In the absentee voting context, Wallace identifies *Raetzel v. Parks/Bellemont Absentee Election Board* as an important illustration of how procedural due process can be employed.[149] There, a federal district court in Arizona applied the *Mathews* test to reach its decision.[150] The *Mathews* analysis is a three-factor balancing test to determine whether the procedures used to deprive someone of a voting right comply with due process. The factors to be weighed are (1) the private or individual interest that is implicated; (2) the risk of "erroneous deprivation" through the procedures currently in place and the probable value of any additional procedures; and (3) the government interests at stake, including any "fiscal and administrative burdens" that additional procedures would create.[151]

In *Raetzel*, the court determined that voting is a fundamental liberty interest requiring constitutionally adequate due process and that Arizona's method of validating absentee ballots was unconstitutional. The biggest red flag was the complete lack of notice before or after a ballot was invalidated.[152] The law permitted members of Absentee Ballots Boards to vote on a challenged ballot privately without notice to the voter, either of the challenge proceeding or of its outcome.[153] The case is an example of how procedural due process can be used to preserve absentee voting rights, and it illustrates Wallace's point that procedural due process under the Fifth and Fourteenth Amendments could serve as a means of protecting voting rights, both absentee and otherwise, by offering "an alternative basis for a claim against voting laws which are restrictive, but not necessarily discriminatory."[154] Wallace argues that procedural due process could also encourage uniformity in state and local election procedures and assist in further developing a body of law that could help protect voting rights.[155]

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[148] Saucedo v. Gardner, 335 F. Supp. 3d 202, 205 (D.N.H. 2018). ("Having induced voters to vote by absentee ballot, the State must provide adequate process to ensure that voters' ballots are fairly considered and, if eligible, counted.").

[149] Wallace, *supra* note 143, at 660. *See* Raetzel v. Parks/Bellemont Absentee Election Bd., 762 F. Supp. 1354 (D. Ariz. 1990).

[150] *Raetzel*, 762 F. Supp. at 1358.

[151] Mathews v. Elridge, 424 U.S. 319, 335 (1976).

[152] *Raetzel*, 762 F. Supp. at 1354.

[153] *Id.*

[154] Wallace, *supra* note 143, at 650.

[155] *Id.*

Like Foley and Wallace, Delaram Takyar argues for a new approach to guaranteeing voting rights. Her proposal would leverage the Fourteenth Amendment's Penalty Clause, which provides for reducing representation in Congress when a state violates voting rights.[156] Takyar argues, "The Clause has been almost entirely ignored for decades, despite some early efforts to effectuate it, but penalizing states for disenfranchisement efforts might offer a long-lasting solution to voting right infringement."[157] Takyar links her proposed solution, published in 2021, to "recent efforts by some Republican states to codify increased voting restrictions, such as a new voting rights law in Georgia."[158] Takyar cites as additional reasons for her sense of urgency the fact that "Republicans in 43 states have proposed laws to limit voting, proposing reforms such as stricter voter ID requirements and limiting opportunities for mail-in voting."[159] It's difficult to gauge what a proposal like his would mean for the EIA because a court would have to come to the conclusion that the law did, indeed, violate voting rights before the state's representation could be reduced as a penalty. And to do that, it would begin by balancing the burden placed on voting with the state's need for orderly administration of elections; as we've seen, this balancing would not likely yield the conclusion that the EIA is disproportionately burdensome. Moreover, to the extent Republicans simply sought some political advantage without intentionally discriminating against a certain class of voter, the obstacle posed by the political question doctrine could arise.

The various solutions proposed by Foley, Wallace, and Takyar highlight the interplay among the United States Constitution, state constitutions, and state legislatures. This interdependence is an important dynamic in the regulation of absentee voting. John Fortier and Norman Ornstein argue that the regulation of absentee voting has historically been a "decentralized activity," despite the fact that the Constitution gives Congress the ultimate authority to regulate the times, places, and manner of federal elections.[160] When Congress is silent, states often act.

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[156] Delaram Takyar, *"The Cornerstone of the Stability of our Government": Electoral Reform in the Aftermath of the 2020 Election*, YALE L. & POL'Y REV., https://yalelawandpolicy.org/inter_alia/cornerstone-stability-our-government-forgotten-penalty-clause-and-electoral-reform (last visited May 24, 2024).

[157] *Id.*

[158] *Id.*

[159] *Id.*

[160] John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. MICH. J.L. REFORM 483, 486 (2003).

But "decentralized" does not necessarily mean irregular or disparate rules are always allowed. In *Bush v. Gore*, the Supreme Court insisted on "uniform treatment of voters"—a concept that became known as the "Uniformity Principle."[161] Professor Michael Morley points out that "Courts have also generally refused to apply the Uniformity Principle—and allowed jurisdictions to intentionally treat various voters differently—in certain discrete contexts."[162] This is because, in part, the Supreme Court has held that the fundamental right to vote does not extend to absentee ballots. Based on that holding, many courts have allowed states to limit absentee eligibility to specific groups of voters. Scholars considering the relevance of *Bush v. Gore*'s Uniformity Principle have generally agreed that it does not fully apply to absentee and early voting.[163]

V. ANALYSIS AND EVALUATION

The Supreme Court permits significant restrictions on absentee voting. But to the extent a state offers absentee voting beyond limited federal requirements (related, for example, to members of the United States military serving overseas), there are constitutional limits on such state restrictions.[164] States cannot intentionally discriminate on the basis of race or create an "undue burden" on a class of voters. Such an undue burden includes restrictions that unfairly or unnecessarily limit ballot access or other opportunity to participate in free and fair elections, especially for certain categories of voters or candidates who find their political effectiveness as a group collectively limited.[165]

According to some scholars, these guardrails are insufficient. Foley, Wallace, Takyar, and others seek to explain and fill gaps in voting rights jurisprudence—gaps which they say leave voters exposed to political exploitation.

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[161] Michael T. Morley, Bush v. Gore*'s Uniformity Principle and the Equal Protection Right to Vote*, 28 GEO. MASON L. REV. 229, 230-31 (2020), *available at* https://lawreview.gmu.edu/print_issues/28-1-morley/.

[162] *Id.* at 258.

[163] *Id.*

[164] Congress enacted the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) in 1986. It requires that states allow certain members of the United States military and United States citizens living overseas to vote absentee. In 2009 Congress amended the UOCAVA, establishing new registration and voting procedures states are required to follow in all federal elections. *The Uniformed And Overseas Citizens Absentee Voting Act*, U.S. DEP'T OF JUST., https://www.justice.gov/crt/uniformed-and-overseas-citizens-absentee-voting-act (last visited May 24, 2024).

[165] *Anderson*, 460 U.S. at 787.

Some of their ideas and illustrations involve absentee voting directly, or they involve overlapping principles that could apply to absentee voting situations. They are concerned that equal protection law, though a valuable tool, is insufficient to stem what they view as a general assault on voting rights across all categories of voters. Foley advocates for a shift to protecting voting rights through substantive due process, Wallace believes that procedural due process is key, and Takyar supports using the Fourteenth Amendment's Penalty Clause to deter restrictive voting laws. So while their methods are different, each finds the currently predominant equal protection approach insufficient by itself.

The core challenge, as these scholars see it, is that legislatures, voting, and indeed politics are essentially political. That's not going to change anytime soon because of the Supreme Court's longstanding and appropriate reservations about interfering with the legislative process based on political and policy considerations.[166] In this way, the scholars' proposed solutions are flawed, but they are nonetheless important illustrations of a growing frustration with politics. Such irritation is visible in a noticeable absence of objectivity in much of the scholarly literature and media coverage surrounding the EIA—both of which are often emotional and activist rather than analytical and objective.

The assertion that Georgia's changes to absentee voting laws favor Republicans is, at a minimum, debatable. And even when there is political intent behind absentee voting restrictions, an objective analysis of absentee voting patterns yields surprising results. For example, a group of scholars hypothesized in 2017 that voting laws may influence who turns out in various ways. Using county-level vote returns in the 2004, 2008, and 2012 presidential elections, the authors found that, "contrary to conventional wisdom, the results show that early voting generally helps Republicans."[167] They are not alone. Many campaign professionals stand by the argument that, all other things being equal, the candidate who better mobilizes his or her absentee and other early voting supporters is more likely to win, regardless of party affiliation.[168]

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[166] *See, e.g.*, Fed. Commc'ns Comm'n v. Beach Commc'ns, Inc., 508 U.S. 307 (1993) ("Whether embodied in the Fourteenth Amendment or inferred from the Fifth, equal protection is not a license for the courts to judge the wisdom, fairness or logic of legislative choices.").

[167] Barry C. Burden et. al., *The Complicated Partisan Effects of State Election Laws*, 70 POL. RSCH. QUARTERLY 564, 576 (2017).

[168] *See, e.g.*, Tal Axelrod, *Republicans launch new effort to boost early voting, breaking with Trump's past criticism*, ABC NEWS (Nov. 20, 2023), https://abcnews.go.com/Politics/republicans-launch-

Case law is unambiguous that states can and must retain the right to regulate their elections, including by imposing absentee voting rules that don't intentionally discriminate against any racial group or unduly burden the right to vote in free and fair elections. The basic tenets for executing such elections are anchored in the Fourteenth and Fifteenth Amendments to the Constitution and the Voting Rights Act. More specifically, the Fourteenth Amendment's Equal Protection Clause plays a significant role in distinguishing legitimate restrictions on absentee voting from illegitimate ones that would violate the Equal Protection or Due Process Clauses.

Because the Equal Protection Clause directs that all citizens be treated equally under the law, there are limitations on disparate treatment of certain categories of citizens. For example, a state is free to deny felons the right to vote, or it may have minimum age requirements or residency requirements before voter eligibility—but all such classifications are subject to Fourteenth Amendment Equal Protection Clause constraints. For example, if a state passed a law that allowed absentee voting only for Republicans—or for active duty military, or for white people, or for heterosexuals, or for owners of real property—such laws would not *necessarily* be unconstitutional, but they would be subjected to further scrutiny to ensure compliance with the Equal Protection Clause. The *basis* of the discrimination and the *burden* it creates are what matter. The key is that laws may not "categorically deny the franchise to a class of citizens based on 'invidious' discrimination."[169]

The Supreme Court made this clear in *Anderson v. Celebrezze* and *Burdick v. Takushi*.[170] Generally speaking, when government action allocates "burdens or benefits based on race, ethnicity, or national origin, courts will impose a rigorous, 'strict scrutiny' test to decide whether it violates constitutional equal protection principles."[171] The strict scrutiny test requires a law

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new-effort-boost-early-voting-breaking/story?id=99908627. *See also* Bill Barro, *Abrams strategy to boost turnout: Early voting commitments*, ASSOCIATED PRESS (Nov. 20, 2023), https://apnews.com/article/2022-midterm-elections-voting-rights-biden-presidential-georgia-79f42eb29feb778a1ca6543f3cbf63e0.

[169] *The Anderson-Burdick Doctrine: Balancing the Benefits and Burdens of Voting Restrictions*, SCOTUSBLOG, https://www.scotusblog.com/election-law-explainers/the-anderson-burdick-doctrine-balancing-the-benefits-and-burdens-of-voting-restrictions/ (last visited May 24, 2024).

[170] Alexander Egber, *The Anatomy of an* Anderson-Burdick *Challenge*, ARIZ. ST. L.J. (Mar. 31, 2022), https://arizonastatelawjournal.org/2022/03/31/the-anatomy-of-an-anderson-burdick-challenge/.

[171] April Anderson, *Equal Protection: Strict Scrutiny of Racial Classifications*, CONG. RSCH. SERV. (June 30, 2023), https://crsreports.congress.gov/product/pdf/IF/IF12391.

be "narrowly tailored to serve a compelling government interest."[172] However, in *Anderson* and *Burdick*, the Court recognized that virtually all election laws impose some type of burden, making a strict scrutiny standard of review impractical.[173] Instead, the Court developed the *Anderson-Burdick* test, which balances the government's asserted interests and the burden on the voter. Under this test, strict scrutiny is applied only if the burden is severe. Otherwise, courts are free to measure the scale of the burden to determine which level of scrutiny should be applied.[174]

In light of existing law and the insignificant burden Georgia's Election Integrity Act places on voters, the EIA will receive a relatively low level of judicial scrutiny.[175] This is true despite the noise coming from outside the legal system. Special interest groups, political parties, and hypersensitive corporate executives are unlikely to derail the law despite their best efforts. And yet the passionate difference of opinion regarding the EIA and its absentee voting provisions comes as no surprise given the political context in which the law was passed. It is a momentous occasion when an incumbent president of the United States is defeated and alleges the election was stolen. Yet it is important to separate Donald Trump's election claims from Georgia's election law changes. After all, Georgia's Republican Governor Brian Kemp, who signed the EIA into law, has adamantly disagreed with Trump about election fraud in Georgia. Speaking hypothetically, two things could be true at the same time: Trump's claims could be false (or true), and the state of Georgia could revise its absentee voting law in a way that is consistent with the Constitution and devoid of discrimination. The two events are not necessarily connected. Not only is evidence of discrimination required to overturn the law, but the restriction of absentee voting rights is not, in and of itself, discriminatory.

VI. CONCLUSION

In *politics*, both sides typically seek a "devil figure" to help agitate and organize opposition to the other candidate and solidify their own support. This devil figure strategy works best when paired with a wedge issue such as

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[172] *Id.*

[173] Egber, *supra* note 170.

[174] *Id.*

[175] *See Crawford*, 553 U.S. at 204 (rejecting the facial invalidity of an Indiana photo identification law). *See also* Ariz. Democratic Party v. Hobbs, 18 F.4th 1179 (9th Cir. 2021) ("The law here neutrally and nondiscriminatorily applies to all voters equally.").

racial discrimination, inflation, or national security. In the hot political context of the 2020 and 2022 elections, Democrats in Georgia found their devil figure in former President Trump and their wedge issue in SB 202. But in *law*, the bottom line is that there is no constitutional right to vote absentee, by mail, or early, and that the Supreme Court permits non-discriminatory restrictions on such methods of voting for the purpose of efficiently administering elections. Sometimes, perceived rights associated with these methods of voting simply do not exist.

Nevertheless, as more people choose to vote absentee or vote early in-person, opportunities for covert intentional discrimination grow. Intentionally racially discriminatory absentee voting laws are not tolerable under the Fourteenth Amendment. Scholars have asked whether current constitutional tools such as equal protection are adequate to protect voting rights, not just for particular racial groups but for broader populations of voters who seek the convenience of absentee voting. In the midst of this debate, one thing is certain—virtually all public opinion surveys tell the same story of growing distrust in U.S. elections. The only way to reverse that trend is to protect the sanctity of every voter's choice on Election Day through basic safeguards and efficiencies like those found in the EIA.

Other Views:

- Complaint, U.S. v. Ga., No. 1:21-cv-02575-JPB (N.D. Ga. June 25, 2021), *available at* https://www.justice.gov/opa/press-release/file/1406456/dl.
- Brendan Williams, *Blocking the Ballot Box: The Republican War on Voting Rights*, 28 WM. & MARY J. RACE, GENDER & SOC. JUST. 389 (2022), *available at* https://scholarship.law.wm.edu/wmjowl/vol28/iss2/5/.
- Stanley Dunlap, *Georgia's controversial 2021 voting law overhaul survives preliminary legal challenge*, GA. RECORDER (OCT. 13, 2023), https://www.culawreview.org/journal/georgias-election-integrity-act-of-2021-how-strict-voter-id-requirements-negatively-impact-people-of-color.
- Stephen Fowler, What Does Georgia's New Voting Law SB 202 Do?, Ga. Pub. Broad., Mar. 27, 2021, https://www.gpb.org/news/2021/03/27/what-does-georgias-new-voting-law-sb-202-do.

DECLARING INDEPENDENCE TO SECURE INTEGRITY: THE SUPREME COURT JUSTICES' CODE OF CONDUCT*

MICHAEL S. MCGINNISS**

> *[T]he judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks.*[1]
>
> - Alexander Hamilton

> *I want to tell you, Gorsuch. I want to tell you, Kavanaugh. You have released the whirlwind, and you will pay the price! You won't know what hit you if you go forward with these awful decisions.*[2]
>
> - Charles Schumer

In late 2023, the nine current members of the U.S. Supreme Court adopted the Code of Conduct for Justices of the Supreme Court of the

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

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[1] THE FEDERALIST NO. 78 (Alexander Hamilton).

[2] Ronn Blitzer, *Schumer faces mounting ethics complaints over Supreme Court comments*, FOX NEWS (Mar. 10, 2020), https://www.foxnews.com/politics/schumer-faces-mounting-ethics-complaints-over-supreme-court-comments; *see also* Gregg Re, *Chief Justice Roberts issues rare rebuke to Schumer's 'dangerous' and 'irresponsible' comments; Trump slams lawmaker, says 'must pay a severe price'*, FOX NEWS (Mar. 5, 2020), https://www.foxnews.com/politics/chief-justice-roberts-rare-rebuke-schumer-calling-comments-kavanaugh-gorsuch-dangerous.

United States ("Justices' Code of Conduct").[3] Although over past decades the Justices have made various official statements[4] and unofficial comments[5] pertaining to Supreme Court ethics, the adoption of the Justices' Code of Conduct "represents the first time that the Court has implemented and published a written code of conduct for Justices" to guide them in performing their duties.[6] Unsurprisingly, an array of legal commentators, academics, and federal legislators immediately criticized the new Code as inadequate, especially because it does not include a specific enforcement mechanism.[7]

This article will argue the new Justices' Code of Conduct represents a bold and appropriate declaration of the Court's independence in the face of the recent surge of congressional and media-driven efforts at intimidation of the individual Justices to influence their adjudication of cases. It is no coincidence that just as the Court's majority began making decisions that the Democratic Party and the progressive academic and media commentariat regard as beyond the pale,[8] attacks on the ethics of the most conservative Justices have

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[3] CODE OF CONDUCT FOR JUSTS. OF THE SUP. CT. OF THE U.S. (U.S. SUP. CT. 2023) [hereinafter JUSTICES' CODE OF CONDUCT], *available at* https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf.

[4] *See* Letter from John G. Roberts, Jr., Chief J. of the U.S. Sup. Ct., to Richard J. Durbin, Chair Comm. on the Judiciary of the U.S. Senate (Apr. 25, 2023), *available at* https://www.judiciary.senate.gov/imo/media/doc/Letter%20to%20Chairman%20Durbin%2004.25.2023.pdf (attaching Statement of Ethics Principles and Practices "to which all of the current Members of the Supreme Court subscribe"); *Statement of Recusal Policy*, Justices Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Thomas & Ginsburg, U.S. Sup. Ct. (Nov. 1, 1993), *available at* https://eppc.org/docLib/20110106_RecusalPolicy23.pdf.

[5] *See, e.g.*, David B. Rivkin Jr. & James Taranto, *Samuel Alito, the Supreme Court's Plain-Spoken Defender*, WALL ST. J. (July 28, 2023), https://www.wsj.com/articles/samuel-alito-the-supreme-courts-plain-spoken-defender-precedent-ethics-originalism-5e3e9a7; Melissa Quinn, *Kagan Says Congress Has Power to Regulate Supreme Court: "We're Not Imperial,"* CBS NEWS (Aug. 4, 2023), https://www.cbsnews.com/news/elena-kagan-congress-regulate-supreme-court-ethics-code/.

[6] Cong. Research Serv., *The Supreme Court Adopts a Code of Conduct*, LEGAL SIDEBAR, at 1, https://crsreports.congress.gov/product/pdf/LSB/LSB11078.

[7] *See, e.g.*, *Judicial Ethics*, 137 HARV. L. REV. 1677 (2024); Russell Wheeler, *The Supreme Court's Code of Conduct: Enforcement Confusion, Extrajudicial Activism*, BROOKINGS INST. (Nov. 29, 2023), https://www.brookings.edu/articles/the-supreme-courts-code-of-conduct-enforcement-confusion-extrajudicial-activism; Jeannie Suk Gersen, *The Supreme Court's Self-Excusing Ethics Code*, THE NEW YORKER (Nov. 21, 2023), https://www.newyorker.com/news/daily-comment/the-supreme-courts-self-excusing-ethics-code ("[N]one of the alleged ethical breaches by Justices that have been reported in the past several years would likely be a violation of the new code of conduct.").

[8] *E.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (holding the U.S. Constitution does not create a right to abortion and overruling *Roe v. Wade*, 410 U.S. 113 (1973)).

increased in both frequency and intensity.[9] Sound constitutional interpretation and principles of separation of powers establish that Congress lacks the institutional authority or policy prerogative to impose ethics regulations on the Court.[10] With proper respect for the Supreme Court's decisional and institutional independence, Congress' exclusive post-confirmation recourse for what it regards as ethical misconduct by individual Justices is impeachment and removal under the Impeachment Clauses.[11]

Part I of this article will provide a summary overview of the regulatory apparatus that has existed over recent decades concerning the lower federal courts and the Supreme Court on matters relating to ethics. Then, Part II will comment on several key aspects of the Justices' Code of Conduct and why they are appropriate and effective for their intended purposes. Part III will explore core constitutional principles of judicial independence, with special attention to why Article III is properly understood as providing maximum protection for the decisional independence of individual Justices, including by restraining Congress in its regulation of the Court as an institution. Part IV will address recent media and congressional efforts to influence the Court's decisions by repeated demands for the recusals of conservative Justices, and it will argue that the Court's principled stand on its independence and securing the integrity of its decisions is so crucial in the current climate of ideologically and politically motivated intimidation. Part V concludes.

I. Overview of Existing Federal Regulations Concerning Judicial Conduct

Since the early 1970s, lower federal judges have been governed by a set of ethical canons now called the Code of Conduct for United States Judges

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[9] *See, e.g.*, Joshua Kaplan et al., *Clarence Thomas and the Billionaire*, ProPublica (Apr. 7, 2023), https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-gifts-crow; Justin Elliot et al., *Justice Samuel Alito Took Luxury Fishing Vacation with GOP Billionaire Who Later Had Cases Before the Court*, ProPublica (June 20, 2023), https://www.propublica.org/article/samuel-alito-luxury-fishing-trip-paul-singer-scotus-supreme-court.

[10] *See, e.g.*, *Supreme Court Ethics Reform Before the S. Comm. on the Judiciary*, 118th Cong. (May 2, 2023) statement of Michael B. Mukasey, Former Att'y Gen. of the United States), *available at* https://www.judiciary.senate.gov/imo/media/doc/2023-05-02%20-%20Testimony%20-%20Mukasey.pdf ("As to policy, I believe that basic principles of the separation of powers mean that the Court, as a separate branch of government and the only court specifically provided for in the Constitution, is solely responsible for its financial disclosure and ethics rules.").

[11] U.S. Const. art. I, § 2, cl. 5; § 3, cl. 6; *see also* U.S. Const. art. II, § 4

("Judges' Code of Conduct").[12] The Judicial Conference of the United States, the national policymaking body for the federal courts, adopted the Judges' Code of Conduct to promote public confidence in the integrity, independence, and impartiality of the federal judiciary.[13] Rather than creating a corpus of mandatory law, it instead formulates a set of "aspirational rules" federal judges should seek to follow;[14] it describes itself as "designed to provide guidance to judges and nominees for judicial office."[15] The Judges' Code of Conduct does not establish its own means or methods of enforcement and states that it "is not designed or intended as a basis for civil liability or criminal prosecution."[16] Significantly, it does not include Supreme Court Justices within its intended scope.[17] However, for many years, the Justices, including most notably Chief Justice John G. Roberts, Jr. in his 2011 Year-End Report on the Federal Judiciary ("2011 Year-End Report"), have emphasized that they regularly consult the Judges' Code of Conduct and other authorities "to resolve specific ethical issues."[18]

In the Judicial Conduct and Disability Act of 1980 ("JCDA"), Congress created a disciplinary apparatus for lower federal court judges that provides a means for addressing their misconduct within the judicial branch without resort to impeachment and removal.[19] The commentary to Canon 1 of the Judges' Code cites the JCDA but also highlights that "not every violation of the Code should lead to disciplinary action."[20] Under the JCDA, "a judge who engages in misconduct may be publicly or privately reprimanded, temporarily barred from hearing new cases, disqualified from an existing case, or

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[12] CODE OF CONDUCT FOR U.S. JUDGES Intro., at 1 (JUD. CONF. OF THE U.S. 2019) [hereinafter JUDGES' CODE OF CONDUCT], *available at* https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges.

[13] *Id.* at Intro., at 2-3.

[14] *The Supreme Court Adopts a Code of Conduct*, *supra* note 6, at 1 (citing White v. Nat'l Football League, 585 F.3d 1129, 1140 (8th Cir. 2009) (observing the Judges' Code "establishes aspirational rules and relies upon self-enforcement")).

[15] JUDGES' CODE OF CONDUCT, *supra* note 12, at Canon 1 Comment., at 3.

[16] *Id.*

[17] *Id.* at Intro., at 2.

[18] JOHN G. ROBERTS, JR., CHIEF J. OF THE U.S. SUP. CT., 2011 YEAR-END REPT. ON THE FED. JUDICIARY 5 (2011) [hereinafter ROBERTS, 2011 YEAR-END REPT.], *available at* http:// www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf.

[19] Pub. L. No. 96-458, 94 Stat. 2035 (codified as amended at 28 U.S.C. §§ 331-32, 372, 604).

[20] JUDGES' CODE OF CONDUCT, *supra* note 12, at Canon 1 Comment., at 3.

referred for possible impeachment."[21] However, formal discipline is not often imposed on federal judges.[22]

The JCDA does not assert any disciplinary authority over Supreme Court Justices.[23] But in other legislation, Congress has included them as the purported subjects of regulation, including on matters involving the individual Justices and their adjudication of cases. For example, 28 U.S.C. § 455 provides that federal judges—and, since 1948, Supreme Court Justices—shall be disqualified under specified circumstances, such as "a personal bias or prejudice concerning a party" or "a financial interest in the subject matter in controversy."[24] Although the Justices have regularly cited this statute in published opinions analyzing their recusal decisions,[25] the Court has never addressed the constitutionality of 28 U.S.C. § 455 under Article III, including, most importantly for this article, the constitutionality of the 1948 amendment bringing the Justices within its claim of authority.[26] In his 2011 Year-End Report, Chief Justice Roberts alluded to this reality by broadly observing that "the limits of Congress's power to require recusal have never been tested."[27]

Moreover, the Ethics in Government Act of 1978 created financial reporting requirements that apply broadly to federal officials.[28] As Chief Justice Roberts explained in his 2011 Year-End Report, "[t]he Justices also observe

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[21] *The Supreme Court Adopts a Code of Conduct*, *supra* note 6, at 1.

[22] *Id.*

[23] 28 U.S.C. 351(d)(1) (defining "judge" as "circuit judge, district judge, bankruptcy judge, or magistrate judge").

[24] Act of June 25, 1948, ch. 646, § 455, 62 Stat. 869, 908 (codified as amended at 28 U.S.C. § 455); *see* Amanda Frost, *Judicial Ethics and Supreme Court Exceptionalism*, 26 GEO. J. LEGAL ETHICS 443, 449 (2013) ("In 1792, Congress passed the first statute requiring lower federal court judges to recuse themselves under certain circumstances. Over the years, Congress repeatedly modified and broadened the law, but continued to limit its application to judges on the 'inferior' courts. It was not until 1948 that Congress expanded the law to include the Justices.").

[25] *See, e.g.*, Cheney v. U.S. Dist. Court for D.C., 541 U.S. 913, 916 (2004) (Scalia, J., mem.); Laird v. Tatum, 409 U.S. 824, 825 (1972) (Rehnquist, J., mem.).

[26] *See* Madeleine Case, Note, *A Case for the Status Quo in Supreme Court Ethics*, 33 GEO. J. LEGAL ETHICS 397, 402 (2020).

[27] ROBERTS, 2011 YEAR-END REPT., *supra* note 18, at 8. As Madeleine Case has noted, when discussing 28 U.S.C. § 455, "some Justices have implied that the statute exercises binding authority over the Supreme Court's recusal decisions." Case, *supra* note 26, at 402 (citing *Cheney*, 541 U.S. at 916). "Others have suggested the opposite." *Id.* (citing ROBERTS, 2011 YEAR-END REPT., *supra* note 18, at 8 ("Like lower court judges, the individual Justices decide for themselves whether recusal is warranted under Section 455.").

[28] Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended in scattered sections of 2, 5, and 28 U.S.C.); *see also* Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716 (codified as amended in scattered sections of 2, 5, and 28 U.S.C.).

the same limitations on gifts and outside income as apply to other federal judges."[29] He further related that, "[i]n 1991, the Members of the Court adopted an internal resolution in which they agreed to follow Judicial Conference regulations" that "provide additional guidance to lower court judges."[30] In each of these comments, Chief Justice Roberts took care to couch the Court's compliance decisions in terms of voluntariness. In fact, he went as far as to inform Congress that although it "has directed Justices" to comply with these financial requirements, "[t]he Court has never addressed whether Congress" may do so.[31] "The Justices," he said, "nevertheless comply with those provisions."[32]

II. KEY ELEMENTS OF THE JUSTICES' CODE OF CONDUCT

On November 13, 2023, the Court published the Justices' Code of Conduct.[33] According to its accompanying introductory statement, it is intended to "set out succinctly and gather in one place the ethics rules and principles that guide the conduct of the Members of the Court"; and for the most part, its "rules and principles are not new."[34] Rather, the Court observes, the new code "largely represents a codification of principles that we have long regarded as governing our conduct."[35]

The Justices' Code of Conduct is organized into five canons, the titles of which closely match those in the Judges' Code of Conduct:

> CANON 1: A JUSTICE SHOULD UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY. . . .
>
> CANON 2: A JUSTICE SHOULD AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL ACTIVITIES. . . .
>
> CANON 3: A JUSTICE SHOULD PERFORM THE DUTIES OF OFFICE FAIRLY, IMPARTIALLY, AND DILIGENTLY. . . .
>
> CANON 4: A JUSTICE MAY ENGAGE IN EXTRAJUDICIAL ACTIVITIES THAT ARE CONSISTENT WITH THE OBLIGATIONS OF THE JUDICIAL OFFICE. . . .

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[29] ROBERTS, 2011 YEAR-END REPT., *supra* note 18, at 6.

[30] *Id.* at 6-7; *see* 2 GUIDE TO JUDICIARY POLICY, pt. C & ch. 6 (ADMIN. OFF. OF THE U.S. CTS. rev. July 27, 2021), *available at* https://www.uscourts.gov/file/2855/download.

[31] ROBERTS, 2011 YEAR-END REPT., *supra* note 18, at 6.

[32] *Id.*

[33] JUSTICES' CODE OF CONDUCT, *supra* note 3.

[34] *Id.* at Statement of the Court Regarding the Code of Conduct.

[35] *Id.*

CANON 5: A JUSTICE SHOULD REFRAIN FROM POLITICAL ACTIVITY . . . .[36]

The rule provisions that accompany each canon have significant similarities to those of the Judges' Code of Conduct, but also notable differences. For example, the Justices' Code of Conduct adds "knowingly" to the provision in Canon 2B regarding Outside Influence, while the counterpart in the Judges' Code of Conduct contains no mens rea component.[37] Moreover, the "explanatory notes" of the two codes differ considerably,[38] both in structure—embedded in the canons for the judges and provided in conclusion for the Justices—and in substance.[39] In the Commentary to its Code, the Supreme Court explains its contents are "substantially derived from" the Judges' Code of Conduct but have been "adapted to the unique institutional setting of the Supreme Court" and "tailored to the Supreme Court's placement at the head of a branch of our tripartite governmental structure."[40] It emphasizes the importance of the Justices having room for the "exercise of judgment or discretion" in the face of uncertainty in the application of its "broadly worded general principles," especially "given the often sharp disagreement concerning matters of great import that come before the Supreme Court."[41]

The most dramatic contrast between the substance of the two codes is found in the blackletter and commentary to Canon 3 concerning disqualification.[42] Canon 3B(1) of the Justices' Code of Conduct states that "[a] Justice is presumed impartial and has an obligation to sit unless disqualified."[43] The Court's Commentary sheds helpful light on both the scope and the purpose of the Justices' duty to sit, and it makes a special point to describe recusal as an "inherently judicial function."[44] Although "[t]he Justices follow the same general principles and statutory standards for recusal as other federal judges," the Commentary emphasizes that "the application of those principles can differ due to the effect on the Court's process and the administration of justice

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[36] JUSTICES' CODE OF CONDUCT, *supra* note 3, at Canons 1-5, at 1-8.

[37] *Id.* at Canon 2B, at 1; JUDGES' CODE OF CONDUCT, *supra* note 12, at Canon 2B, at 3.

[38] *The Supreme Court Adopts a Code of Conduct*, *supra* note 6, at 2.

[39] *Compare* JUSTICES' CODE OF CONDUCT, *supra* note 3, *with* JUDGES' CODE OF CONDUCT, *supra* note 12.

[40] JUSTICES' CODE OF CONDUCT, *supra* note 3, at Canon 3B(1), at 2.

[41] *Id.* at Comment., at 10.

[42] *Compare* JUSTICES' CODE OF CONDUCT, *supra* note 3, at Canon 3B *with* JUDGES' CODE OF CONDUCT, *supra* note 12, at Canon 3C.

[43] JUSTICES' CODE OF CONDUCT, *supra* note 3, at Canon 3B(1).

[44] *Id.* at Comment., at 10.

in the event that one or more Members must withdraw from a case."[45] Citing Justice Scalia's 2004 memorandum in *Cheney v. United States District Court for D.C.*,[46] the Court explains "the loss of one Justice is 'effectively the same as casting a vote against the petitioner,'" who "'needs five votes to overturn the judgment below.'"[47] Thus, "the absence of one Justice risks the affirmance of a lower court decision by an evenly divided Court—potentially preventing the Court from providing a uniform national rule of decision on an important issue."[48] With similar concerns in mind, the Court notes that although "Canon 3B(2)(d) retains language from the lower court code relating to known interests of third-degree relatives that might be substantially affected by the outcome of a proceeding," considering "the broad scope of the cases that come before the Supreme Court and the nationwide impact of its decisions, this provision should be construed narrowly."[49] In underscoring the practical necessity of a knowledge standard for "relationships and interests," the Court explains it "receives approximately 5,000 to 6,000 petitions for writs of certiorari each year," and "[r]oughly 97 percent of this number may be and are denied at a preliminary stage, without joint discussion among the Justices, as lacking any reasonable prospect of certiorari review."[50] The Court underscores that its recusal standards and decisions "must be considered in light of this reality,"[51] and it further highlights Canon 3B(3) as providing that "the time-honored rule of necessity may override the rule of disqualification."[52] Moreover, the Court's Canon 3B omits the remittal process found in Canon 3D of the Judges' Code of Conduct.[53]

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[45] *Id.*

[46] 541 U.S. at 913.

[47] JUSTICES' CODE OF CONDUCT, *supra* note 3, at Comment., at 10 (quoting *Cheney*, 541 U.S. at 916). In *Cheney*, Justice Scalia also noted that a recusal by a Justice in consideration of a petition for writ of certiorari is, in effect, a vote for the respondent, as there is one fewer Justice left to potentially satisfy the Court's rule-of-four for granting the petition. *Cheney*, 541 U.S. at 916.

[48] JUSTICES' CODE OF CONDUCT, *supra* note 3, at Comment., at 10-11 (citing Microsoft Corp. v. United States, 530 U.S. 1301, 1303 (2000) (Rehnquist, J., statement)).

[49] JUSTICES' CODE OF CONDUCT, *supra* note 3, at Comment., at 11. The Court also departs from the Judges' Code of Conduct by moving the "known by the Justice" qualifier to the beginning of the third degree of relationship/ "spouse of such person" provision so that it qualifies each of its components, including those for such persons who are a party/officer-director-trustee or "acting as a lawyer in the proceeding." JUSTICES' CODE OF CONDUCT, *supra* note 3, at Canon 3B(d); *cf.* JUDGES' CODE OF CONDUCT, *supra* note 12, at Canon 3C(1)(d).

[50] JUSTICES' CODE OF CONDUCT, *supra* note 3, at Comment., at 11.

[51] *Id.*

[52] *Id.*

[53] *Id.*; *see* JUDGES' CODE OF CONDUCT, *supra* note 12, at Canon 3D.

Beyond these variations, there are several other important ways in which the substance of the Court's Canon 3B(2) recusal provision differs from that of the Judges' Code of Conduct. First, consistent with its express emphasis on the Justices' duty to sit, it provides that "[a] Justice *should* disqualify himself or herself," rather than using the mandatory "shall" found in both the Judges' Code of Conduct and 28 U.S.C. § 455.[54] The Court's conspicuous decision to depart from the mandatory language of the federal disqualification statute is highly significant evidence that it does not consider itself constitutionally bound to submit to Congress on the standards for exercising its judicial power in hearing and deciding cases and controversies.[55]

Next, the Court specifically carves out "the filing of a brief *amicus curiae*" and "the participation of counsel for *amicus curiae*" from the factors requiring a Justice's disqualification.[56] In support of this departure from the Judges' Code, it explains the Court, in contrast with the lower federal courts, has "adopted a permissive approach to *amicus* filings, having recently modified its rules to dispense with the prior requirement that *amici* either obtain the consent of all parties or file a motion seeking leave to submit an *amicus* brief."[57] Thus, the Court "receives up to a thousand *amicus* filings each Term" and, in some cases, "more than 100 *amicus* briefs have been filed in a single case."[58] In addition to the impracticality of identifying potential conflicts in such volumes of *amicus* filings, including them as grounds for disqualification of the Justices would invite strategic behavior on the part of parties in the solicitation of such briefs in matters before the Court.

Finally, when defining the standard for when a Justice should be disqualified, Canon 3B adds to the language of the Judges' Code of Conduct in a very prominent and significant way. After opening with the statement that "[a] Justice should disqualify himself or herself in a proceeding in which the Justice's impartiality might reasonably be questioned," and before listing illustrative "instances" of such circumstances, Canon 3B(2) qualifies the reasonable questioning of impartiality by stating "that is, where an *unbiased and reasonable person who is aware of all relevant circumstances would doubt*

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[54] JUSTICES' CODE OF CONDUCT, *supra* note 3, at Canon 3B(2) (emphasis added); *see* JUDGES' CODE OF CONDUCT, *supra* note 12, at Canon 3C(1); 28 U.S.C. § 455(a).

[55] *See* discussion *infra* Part III.

[56] JUSTICES' CODE OF CONDUCT, *supra* note 3, at Canon 3B(4).

[57] *Id.* at Comment., at 11.

[58] *Id.*

that the Justice could fairly discharge his or her duties."[59] The "reasonable person who is aware of all relevant circumstances" standard on appearance of lack of impartiality is drawn from the Court's own case law interpreting 28 U.S.C. § 455.[60] However, the Court's addition of the words "unbiased and" before "reasonable person"[61] was clearly purposeful and meaningful in setting the parameters for interpreting the recusal standard, especially in the face of demands for recusal being lodged by outsiders to Supreme Court litigation. Those words are absent from both the Judges' Code of Conduct and 28 U.S.C. § 455[62] and underscore the importance of the "unique institutional setting of the Supreme Court" and the "often sharp disagreement concerning matters of great import" it is called upon to decide.[63] Their inclusion in the Justices' Code of Conduct has substantial value in communicating and promoting the Court's independence from ideologically and politically motivated pressures on them to recuse.[64]

III. JUDICIAL INDEPENDENCE UNDER ARTICLE III AND THE JUSTICES' CODE OF CONDUCT

Judicial independence is a well-established core principle of American jurisprudence and is well-reflected in the structure and text of the United States Constitution.[65] As Judge Anthony J. Scirica has observed, judicial independence may be helpfully thought of in "two dimensions":

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[59] *Id.* at Canon 3B(2) (emphasis added); *see* JUDGES' CODE OF CONDUCT, *supra* note 12, at Canon 3C(1); 28 U.S.C. § 455(a).

[60] *See, e.g.*, *Microsoft*, 530 U.S. at 1302 (Rehnquist, J., statement) ("This inquiry is an objective one, made from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances.") (citing Liteky v. United States, 510 U.S. 540, 548 (1994)).

[61] JUSTICES' CODE OF CONDUCT, *supra* note 3, at Canon 3B(2).

[62] *See* JUDGES' CODE OF CONDUCT, *supra* note 12, at Canon 3C(1); 28 U.S.C. § 455(a).

[63] JUSTICES' CODE OF CONDUCT, *supra* note 3, at Comment., at 11.

[64] The meaning and value of the "unbiased" language has already been demonstrated by the standard articulated by Justice Samuel A. Alito, Jr. in response to recusal demands from members of Congress based on incidents involving the flying of flags. *See infra* Part IV, discussing Letter from Samuel A. Alito, Jr., Assoc. J. of the U.S. Sup. Ct., to Richard J. Durbin, Chair of the S. Comm. on the Judiciary et al. (May 29, 2024), *available at* https://www.judiciary.senate.gov/download/letter-from-justice-alito-to-senators-durbin-and-whitehouse [hereinafter Justice Alito Letter to Chair Durbin].

[65] *See, e.g.*, The Honorable Anthony J. Scirica, *Judicial Governance and Judicial Independence*, 90 N.Y.U. L. REV. 779, 780 (2015) ("Judicial independence is at the core of the rule of law."); Frost, *supra* note 24, at 463 ("Although Congress has constitutional authority to regulate judicial ethics, its powers are constrained by other constitutional values, such as the separation of powers and the need to preserve judicial independence.").

> *Decisional independence* is the ability of an individual judge to render a decision in the absence of political pressures and personal interests . . . . Deference to the judgment and rulings of the courts depends on public confidence that those decisions were based on the law and the facts . . . .
>
> *Institutional independence* is the structural autonomy of the judicial branch as a coequal branch of government. Robust institutional independence is necessary to ensure decisional independence because external regulation of judges' conduct may chill the ability and willingness to reach just merits decisions.[66]

These principles apply across the judiciary. However, when it comes to regulation of the Supreme Court, there are unique considerations that arise from the language of Article III of the Constitution and its implications supporting the exceptionalism of the Court and its placement at the apex of the judicial branch. All agree that the Court's decisional independence is of paramount importance in our constitutional system. The competing views on the question of regulating the Court reflect, first and foremost, a strong divergence of opinion on whether the Court's decisional independence depends on its maintaining a highly "[r]obust institutional independence," or whether it would be better supported by robust external regulation to increase "public confidence" and the perceived legitimacy of its decisions.[67] Notably, Chief Justice John Roberts aligned himself with the first school of thought in his 2021 Year-End Report on the Federal Judiciary, asserting that the federal courts "require ample institutional independence," and insisting that "the Judiciary's power to manage its internal affairs insulates courts from inappropriate political influence and is crucial to preserving public trust in its work as a separate and coequal branch of government."[68]

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[66] Scirica, *supra* note 65, at 782 (emphases added) (citing Gordon Bermant & Russell R. Wheeler, *Federal Judges and the Judicial Branch: Their Independence and Accountability*, 46 MERCER L. REV. 835, 839 (1995); Charles G. Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts*, 78 IND. L.J. 153, 159, 162-63 (2003)).

[67] *See, e.g.*, *Judicial Ethics*, *supra* note 7, at 1690 ("Since the Court has not bound itself to any ethical standards, protectors of the Court's legitimacy should look to enforcement by another branch.").

[68] JOHN G. ROBERTS, JR., CHIEF J. OF THE U.S. SUP. CT., 2021 YEAR-END REPT. ON THE FED. JUDICIARY 1 (2021), *available at* http://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf.

A. Key Constitutional Provisions

Two components of Article III are most central to the disagreements about the scope of judicial independence as a limitation on Congress and its regulation of Supreme Court ethics. The first is Article III, Section One, which provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.[69]

Thus, the "one supreme Court" was a special creation of the Constitution, directly granted by the People through representative ratification the investment with, and the authority to exercise, "[t]he judicial Power of the United States." Unlike the "from time to time" to-be-ordained-and-established "inferior Courts," the existence of the Supreme Court precedes any act of Congress and, strictly speaking, is not dependent on Congress's adoption of any authorizing legislation.[70]

The core principles of judicial independence, as ultimately reflected in Article III, Section One, are articulated and justified quite effectively in *The Federalist Papers* that were published prior to the Constitution's ratification, including those authored by Alexander Hamilton. For example, in *The Federalist No. 78*, Hamilton observed, "[t]he complete independence of the courts of justice is peculiarly essential in a limited Constitution," and, in

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[69] U.S. CONST. art. III, § 1; *see* Cong. Research Serv., *Historical Background on Establishment of Article III Courts*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artIII-S1-8-2/ALDE_00013558/.

[70] This independent existence is significant for interpreting Congress's authority to regulate the Supreme Court as differentiated from its authority to regulate the lower federal courts, even though the spare terms of Article III created a practical need for Congress to pass the Judiciary Act of 1789 and include the Supreme Court's basic structure and organization in that legislation. *See* An Act to Establish the Judicial Courts of the United States, ch. 20, 1 Stat. 73 (1789); Frost, *supra* note 24, at 457-58; *see also* Frost, *supra* note 24, at 458 n.74 ("If Congress had not enacted legislation establishing the Supreme Court, the Court might nonetheless have come into existence had the President nominated a Chief Justice who was then confirmed by the Senate. Thus, congressional legislation was perhaps not required to establish the Supreme Court, though such legislation was surely envisioned by the Framers, as evidenced by the First Judiciary Act."); U.S. CONST. art. I, § 8 (providing Congress authority to "constitute Tribunals inferior to the Supreme Court").

furtherance of that independence, "[t]he standard of good behaviour for the continuance in office is the best expedient which can be devised in any government, to secure a steady, upright and impartial administration of the laws."[71] Moreover, in *The Federalist No. 79*, Hamilton emphasized that "[t]he precautions for their responsibility are comprised in the article respecting impeachments. . . . This is the only provision on the point which is consistent with the necessary independence of the judicial character, and is the only one which we find in our own Constitution in respect to our own judges."[72]

Another key provision from Article III is Section Two, Clause Two (the "Exceptions Clause"), which specially creates the Court's original jurisdiction and designates its subject matter ("all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a party").[73] In reference to "all the other Cases before mentioned," Section Two, Clause Two further states, "the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."[74] Finally, those arguing for Congress's extensive authority to regulate the Court have relied upon Article I's Necessary and Proper Clause, which provides, "[the Congress shall have Power . . .] [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[75]

B. The Scholarly Debate About Congress's Regulation of Supreme Court Ethics

In recent years, law reviews have published multiple articles insisting Congress has far-reaching legislative power to impose various ethics-related

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[71] THE FEDERALIST NO. 78 (Alexander Hamilton).

[72] THE FEDERALIST NO. 79 (Alexander Hamilton).

[73] U.S. CONST. art. III, § 2, cl. 2:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—. . . between a State and Citizens of another State,—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

[74] *Id.*

[75] U.S. CONST. art. I, § 8, cl. 18.

regulations on the Supreme Court,[76] including specific recusal standards and procedures,[77] additional financial disclosure and gift rules,[78] external ethics commission oversight,[79] or non-impeachment disciplinary processes.[80] Other articles have disagreed with these positions in various respects.[81] These debates have tended to follow in the wake of proposed legislation in Congress that would impose stronger regulatory control over the Supreme Court's conduct both internally and externally.[82]

In her 2013 article *Judicial Ethics and Supreme Court Exceptionalism*, Professor Amanda Frost expresses her view that the Constitution solely protects "federal judges' *decisional* independence."[83] She construes this aspect of

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[76] *See, e.g.*, Jennifer Ahearn & Michael Milov-Cordoba, *The Role of Congress in Enforcing Supreme Court Ethics*, 52 HOFSTRA L. REV. 557, 558–61 (2024); Frost, *supra* note 24, at 443 ("[C]ongress has broad constitutional authority to regulate the Justices' ethical conduct, just as it has exercised control over other vital aspects of the Court's administration, such as the Court's size, quorum requirement, oath of office, and the dates of its sessions.").

[77] *See, e.g.*, Ahearn & Milov-Cordoba, *supra* note 76, at 564-69.

[78] *See* April Rivera, Note, *Supreme Court Ethics Regulation: Amending the Ethics in Government Act of 1978 to Address Justices' Unethical Behavior*, 52 SW. L. REV. 308, 323-28 (2023).

[79] *See* Veronica Root Martinez, *Supreme Impropriety? Questions of Goodness and Power*, LAW & CONTEMP. PROBS. (forthcoming 2024), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4685507#.

[80] *See* Russell R. Wheeler, *A Primer on Regulating Federal Judicial Ethics*, 56 ARIZ. L. REV. 479, 479 (2014).

[81] *See, e.g.*, Case, *supra* note 26, at 399 (arguing "outside of one which the Court itself creates, . . . there should not be an imposed code of conduct on the judicial branch"); Louis J. Virelli III, *The (Un)constitutionality of Supreme Court Recusal Standards*, 2011 WIS. L. REV. 1181, 1185 (2011) [hereinafter Virelli, *(Un)constitutionality of Supreme Court Recusal Standards*] ("[A]ny legislative interference with Supreme Court recusal decisions is an unconstitutional intrusion into the judicial power vested in the Court by Article III of the Constitution."); Kevin Hopkins, *Supreme Court Leaks and Recusals: A Response to Professor Steven Lubet's* SCOTUS Ethics in the Wake of *NFIB v. Sebelius*, 47 VAL. U. L. REV. 925, 929 (2013) ("[T]he Constitution makes impeachment and removal from office the only political check available to the legislative branch for regulating the behavior of Supreme Court justices."); *cf.* Peter M. Shane, *Who May Discipline or Remove Federal Judges? A Constitutional Analysis*, 142 U. PA. L. REV. 209, 211-12 (1993) (arguing that "history provides clear evidence that impeachment was to be the sole political mechanism for disciplining federal judges," but allowing for "judiciary-dependent mechanisms for judicial discipline" created by congressional legislation for judges "not sitting on the Supreme Court").

[82] *See, e.g.*, Supreme Court Transparency and Disclosure Act of 2011, H.R. 862, 112th Cong. (2011), *available at* https://www.congress.gov/bill/112th-congress/house-bill/862/text. *See also, e.g.*, Judicial Ethics and Anti-Corruption Act of 2023, H.R. 2973, 118th Cong. (2023), *available at* https://www.warren.senate.gov/imo/media/doc/SIL23572.pdf; Supreme Court Ethics Act, S. 325, 118th Cong. (2023), *available at* https://www.govtrack.us/congress/bills/118/s325/text; Supreme Court Ethics, Recusal, and Transparency Act of 2023, S. 359, 118th Cong. (2023), *available at* https://www.govtrack.us/congress/bills/118/s359/text.

[83] Frost, *supra* note 24, at 463.

judicial independence in narrow terms and with protections almost solely sourced in Article III, Section One's specific limitations on congressional power: "that is, their ability to issue judicial decisions free from fear that their compensation will be diminished or that they will be forced from office."[84] She does not think the distinctive constitutional status of our "one supreme Court" under Article III, Section One substantially limits the authority of Congress under the Necessary and Proper Clause to regulate the ethical standards of conduct for the Court.[85] Rather, in her opinion, provided it is "careful to avoid interfering with judges' decisions in specific cases"—understood as the substantive outcomes of cases on the merits, and not including the imposition of recusal standards—Congress's power is extremely broad and includes its ability to legislate for the imposition of "judicial discipline" on the Justices.[86] According to Frost, "as long as such legislation is neutral in its application—applying to all judges and Justices, and to all litigation—it does not undermine the decisional independence protected by the Constitution."[87] Finally, she concludes that the Impeachment Clauses[88] should not be interpreted as the exclusive remedy for judicial misconduct, including by Justices, or as an "implied bar to all legislation regarding judicial ethics."[89]

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[84] *Id.*

[85] *Id.* at 456-75. Although the author acknowledges that the "one supreme Court" provision "has never been the subject of litigation, or even much close academic scrutiny," she concurs with commentators who think it merely "prohibits Congress from establishing multiple Supreme Courts populated by different sets of Justices, all empowered to issue decisions binding on the nation as a whole." *Id.* at 471-72 (citing EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 2-3 (9th ed. 2007)).

[86] *Id.* at 466.

[87] *Id.* at 465 (citing Geyh, *supra* note 66, at 919). She further explains that because "separation of powers generally, and judicial independence in particular, are constitutional values that protect all Article III judges, not just the Justices on the Supreme Court," in her view, "any independence-based limits on Congress's authority to legislative regarding recusal and judicial misconduct apply equally to legislation affecting all three existing tiers of the federal judiciary." *Id.* at 465-66.

[88] U.S. CONST. art. I, § 2, cl. 5; § 3, cl. 6; *see also* U.S. CONST. art. II, § 4 (providing federal judges, "as civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors").

[89] Frost, *supra* note 24, at 466-68. In addition to her textual analysis of the "silence" of the Impeachment Clause on discipline short of removal by Congress, Frost raises pragmatic concerns about an "impeachment-or-nothing" approach to congressional authority:

> If the only method of regulating judicial misconduct were impeachment, Congress might resort to this ultimate sanction more often than the Framers intended, and more often than would be healthy for judicial independence. Alternatively, Congress might refrain from taking any action, leaving judges free to engage in serious, but not impeachment-worthy, offenses without fear of consequences.

A number of legal scholars, such as those responding to the recent controversies surrounding allegations of unethical conduct by conservative Justices, have shared Frost's opinion that the Constitution places minimal constraints on Congress's authority to regulate the Supreme Court's ethics.[90] But other legal scholars have made compelling counterarguments that, properly understood in the light of text and history, the Constitution and core principles of judicial independence require a far more circumscribed role for Congress in regulating the Supreme Court than claimed by advocates for "Supreme Court ethics reform."[91] To capture the essence of the latter arguments, this article will focus primarily on the scholarly contributions of Professor Louis J. Virelli III[92] and, more recently, Madeleine Case.[93]

Virelli has researched and written extensively on the constitutionality of congressional regulation of Supreme Court recusals.[94] Although recusal has been his principal point of concern, his constitutional, structural, and policy arguments also have broader implications for congressional efforts to regulate Supreme Court ethics. In response to scholars who have relied upon the Exceptions Clause (providing for the Court's "appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make"[95]) to justify Congress's authority to regulate recusal, he offers convincing contrary arguments:

> The Exceptions Clause applies to the Court but only with regard to its appellate jurisdiction, which is far removed from recusal. . . .[T]he Framers did not equate judicial power with jurisdiction. . . . [A]uthority over a

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> Either way, the result would diminish the courts' legitimacy in the eyes of the public—a result at odds with the Framers' goals.

Id. at 467-68.

[90] *See, e.g.*, Ahearn & Milov-Cordoba, *supra* note 76, at 571-72; *Judicial Ethics*, *supra* note 7, at 1690-96.

[91] *See, e.g.*, Shane, *supra* note 81, at 211-12; Hopkins, *supra* note 81, at 928-30; Thomas Jipping, *Senate Democrats' Supreme Court "Ethics" Bill Is Really About Disapproval of Rulings*, DAILY SIGNAL (July 13, 2023), https://www.heritage.org/courts/commentary/senate-democrats-supreme-court-ethics-bill-really-about-disapproval-rulings.

[92] LOUIS J. VIRELLI III, DISQUALIFYING THE HIGH COURT: SUPREME COURT RECUSAL AND THE CONSTITUTION (2016); Virelli, *(Un)constitutionality of Supreme Court Recusal Standards*, *supra* note 81; Louis J. Virelli III, *Congress, the Constitution, and Supreme Court Recusal*, 69 WASH. & LEE L. REV. 1535, 1535 (2012) [hereinafter Virelli, *Congress*].

[93] Case, *supra* note 26.

[94] VIRELLI, *supra* note 92; Virelli, *(Un)constitutionality of Supreme Court Recusal Standards*, *supra* note 81.

[95] U.S. CONST. art. III, § 2, cl. 2.

> court's jurisdiction does not necessarily extend to authority over questions arising before the court under the proper exercise of that jurisdiction.[96]

Virelli further observes that "[i]t would prove too much to read the Exceptions Clause as also granting Congress the power to mandate judicial recusal, especially when the recusal power represents a potentially greater infringement on judicial independence than limiting the Court's appellate jurisdiction."[97] And, in addition, "since recusal is just as likely to arise in cases under the Court's original jurisdiction, which is not subject to congressional influence under the Exceptions Clause or any other part of Article III, it would be a gross over-reading of the Exceptions Clause to assume that it grants Congress some measure of authority over the Court's recusal decisions."[98]

Virelli concludes this argument with a persuasive textualist point that "the Framers' choice to empower Congress to affect Supreme Court appellate jurisdiction suggests a countervailing intent to preclude congressional intrusion into those exercises of the judicial power—like recusal—that are not expressly subjected to congressional authority under Article III."[99] In making this textualist argument, he relies upon "the interpretive canon of *expressio unius est exclusio alterius* ('to state the one is to exclude the other')."[100] He makes similar arguments against Congress's constitutional authority under the Impeachment Clauses:

> [I]mpeachment is the only authority granted in the Constitution's text for the removal of life-tenured federal judges, including Supreme Court Justices. . . . Since recusal is not included in the Constitution along with impeachment as one of Congress's powers over the judiciary, it should not be treated as such. This more targeted and more efficient remedy [of

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[96] Virelli, *(Un)constitutionality of Supreme Court Recusal Standards*, *supra* note 81, at 1208-09 (citing James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 708 (1998)).

[97] *Id.* at 1209.

[98] *Id.*

[99] *Id.* He has also observed that, although the Court "has offered very limited guidance regarding the scope of the [Exceptions] Clause, . . . the information it has provided indicates that Congress has a robust, *yet not unbounded*, authority to limit the Court's appellate jurisdiction." VIRELLI, *supra* note 92, at 59-60 (emphasis added). For example, "it has consistently stopped short of allowing Congress to wholly insulate a class of cases from Supreme Court review." *Id.* Thus, if Congress passed a "jurisdiction-stripping statute incorporating substantive recusal standards," it would invite "constitutional challenges on the basis that it improperly use[d] jurisdiction stripping to influence the substantive outcome of particular cases." *Id.* at 69.

[100] Virelli, *(Un)constitutionality of Supreme Court Recusal Standards*, *supra* note 81, at 1209 n.163.

> recusal] has a far greater deleterious effect on the independent exercise of judicial power to decide specific cases. This level of intrusion into the judicial power is simply not anticipated by the Impeachment Clauses.[101]

For this reason, he opines, "the Impeachment Clauses should be read in connection with Article III to accord proper respect for the federal judiciary's role in our constitutional scheme as the repository of judicial power."[102] Reading these together, it becomes clear that "the Impeachment Clauses offer structural support for the proposition that recusal is sufficiently distinct from impeachment to be understood as a feature of judicial, rather than legislative, constitutional authority."[103]

Finally, Virelli makes a very effective case for why the Necessary and Proper Clause does not support congressional regulation of the Court's recusal processes. He begins by framing the question as "whether the Necessary and Proper Clause empowers Congress to regulate the Court's recusal practices, or whether recusal is within the Court's 'inherent power' under Article III such that Congress (and other governmental actors outside the Court, for that matter) is precluded from doing so."[104] In answering that question, it is essential for the interpreter of the constitutional text to recognize that the Supreme Court is "the nation's court of last resort, and one which is set apart in the language of Article III as unique among all the federal courts."[105] As such, it "provides the strongest constitutional case for retaining robust and inviolable inherent judicial powers."[106] These powers include "the power to decide cases properly before it without interbranch dictates, interferences, or influences. [So viewed,] Supreme Court recusal . . . falls within the core of judicial power widely considered to be exclusively committed to the Court by Article III."[107] In light of the significance of the "inherent power" issue in determining whether Congress has authority under the Necessary and Proper Clause, the Commentary in the Justices' Code of Conduct describing recusal as an "inherently judicial function" implicitly signals the Court may support

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[101] *Id.* at 1211-12.
[102] *Id.* at 1212.
[103] *Id.* at 1211-12.
[104] *Id.* at 1214-15.
[105] *Id.*
[106] *Id.*
[107] *Id.* at 1217; *see also* VIRELLI, *supra* note 92, at 71-75.

a constitutional interpretation that denies Congress power to mandate the Court's recusal standards.[108]

In 2020, Madeleine Case published a Note in the Georgetown Journal of Legal Ethics titled *A Case for the Status Quo in Supreme Court Ethics*.[109] In her introduction, she correctly points out that "[v]ery few, if any, have made a case in opposition to a code of conduct externally imposed on the Supreme Court by a branch of government or the Judicial Conference."[110] She crafts a compelling defense of the "status quo" that reflects the Supreme Court's unique need for independence, and she proposes a "self-created" code of conduct to be internally enforced by the Court—much like what the Court ultimately adopted in the November 2023 Justices' Code.[111] Case's "status quo" argument proceeds with three categories of justification: (1) the "serious structural concerns" with congressional regulation of Supreme Court ethics; (2) the important ways in which "existing constitutional safeguards take into account the ethical conduct of the Supreme Court Justices without threatening underlying separation of powers principles or the integrity of the institution"; and (3) the significant "pragmatic reasons why it is difficult for the Court to adopt an inflexible code of conduct."[112]

As to the structural concerns with congressional regulation of Supreme Court ethics, Case presciently remarks that "[t]he primary problem with executive branch involvement and legislative branch involvement beyond the nomination process is that it automatically injects an independent branch with partisanship, or at the very least, has the potential to do so."[113] That the problem Case identifies is quite real rather than merely hypothetical has been made all the more clear in light of the recent patterns of vitriolic rhetoric[114]

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[108] JUSTICES' CODE OF CONDUCT, *supra* note 3, at Comment., at 11. In other scholarship, Virelli has argued that although Congress lacks constitutional authority to directly regulate recusal standards, it should nevertheless "take the lead on resolving [the inter-branch] impasse over recusal by using "indirect constitutional mechanisms to do so. Virelli, *Congress*, *supra* note 92, at 1535. For example, he recommends Congress should amend 28 U.S.C. § 455 to remove the 1948 addition of Supreme Court Justices to the judges covered by the statute and "focus instead" on tools such as "impeachment, procedural reform, judicial confirmation, appropriations, and investigation" in order to "influence the Justices' recusal practices." *Id.* at 1535-36.

[109] Case, *supra* note 26.

[110] *Id.* at 398.

[111] *Id.* at 411.

[112] *Id.* at 412.

[113] *Id.*

[114] *See, e.g.*, text accompanying note 2, *supra* (quoting United States Senate Majority Leader Charles Schumer, warning, "I want to tell you, Gorsuch. I want to tell you, Kavanaugh. You have

and strategic delegitimization efforts from federal legislators directed at conservative Supreme Court Justices.[115] In response to those who argue that the Chief Justice or the other Justices as a group should pass judgment on the ethical conduct of individual Justices (e.g., by recommending that they recuse from certain cases),[116] Case initially notes that it is unclear what such a process would accomplish as a practical matter beyond the status quo (i.e., voluntary collegial consultation and informal peer "enforcement") that has been deemed insufficient by critics.[117] However, she also argues that a more concerning drawback of a system of peer adjudication is that "Justices might apply the ethics code asymmetrically to the Court's members,"[118] raising the potential for tactical disqualification of certain Justices to influence the outcomes of cases.[119] She further argues that a regime requiring ethics review by other Justices could lead to a diminishment of "trust among members of the Court," especially if Justices believe that their colleagues are reviewing their recusal decisions in a biased or unjustified manner.[120] Finally, in rebuttal to those who have said the Judicial Conference of the United States should provide the mechanism for regulating Supreme Court ethics, she points out a fatal flaw of this approach: "[T]he Supreme Court is the only court created by the Constitution itself and is, by the language there, 'vested' with '[t]he judicial Power of the United States.'"[121] Responding to Frost's reliance on an

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released the whirlwind, and you will pay the price! You won't know what hit you if you go forward with these awful decisions.").

[115] *See infra* Part IV.

[116] Case, *supra* note 26, at 413 (citing Frost, *supra* note 24, at 471, 474-75).

[117] *Id.*

[118] *Id.* at 414.

[119] Case focuses on potential differences of opinion between the majority of the Justices and a "minority (or even an individual)" as to the "severity of an ethical code violation." Case, *supra* note 26, at 414. But the greater concern, especially on a closely divided Court on a controversial case, would be how such a review process could facilitate strategic decision-making that would be less about ethics and more about case results:

> As in the case of the lower courts, the Supreme Court does not sit in judgment of one of its own Members' decision whether to recuse in the course of deciding a case. Indeed, if the Supreme Court reviewed those decisions, it would create an undesirable situation in which the Court could affect the outcome of a case by selecting who among its Members may participate.

ROBERTS, 2011 YEAR-END REPORT, *supra* note 18, at 9.

[120] Case, *supra* note 26, at 414; *see also* Shane, *supra* note 81, at 236 ("[P]ermitting Supreme Court justices to discipline one another could so easily destabilize the Court as to pose an intolerable risk to the Court's legitimacy.").

[121] Case, *supra* note 26, at 417; *see also* Shane, *supra* note 81, at 236 ("Giving lower court judges disciplinary power over the justices would be facially inconsistent with the Supreme Court's role.").

"administrative/decisional" distinction to support the Judicial Conference's ability to regulate at least the extrajudicial conduct of Justices, Case explains that "it is underinclusive to cabin the realm of legal ethics to a purely 'administrative' category, and overinclusive to include Supreme Court Justice conduct with that of other federal judges" in light of the "higher stakes and larger consequences" involved in Supreme Court ethics.[122]

Second, Case points to the important preventive and responsive protections the Constitution provides through the Impeachment Clauses and the searching and vigorous Senate confirmation process of advice and consent.[123] As she observes, impeachment is both "an explicit method for Congress to remove Supreme Court Justices who have committed egregious ethical violations" and "a mechanism that Congress has not been afraid to wield in the past."[124] Responding to Frost's argument that impeachment procedures are not suitable for less serious unethical conduct—which would be better addressed by a code of conduct applicable to the Court—Case points out that the disciplinary sanctions that are typically imposed on lower federal court judges (i.e., under the JCDA) are not applicable to Supreme Court Justices, and she argues more broadly that "[d]iminishing its members [e.g., through temporary suspensions or similar disciplinary sanctions] only inhibits the Court's productivity."[125] However, a stronger counterargument to Frost on this point is based on a more foundational legal principle: Article III of the Constitution itself sets the Justices apart from the lower federal judges

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[122] Case, *supra* note 26, at 417 (citing Frost, *supra* note 24, at 468-69); *see, e.g.,* JUDGES' CODE OF CONDUCT, *supra* note 12, at Canon 2B ("A judge should not allow family, social, political, financial, or other relationships to influence judicial conduct *or judgment*.") (emphasis added). Case further pushes back against Frost's sharp distinction between decisional and institutional/administrative independence by pointing out that any legislation on Supreme Court ethics "does—it *must*—walk the very line between decisional and administrative independence. It is true that judicial ethics violations can occur completely outside of the Court's work to hear cases. But it is also true that any consequences imposed for *violating* an ethics code can impair a Justice's duty to hear cases and issue decisions, especially with issues like recusal. A Justice cannot make an *independent* decision on a case if he or she cannot even *make the decision to begin with* because of administrative oversight." Case, *supra* note 26, at 416.

[123] *See* Case, *supra* note 26, at 418-19.

[124] *Id.* at 418 (discussing the 1805 impeachment of Supreme Court Justice Samuel Chase).

[125] *Id.* at 419-20; *see The Supreme Court Adopts a Code of Conduct*, *supra* note 6, at 1 ("Under the [JCDA], a judge who engages in misconduct may be publicly or privately reprimanded, temporarily barred from hearing new cases, disqualified from an existing case, or referred for possible impeachment. Formal discipline under the [JCDA] is rare."). Case further comments that even though only one Supreme Court Justice has actually been impeached, "Congress has tended to propose legislation rather than propose impeachment when it has considered its tools for remedying perceived ethics errors." Case, *supra* note 26, at 419.

through its direct creation of "one supreme Court."[126] Preserving and protecting the Court's institutional independence by allowing it to police its own ethical standards is critical to maintaining its decisional independence at the apex of the judicial branch of the United States. Moreover, the confirmation process ensures that "before the Justice even reaches the bench, he or she has been thoroughly vetted for professional and personal integrity."[127] The process can certainly include questions from senators to Supreme Court nominees about their philosophies and perspectives on matters involving judicial ethics,[128] including how they understand and intend to approach the guidance found in specific provisions of the Justices' Code of Conduct.

Finally, Case defends the "status quo" of the Court's independent regulation of its ethics based on significant "pragmatic" considerations.[129] For one thing, a Justice subjected to disqualification against his or her individual judgment has no opportunity to appeal to a higher court.[130] Justices may also feel the need to isolate themselves from friendships and social connections with those in other branches of the government in order to conform to conduct mandates or threats of disciplinary action outside of the impeachment process.[131]

IV. INDEPENDENCE AND INTEGRITY IN THE FACE OF POLITICAL AND MEDIA INTIMIDATION

In recent decades, members of Congress have sometimes seen fit to write letters to members of the Supreme Court to challenge their ethical conduct.[132] However, in the lead-up to and aftermath of the Court's decision in *Dobbs v.*

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[126] *See* U.S. CONST. art. III, § 1.

[127] Case, *supra* note 26, at 419.

[128] *Id.* (citing Virelli, *Congress*, *supra* note 92, at 1594, who observes that questions to nominees about their "views on judicial recusal" would generally not be objectionable as they are "akin to questions about judicial philosophy" and are "technically not the subject of cases before the Court, as they are committed entirely to an individual Justice's judgment").

[129] *Id.* at 420.

[130] *Id.* (citing ROBERTS, 2011 YEAR-END REPORT, *supra* note 18, at 9).

[131] *Id.* (citing *Cheney*, 541 U.S. at 916).

[132] *See, e.g.*, *Should Supreme Court Justices Clarence Thomas, Elena Kagan Sit Out Health Care Case?*, ABC NEWS (Feb. 9, 2011), https://abcnews.go.com/Politics/supreme-court-justice-clarence-thomas-sit-health-care/story?id=12878346 (reporting 74 House Democrats wrote to Justice Thomas "calling on him to sit out deliberations on the Affordable Care Act because of his wife's ties to a lobbying group that opposes the health care law").

Jackson Women's Health Organization[133] and cases relating to the events at the United States Capitol on January 6, 2021,[134] progressive activists in the media and elected officials in the Democratic Party have conducted an aggressive, incessant, and increasingly venomous campaign attacking the ethics of the most conservative Justices on the Court,[135] and seeking to damage the public reputations of those disfavored Justices, particularly Clarence Thomas and Samuel A. Alito, Jr.[136] A clear pattern has emerged whereby progressive media writers publish articles that then serve as fodder for sundry congressional Democrats to issue press statements[137] and write letters of complaint to the Court petitioning for recusals of conservative Justices from controversial pending cases.[138] The transparent objectives are (1) to delegitimize any

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[133] 597 U.S. 215 (holding the U.S. Constitution does not create a right to abortion and overruling *Roe v. Wade*, 410 U.S. 113 (1973)).

[134] *See* Trump v. United States, No. 23-939 (U.S. July 1, 2024); Fischer v. United States, No. 23-5572 (U.S. June 28, 2024).

[135] *See, e.g.*, Kaplan et al., *supra* note 9; Elliot et al., *supra* note 9; Heidi Przybyla, *Law firm head bought Gorsuch-owned property*, POLITICO (Apr. 25, 2023), https://www.politico.com/news/2023/04/25/neil-gorsuch-colorado-property-sale-00093579; *cf.* David Harsanyi, *ProPublica Exposes Clarence Thomas: He Has a Rich Friend!*, THE FEDERALIST (Apr. 6, 2023), https://thefederalist.com/2023/04/06/propublica-exposes-clarence-thomas-he-has-a-rich-friend/ (commenting, with its attacks on Justice Thomas as an example, "ProPublica often practices what you might call Potemkin journalism—dressing up non-stories with neutral-sounding reporting verbiage and lots of graphs and pictures that seem important at first glance, but in actuality tell us very little"); *see also* Samuel A. Alito, Jr., *Justice Samuel Alito: ProPublica Misleads Its Readers*, WALL ST. J. (June 20, 2023), https://www.wsj.com/articles/propublica-misleads-its-readers-alito-gifts-disclosure-alaska-singer-23b51eda.

[136] *See, e.g.*, Jipping, *supra* note 91; John G. Malcolm, *The Left's Relentless, Unjustified Assaults on the Supreme Court's Legitimacy*, DAILY SIGNAL (Aug. 10, 2023), https://www.dailysignal.com/2023/08/10/the-lefts-relentless-unjustified-assaults-on-the-supreme-courts-legitimacy/ (observing "[t]hese attacks are transparently partisan," as "[l]left-wing media outlets have set their sights on Supreme Court justices who were appointed by Republican presidents, while assiduously ignoring similar transgressions by liberal judges, including justices appointed by Democratic presidents").

[137] *See, e.g.*, *Durbin Calls for Justice Clarence Thomas to Recuse Himself from Loper Bright v. Raimondo in Upcoming Supreme Court Term*, U.S. SEN. COMM. ON THE JUDICIARY (Sept. 22, 2023), https://www.judiciary.senate.gov/press/releases/durbin-calls-for-justice-clarence-thomas-to-recuse-himself-from-loper-bright-v-raimondo-in-upcoming-supreme-court-term.

[138] *See, e.g.*, Letter from Sen. Richard Blumenthal to John G. Roberts, Jr., Chief J. of the U.S. Sup. Ct. (Dec. 20, 2023), *available at* https://www.blumenthal.senate.gov/imo/media/doc/122023scotusthomasrecusalletter.pdf ("urg[ing the Chief Justice] to take appropriate steps to ensure that Justice Clarence Thomas recuses himself from consideration of the petition for certiorari and any future proceedings in *United States v. Trump*, or otherwise provides the public an 'explanation of [his] recusal decision' showing how his participation comports with judicial ethics and federal law") (quoting Letter from Supreme Court Justices to Sen. Richard J. Durbin, at 2 (Apr. 25, 2023)); Letter from Rep. Henry C. "Hank" Johnson, Jr. et al., to Clarence Thomas, Assoc. J. of

decision involving those Justices, along with the Roberts Court in general;[139] and (2) to goad Congress into passing legislation to impose new regulations on the Court.[140]

The passionate ideological crusade against the Supreme Court reached a new height of brazen absurdity with May 2024 investigative reporting[141] and subsequent letters from congressional Democrats[142] seeking to pressure

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the U.S. Sup. Ct. (Dec. 15, 2023), *available at* https://hankjohnson.house.gov/sites/evo-subsites/hankjohnson.house.gov/files/evo-media-document/2023.12.15-thomas-letter-final.pdf. ("If you want to show the American people that the Supreme Court's recent Code of Conduct is worth more than the paper it is written on, you must do the honorable thing and recuse yourself from any decisions in the case of *United States v. Trump*.").

[139] *See, e.g.*, Malcolm, *supra* note 136 (opining that "[t]o preserve our system of separation of powers and checks and balances—and for the good of the country—these one-sided attacks on Republican appointees to the Supreme Court, and the unending assaults on the legitimacy of the court itself, have to stop").

[140] *See, e.g.*, *Durbin Statement On Supreme Court Ruling In Chevron Deference Cases, Failure of Justice Thomas To Recuse*, U.S. SEN. COMM. ON JUDICIARY (July 8, 2024), https://www.judiciary.senate.gov/press/dem/releases/durbin-statement-on-supreme-court-ruling-in-chevron-deference-cases-failure-of-justice-thomas-to-recuse ("'I'm disappointed—but unsurprised—that Justice Thomas refused to recuse himself from these cases . . . . Like I've said before: even the appearance of impropriety warrants recusal, and this episode is another textbook example of a warranted recusal. Until Chief Justice Roberts uses his existing authority to implement an enforceable code of conduct for all Supreme Court justices, we will push to pass the [Supreme Court Ethics and Recusal Transparency] Act.'").

[141] Jodi Kantor, *At Justice Alito's House, a 'Stop the Steal' Symbol on Display*, N.Y. TIMES (May 16, 2024) [hereinafter Kantor, *Stop the Steal*], https://www.nytimes.com/2024/05/16/us/justice-alito-upside-down-flag.html; Jodi Kantor et al., *Another Provocative Flag Was Flown at Another Alito Home*, N.Y. TIMES (May 22, 2024) [hereinafter Kantor, *Another Provocative Flag*], https://www.nytimes.com/2024/05/22/us/justice-alito-flag-appeal-to-heaven.html. *But see* Kimberley A. Strassel, *A Flagging Campaign Against Justice Alito*, WALL ST. J. (May 23, 2024), https://www.wsj.com/articles/a-flagging-campaign-against-the-supreme-court-alito-jan-6-a545cd69?mod=opinion_lead_pos10; *see also* Jonathan Turley, *Capitol Vapors: The Laughably Fake Outrage Over the Alito Flags and Tapes* (June 14, 2024), https://jonathanturley.org/2024/06/14/capitol-vapors-the-laughably-fake-outrage-over-justice-alito/; Mollie Hemingway, *NYT's Jodi Kantor Has A History Of Peddling Deranged Anti-Alito Hoaxes*, THE FEDERALIST (June 6, 2024), https://thefederalist.com/2024/06/06/nyts-jodi-kantor-has-a-history-of-peddling-deranged-anti-alito-hoaxes/.

[142] Letter from Sen. Sheldon Whitehouse et al., Chairman, Senate Comm. on the Judiciary Subcomm. on Fed. Cts., Oversight, Agency Action, and Fed. Rts., to John G. Roberts, Jr., Chief J. of the U.S. Sup. Ct. [hereinafter Chairman Whitehouse Letter to Chief Justice] (May 23, 2024), *available at* https://www.whitehouse.senate.gov/wp-content/uploads/2024/05/2024-05-23-Letter-to-CJ-Roberts.pdf.; Letter from Rep. Henry C. "Hank" Johnson, Jr., et al. to Samuel Alito, Assoc. J. of the U.S. Sup. Ct. (May 21, 2024), *available at* https://hankjohnson.house.gov/sites/evo-subsites/hankjohnson.house.gov/files/evo-media-document/2024.05.21%20Letter%20to%20Justice%20Alito.pdf; Letter from Rep. Henry C. "Hank" Johnson, Jr., et al. to Samuel Alito, Assoc. J. of the U.S. Sup. Ct. (May 24, 2024) [hereinafter Representative Johnson Letter to Justice Alito],

Justice Alito to recuse from two pending cases[143] and "any other cases that may arise involving Donald Trump, the January 6, 2021 attack on the Capitol, or attempts to overturn the 2020 election."[144] This media and political circus arose from two flags: an upside-down American flag flown at Justice Alito's primary residence in Virginia,[145] and an "Appeal to Heaven" flag flown at his summer home in New Jersey.[146] United States Senators Richard J. Durbin and Sheldon Whitehouse also requested a meeting with Chief Justice Roberts "as soon as possible" to discuss, among other topics, their concerns about the alleged flag incidents; their ongoing complaints about Justice Thomas, such as his alleged improper extrajudicial conduct and their prior calls for his recusal from January 6-related cases; and their recurring insistence that the Court adopt an "enforceable" code of conduct for itself, or else be subjected to continued congressional efforts to resolve "this crisis" through legislation.[147]

Justice Alito responded in a letter to Chair Durbin, firmly rejecting the demands that he recuse in any pending or future cases because "two incidents

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available at https://hankjohnson.house.gov/sites/evo-subsites/hankjohnson.house.gov/files/evo-mediadocument/2024.05.24%20Alito%20SECOND%20letter%20with%20signatures.pdf.

[143] The two cases pending at the time were *Trump v. United States*, No. 23-939 (concerning questions of former President Donald J. Trump's immunity from prosecution for his alleged role in the events of January 6) and *Fischer v. United States*, No. 23-5572 (concerning the interpretation of 18 U.S.C. § 1512(c)(2), which makes it a crime to "otherwise obstruct[], influence[], or impede[] any official proceeding," as applied to criminal defendants involved in the events of January 6).

[144] Representative Johnson Letter to Justice Alito, *supra* note 142, at 1.

[145] *See* Kantor, *Stop the Steal*, *supra* note 141. *See also* Courtney Campbell, *Why Is the American Flag Displayed Upside Down Sometimes?*, THE TRUE COLORS (Sept. 26, 2023), https://thetruecolors.org/upside-down-american-flag/ ("At first glance, an upside-down American flag may appear to be a sign of disrespect or disregard for the nation's symbol. However, it is essential to understand that in many cases, this inversion is not an act of disrespect but rather a symbolic signal of distress.").

[146] *See* Kantor, *Another Provocative Flag*, *supra* note 141. *See also The Meaning Behind an Appeal to Heaven Flag*, AMERICANFLAGS.COM, https://www.americanflags.com/blog/post/an-appeal-to-heaven-flag-meaning (last visited July 8, 2024) ("The Appeal to Heaven flag was designed by Colonel Joseph Reed, who served as the personal secretary to George Washington. Originally commissioned for use on six military cruiser ships, the flag was adopted on October 21, 1775. It became the official Massachusetts navy flag in 1776.").

[147] Chairman Whitehouse Letter to Chief Justice, *supra* note 142, at 1-4. The letter also renewed the Senators' complaints about Justice Alito's interviews for a 2023 *Wall Street Journal* article written by David B. Rivkin and James Taranto, in which he allegedly "opined on the constitutionality of legislation pending before the U.S. Senate." *Id.* at 3. They further complained about Alito's decision not to recuse from a matter before the Court in which Mr. Rivkin was counsel at the time. *Id.* Justice Alito, however, had already explained his well-reasoned decision not to recuse in that case. *See* Moore v. United States, No. 22–800 (Sept. 8, 2023) (Alito, J., statement), *available at* https://www.supremecourt.gov/opinions/22pdf/22-800_1an2.pdf.

involving the flying of flags" allegedly "created an appearance of impropriety."[148] This letter was the first time a Justice publicly interpreted and applied the new Justices' Code of Conduct in response to a complaint or petition relating to ethical considerations.[149] Justice Alito opened his ethics analysis by quoting Canon 3B on Disqualification, explaining that because the flag incidents "do not meet the conditions for recusal set out in (B)(2)"—i.e., where "an *unbiased* and reasonable person who is aware of all relevant circumstances would doubt that the Justice could fairly discharge his or her duties"[150]—he "therefore [has] an obligation to sit under (B)(1)."[151] His description of the conditions for qualifying as an "unbiased and reasonable person" under Canon 3(B)(2) is highly significant, especially as the "unbiased" aspect of the conditions does not appear in the Judges' Code of Conduct on Disqualification:[152]

> I am confident that a reasonable person *who is not motivated by political or ideological considerations or a desire to affect the outcome of Supreme Court cases* would conclude that the events recounted above do not meet the applicable standards for recusal. I am, therefore, *required* to reject your request.[153]

Justice Alito used the quoted language in reference to the "upside-down American flag" incident; he used parallel language in rejecting the demand for recusal based on the "An Appeal to Heaven" flag incident.[154]

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[148] Justice Alito Letter to Chair Durbin, *supra* note 64.

[149] Justice Alito's statement in *Moore v. United States*, No. 22–800, addressed Senator Durbin's demand for his recusal in that case based on his interviews with the *Wall Street Journal*, but this preceded the adoption of the Justices' Code of Conduct by two months. However, Justice Alito did cite and rely upon the Statement on Ethics Principles and Practices that the Chief Justice had attached to his April 25, 2023, letter responding to Senator Durbin's invitation for him to testify at a Senator Judiciary Committee hearing on May 2, 2023. *Moore v. United States*, No. 22–800, at 1 & n.2 (citing the April 2023 Statement on Ethical Principles and Practices in support of the proposition that "[r]ecusal is a personal decision for each Justice, and when there is no sound reason for a Justice to recuse, the Justice has a duty to sit").

[150] JUSTICES' CODE OF CONDUCT, *supra* note 3, at Canon 3B(2) (emphasis added).

[151] Letter from Justice Alito to Chair Durbin, *supra* note 64, at 1; *see supra* Part II (discussing Canon 3B).

[152] *See supra* text accompanying notes 59-64.

[153] Letter from Justice Alito to Chair Durbin, *supra* note 64, at 2 (emphases added).

[154] *Id.* at 3. Mollie Hemingway has astutely commented on the absurdity of the media's and congressional Democrats' appeals for recusal based on the flying of the "Appeal to Heaven" flag:

> The flag is in such wide use that left-wing city San Francisco famously flew it for 60 years in Civic Center Plaza until last week. When *The New York Times* began pushing its propaganda against the flag, San Francisco quickly removed it to help

The day after Justice Alito sent his letter, Chief Justice Roberts too wrote to the Senators.[155] In response to their "questions concerning any Justice's participation in pending cases," he reminded them that "the Members of the Supreme Court recently reaffirmed the practice we have followed for 235 years pursuant to which individual Justices decide recusal issues."[156] Consistent with this practice, rather than address the merits of the petition, he simply expressed his "understanding that Justice Alito has sent you a letter addressing this subject."[157] As to the Senators' request for a meeting, he "respectfully decline[d]" and offered these remarks in explanation of his decision:

> As noted in my letter to Chairman Durbin last April, apart from ceremonial events, only on rare occasions in our Nation's history has a sitting Chief Justice met with legislators, even in a public setting (such as a Committee hearing) with members of both major political parties present. Separation of powers concerns and the importance of preserving judicial independence counsel against such appearances. Moreover, the format proposed—a meeting with leaders of only one party who have expressed an interest in matters currently pending before the Court—simply underscores that participating in such a meeting would be inadvisable.[158]

Both Justice Alito's and the Chief Justice's responses highlight the risks to the integrity of the United States Supreme Court that are posed by opening the door to political interference with the Court's internal decision-making processes—including on questions of recusal and ethics.[159] The fact that many

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> the left's efforts against the legitimacy of the Supreme Court. What's more, *The New York Times* and other left-wing media outlets never once claimed the flag was one of the flags seen inside the Capitol on Jan. 6, until Kantor published her conspiracy theory last month. In fact, the *Times* published a detailed "Visual Investigation" of the events of Jan. 6 headlined, "Decoding the Far-Right Symbols at the Capitol Riot" — and neither of the supposedly controversial flags flown by Martha-Ann Alito were included in the article.

Hemingway, *supra* note 141.

[155] Letter from John G. Roberts, Jr., Chief J. of the U.S. Sup. Ct., to Sens. Richard J. Durbin & Sheldon Whitehouse (May 30, 2024), *available at* https://static.foxnews.com/foxnews.com/content/uploads/2024/05/2024-05-30-CJR-Letter-to-Chairman-Durbin-and-Senator-Whitehouse.pdf.

[156] *Id.*

[157] *Id.*

[158] *Id.*

[159] Illustrating the increasing levels of attempted congressional intrusiveness into the internal operations of the Court, in a letter to Chief Justice Roberts on May 30, 2024, Senator Richard Blumenthal went as far as to "urge" that "to restore the institutional integrity and standing of the Court" after their alleged ethics violations, Chief Justice Roberts should stop assigning majority opinions to Justices Thomas and Alito and remove them from the regular circuit Justice duties. Letter from Sen.

of the critiques of individual Justices are plainly politically motivated underscores the importance of the Court's institutional independence, which it declared in the November 2023 Justices' Code of Conduct. Continual vigorous defense of the Court's institutional independence will be essential to thwarting ongoing and future political efforts to influence the outcomes of cases before the Court through intimidating rhetoric[160] and legislative action.[161]

V. CONCLUSION

In June 2024, at the Annual Meeting of the State Bar Association of North Dakota, I had the privilege of moderating the Mart Vogel Lecture on Professionalism and Legal Ethics.[162] The title of the program was *The Constitution as Client*, and it featured Vikram David Amar, Distinguished Professor of Law at UC Davis School of Law, as our esteemed Vogel Lecturer. The program description opened as follows:

Richard Blumenthal to John G. Roberts, Jr., Chief J. of the U.S. Sup. Ct. (May 30, 2024), *available at* https://www.blumenthal.senate.gov/imo/media/doc/53024lettertocjrobertsletter.pdf.

[160] *See, e.g.*, *supra* note 2 and accompanying text.

[161] *See, e.g.*, *supra* note 82 and accompanying text (citing 2023 and 2024 congressional legislative proposals). In July 2024, President Joseph R. Biden, Jr. issued a statement announcing his support for a package of three "reforms to restore trust and accountability" in response to an alleged "crisis of confidence in America's democratic institutions." *FACT SHEET: President Biden Announces Bold Plan to Reform the Supreme Court and Ensure No President Is Above the Law*, THE WHITE HOUSE (July 29, 2024), https://www.whitehouse.gov/briefing-room/statements-releases/2024/07/29/fact-sheet-president-biden-announces-bold-plan-to-reform-the-supreme-court-and-ensure-no-president-is-above-the-law/. These included (1) a constitutional amendment to overturn the Supreme Court's decision in *Trump v. United States* on presidential immunity; (2) term limits for Supreme Court Justices; and (3) a "Binding Code of Conduct for the Supreme Court" passed by Congress that would "require Justices to disclose gifts, refrain from public political activity, and recuse themselves from cases in which they or their spouses have financial or other conflicts of interest." *Id.* He stated that "Supreme Court Justices should not be exempt from the enforceable code of conduct that applies to every other federal judge." *Id.* The preface to his proposals also expressed criticism that "[i] recent years, the Supreme Court has overturned long-established legal precedents protecting fundamental rights," including "tak[ing] away a woman's right to choose." *Id.* By relying on his disagreements with the substance of the Court's decisions as an asserted basis for imposing alterations of its institutional structure and prerogatives, President Biden's statement brings into bold relief the Framers' wisdom in constitutionally protecting the Supreme Court's decisional independence against attempted regulatory influence by the executive and legislative branches.

[162] Vikram David Amar, Distinguished Professor of L., UC Davis School of L., 2024 Mart Vogel Lecture on Professionalism & Legal Ethics, St. Bar Ass'n of N.D., 125th Ann. Mtg. (June 14, 2024), *available at* https://mcusercontent.com/791139e1f4d0f79a010ab2a0c/files/d468cc75-f0ff-67d0-513d-64e55d9bfc81/AM24_PRESENTERS_CLE_schedule_at_a_glance.pdf.

> All new Justices appointed to the United States Supreme Court take oaths to "administer justice without respect to persons, and do equal right to the poor and to the rich"; to "faithfully and impartially discharge and perform all the duties incumbent upon [them] under the Constitution and laws of the United States; to "support and defend the Constitution of the United States against all enemies, foreign and domestic; to "bear true faith and allegiance to the same"; and to "well and faithfully discharge the duties of the office on which [they are] about to enter." These solemn commitments to be "faithful" to the Constitution and to the judicial office invoke profound ethical responsibilities shouldered by each Justice and tested by immense challenges and temptations that can lead them astray, even with the best of intentions.[163]

After Professor Amar's lecture, I offered remarks commenting on the United States Constitution as itself being a "client" to whom Justices owe duties of faithfulness and loyalty, and I invoked the importance of judicial independence in allowing them to fulfill those fundamental ethical duties. In their role as advisors to clients, lawyers have an ethical obligation to "exercise independent professional judgment and render candid advice."[164] Analogously, Supreme Court Justices have an ethical obligation to exercise their independent judgment in deciding cases and controversies presented to them, and to render candid opinions about the meaning of the law. Securing the integrity of the Court's role as the final arbiter of the meaning of the Constitution and other federal law[165] requires strong and stable boundaries allowing the Justices to make their decisions without fear or favor, and with their judgment unimpeded by intimidation campaigns by elected officials, media publications, or members of the general public seeking to affect the outcomes of pending or future cases. For these reasons, and considering the Court's unique status in our constitutional structure under Article III, Congress should stay

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[163] *Id.* (quoting OFFICE OF THE CURATOR, SUP. CT. OF THE U.S., TEXT OF THE OATHS OF OFFICE FOR SUP. CT. JUSTS. (updated Aug. 10, 2009), https://www.supremecourt.gov/about/oath/textoftheoathsofoffice08-10-2009.pdf). With a view of the U.S. Constitution as itself being a "'client' to whom Justices owe duties of faithfulness and loyalty," Amar's outstanding lecture discussed "how changes in the makeup and experiences of the Supreme Court bench and bar make it increasingly difficult for the Court to properly resolve many complex constitutional disputes, especially considering the Court's professed commitment to an originalist approach to constitutional interpretation."

[164] MODEL RULES OF PRO. CONDUCT r. 2.1 (AM. BAR ASS'N 2024).

[165] *See generally* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

out of the business of regulating the internal operations of the Court and seeking to direct its management of ethical questions.[166]

Other Views:

- Jennifer Ahearn & Michael Milov-Cordoba, *The Role of Congress in Enforcing Supreme Court Ethics*, 52 HOFSTRA L. REV. 557 (2024), *available at* https://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=3261&context=hlr.
- Veronica Root Martinez, *Supreme Impropriety? Questions of Goodness and Power*, LAW & CONTEMP. PROBS. (forthcoming 2024), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4685507#.
- Amanda Frost, *Judicial Ethics and Supreme Court Exceptionalism*, 26 GEO. J. LEGAL ETHICS 443 (2013), *available at* https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=2389&context=facsch_lawrev.

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[166] Responding to a moderator question at the 2024 Ninth Circuit Judicial Conference, Justice Elena Kagan expressed her individual view that although the Justices' Code of Conduct has "good" rules, "the thing that can be criticized is . . . rules usually have enforcement mechanisms attached to them," and "this set of rules does not." Devon Cole, *Justice Elena Kagan says Supreme Court's code of conduct needs an enforcement plan. Takeaways from her wide-ranging comments.*, CNN (July 25, 2024), https://www.cnn.com/2024/07/25/politics/kagan-supreme-court-ethics-sacramento-conference/index.html. She "went on to say that she thought the best enforcers of it for the Supreme Court would be lower-court judges, but not the justices themselves." *Id.* She also remarked, "if the chief justice appointed some sort of committee of . . . highly respected judges with a great deal of experience, with a reputation for fairness . . . that seems like a good solution to me." *But see Justice Kagan's Ethics Inversion*, WALL ST. J. (July 26, 2024), https://www.wsj.com/articles/justice-kagans-ethics-inversion-def2ad0f?mod:

> Justice Kagan greatly understates the problems of her proposal. Could her panel issue subpoenas to investigate allegations? How would it sanction Justices who enjoy life tenure? Wouldn't setting up such a system encourage frivolous complaints, filed for partisan PR purposes or to make the process into the punishment?
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> There is also the constitutional question. The Supreme Court was established by the Constitution, but the lower courts were created by Congress. A lower-court tribunal would therefore subject the High Court to supervision by a creature of Congress, which is constitutionally dubious. The lower-court judges would be under political pressure to rule against this or that Justice.
>
> Justice Kagan's comments are a serious misjudgment. She seems to think that an external review board would protect the High Court's reputation, but it would do the opposite.

- James J. Alfini, *Supreme Court Ethics: The Need for Greater Transparency and Accountability*, 21 THE PROF. LAW. (2012), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2690391.
- Russell Wheeler, *The Supreme Court's Code of Conduct: Enforcement Confusion, Extrajudicial Activism*, BROOKINGS INST. (Nov. 29, 2023), https://www.brookings.edu/articles/the-supreme-courts-code-of-conduct-enforcement-confusion-extrajudicial-activism

RACIALLY DISCRIMINATORY CORPORATE POLICIES: WHO'S LIABLE?*

DAN MORENOFF**

Laws banning discrimination have been on the books across America for more than a century and a half. Their prohibitions are among the most morally grounded, widely known, and widely supported in our law.[1] Despite these facts, the last decade saw a cavalcade of corporations adopt policies that seemingly commit to violating these laws.[2] While academics have spilled much ink considering *whether* such policies violate these laws, remarkably little attention has focused on *whom* these laws make liable for corporate violations. That omission masks a surprisingly under-appreciated near-consensus that American law makes *individual decisionmakers* liable for programmatic discrimination by the enterprises through which those decisionmakers discriminate. Specifically, both America's longest-standing federal nondiscrimination law and the corporate laws of every state I've investigated assign such liability to the individual actors themselves—either making them directly liable to the victims of their discrimination in the first instance or

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

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[1] *See, e.g.*, *2021 National Poll on Reimagining Rights and Responsibilities in the U.S.*, HARV. KENNEDY SCH. CARR CTR. FOR HUM. RTS. POL'Y (May 2021), https://www.hks.harvard.edu/centers/carr/programs/reimagining-rights-responsibilities/2021-poll; *Public Opinion on Civil Rights: Reflections on the Civil Rights Act of 1964*, ROPER CTR. FOR PUB. OP. RSCH. (Jul. 2, 2014), https://ropercenter.cornell.edu/public-opinion-civil-rights-reflections-civil-rights-act-1964.

[2] *See, e.g.*, Letter from Kris W. Kobach, et al., Attorneys General of 13 states, to Fortune 100 CEOs (Jul. 13, 2024), *available at* https://www.tn.gov/content/dam/tn/attorneygeneral/documents/pr/2023/pr23-27-letter.pdf (arguing that race-preferential policies in employment and contracting violate the law, particularly after the Supreme Court's decision in *Students for Fair Admissions v. President & Fellows of Harvard College*). While this article does not cover whether and how specific corporate policies violate these enactments, according to prosecutors, a wide array of common corporate policies likely do so.

holding them liable to shareholders for the corporate liabilities those individual actors create—and universal public policy concerns prohibit any institutional coverage of those personal liabilities.

Officers and directors of major enterprises should bear this consensus in mind when considering the adoption, implementation, or retention of discriminatory policies.

I. PERSONAL LIABILITY OF INVOLVED INDIVIDUALS FOR CORPORATE VIOLATIONS OF 42 U.S.C. § 1981

A. Enactment History and Original Public Meaning

42 U.S.C. § 1981 began life as Section 1 of the Civil Rights Act of 1866.[3] Congress subsequently wrote the Fourteenth Amendment to cut off any argument that the Civil Rights Act of 1866 might overreach Congress's preexisting legislative powers.[4] Following ratification of the Fourteenth Amendment, Congress re-passed Section 1981's antecedent in 1870 to head off any contention that it had lacked the authority to pass Section 1981 in 1866.[5] Congress recodified the statute in 1874.[6] Section 1981's basic structure then remained unchanged until 1991.[7]

Despite the old-timey language of Section 1981,[8] for decades leading up to the 1991 revision, the Supreme Court maintained with uniformity that Section 1981 barred discrimination on the basis of *any* race in *any* contracting, whether by actors private or public.[9] Over the same decades, the Court

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[3] 14 Stat. 27.

[4] *See, e.g.*, Gen'l Bldg. Contractors Ass'n v. Pa., 458 U.S. 375, 389 (1982) ("The 1866 Act represented Congress's first attempt to ensure equal rights . . . . As such, it constituted an initial blueprint of the Fourteenth Amendment, which Congress proposed in part as a means of 'incorporat[ing] the guaranties of the Civil Rights Act of 1866 in the organic law of the land.'") (citing Hurd v. Hodge, 334 U.S. 24, 32 (1948)).

[5] Runyon v. McCrary, 427 U.S. 160, 168-69 n.8 (1976) (recounting the early history of 42 U.S.C. § 1981).

[6] *Id.*

[7] *See* Jones v. R.R. Donnelley & Sons Co., 541 U.S. 369, 372-73 (2004) (discussing the relevant history of 42 U.S.C. § 1981 through its last amendment in 1991).

[8] The section reads, "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. § 1981(a).

[9] *See, e.g.*, McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 298 (1976) (Section 1981 "was meant, by its broad terms, to proscribe discrimination in the making or enforcement of contracts against, or in favor of, any race."). These cases predate the rise of textualist and originalist

maintained with the same uniformity that Section 1981's prohibitions are "violated if a private offeror refuses to extend to [an American], solely because [of his race], the same opportunity to enter into contracts as he extends to [other] offerees."[10]

Then, Congress acted in 1991 to dispel any remaining confusion about the extent of Section 1981's ambit. In the Civil Rights Act of 1991, Congress added two subsections to Section 1981, only the first of which—subsection (b)—matters for present purposes. That subsection states:

> For purposes of this section, the term "make and enforce contracts" includes the *making*, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.[11]

Congress added subsection (b) in part in response to the Supreme Court's 1989 ruling in *Patterson v. McLean Credit Union*.[12] In *Patterson*, an employee sought damages for racial harassment and discrimination under 42 U.S.C.

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statutory interpretation. Had the Court employed the modern (which is to say the textualist-originalist) approach to statutory interpretation to construe the version of Section 1981 extant between 1870 and 1991, it arguably would have reached a different interpretation of the statute. *See, e.g.*, CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION 1864-88, PART ONE 1258 (Paul A. Freund ed., 1971) ("In *Jones v. Mayer* the Court appears to have had no feeling for the truth of history, but only to have read it through the glass of the Court's own purpose. It allowed itself to believe impossible things—as though the dawning enlightenment of 1968 could be ascribed to the Congress of a century agone.") (footnote omitted); George Rutherglen, *The Improbable History of Section 1981: Clio Still Bemused and Confused*, 2003 SUP. CT. REV. 303, 321 ("Under the 1866 Act, only the more limited rights, simply to participate in public economic life, were protected: the rights to be a person generally recognized as capable of entering into contracts and holding property. These rights could not be violated by isolated acts of discrimination, but only by concerted refusals to deal with an entire class of individuals."). However, as explained below, the subsequent history of Congress's 1991 amendment to the statute renders this argument moot: whatever the original interpretative community would have understood the text of Section 1981 to mean in 1866 and 1870, the original interpretative community *for the 1991 amendment* clearly understood the statute's new text to adopt and codify the prior case law.

[10] *Runyon*, 427 U.S. at 170-71. The Supreme Court released its opinions in *Runyon* and *McDonald* on the same day (June 25, 1976), with seven of the Justices signing on to both majority opinions. Accordingly, while only the *McDonald* opinion focuses on the universality of Section 1981's protection of Americans *of all races* against racial contracting discrimination, with *Runyon* instead focusing on the applicability of Section 1981 to the categorical refusal *of private parties* to extend contracts to any black customers, one can properly read the cases in conjunction as clarifying that Section 1981 bars *private* actors from deciding not to contract with *any* American because of *any* race.

[11] 42 U.S.C. § 1981(b) (emphasis added).

[12] 491 U.S. 164 (1989).

§ 1981. The Supreme Court held that racial harassment relating to conditions of employment was not actionable under Section 1981 because the statute did not apply to conduct which occurs after the formation of a contract and which does not interfere with the right to enforce established contractual obligations. Congress responded with subsection (b). Its primary goal was to codify the prior judicial interpretations of the statute concerning Section 1981's application to post-contract-formation conduct (including discriminatory termination). But it simultaneously expressly included language that would assure that henceforth Section 1981 would clearly govern *entry* into contracts.

The original public meaning of Section 1981, as amended in 1991, is thus clear. The modern version of Section 1981 "protects the equal right of all persons . . . to *make* and enforce contracts without respect to race."[13] Thus, "Section 1981 prohibits intentional race discrimination in the *making* and enforcement of public and private contracts."[14]

B. Personal Liability for Section 1981 Violations

Focused as it is on contracts, one might imagine that Section 1981 would only assign liability for a corporation's illicitly discriminatory contracting decisions to the contracting enterprise in privity with a plaintiff. That would be reasonable, but also very wrong. *All* of the courts of appeals that have considered the issue have agreed that the personnel responsible for a Section 1981 violation are *personally* liable for the damages worked.

The Fourth Circuit faced the question first. In 1975, in *Tillman v. Wheaton-Haven Recreation Association*,[15] after the Supreme Court held a community swimming pool's policy against black memberships to violate the Civil Rights Act of 1866, the district court—on remand—"absolved the directors from all liability" for the policy,[16] reasoning that although the directors knew that they were intentionally approving racial discrimination, they didn't know that it was illegal when they did so.[17]

The Fourth Circuit reversed. It reasoned that (a) Section 1981 created a statutory tort; (b) "[g]enerally, a tortfeasor who acted intentionally cannot defend on the ground that he mistook the law"; and (c) "Section 1981 . . .

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[13] Domino's Pizza, Inc. v. McDonald, 546 U.S. 470, 474 (2006) (cleaned up) (emphasis added).
[14] Jenkins v. Nell, 26 F.4th 1243, 1249 (11th Cir. 2022) (emphasis added).
[15] 517 F.2d 1141 (4th Cir. 1975).
[16] *Id.* at 1142.
[17] *Id.* at 1143.

create[s] no exception[] to these principles."[18] The court expressly held that "a complainant relying on § 1981 . . . need not prove that the defendant knew the duties these statutes impose. Stated conversely, ignorance of the rights secured by these statutes is not a defense to an action brought to enforce them."[19] As a result, the *Wheaton-Haven* court held that "a director who actually votes for the commission of a tort is personally liable, even though the wrongful act is performed in the name of the corporation . . . . Proof that the director voluntarily and intentionally caused the corporation to act is sufficient to make him personally accountable."[20]

Since *Wheaton-Haven*, at least seven more U.S. courts of appeals have reached the same conclusion. In 1985, the Seventh Circuit expressly followed *Wheaton-Haven* on this issue.[21] 1986 saw the Third Circuit follow suit in *Al-Khazraji v. St. Francis College*.[22] It, too, reasoned that:

> [a]lthough Section 1981 is a federal civil rights remedy it is in the nature of a tort remedy.
>
> An individual, including a director, officer, or agent of a corporation, may be liable for injuries suffered by third parties because of his torts, regardless of whether he acted on his own account or on behalf of the corporation. "An officer of a corporation who takes part in the commission of a tort by the corporation is personally liable therefore."[23]

The Third Circuit expressly held that "directors, officers, and employees of a corporation may become personally liable when they intentionally cause an infringement of rights protected by Section 1981, regardless of whether the corporation may also be held liable," so long as they "are personally involved in the discrimination . . . and if they intentionally caused [the] infringe[ment of] Section 1981 rights, or if they authorized, directed, or

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[18] *Id.*

[19] *Id.*

[20] *Id.* at 1144.

[21] Musikiwamba v. ESSI, Inc., 760 F.2d 740, 753 (7th Cir. 1985) ("We agree with the Fourth Circuit that personal liability cannot be imposed on a corporate official for the corporation's violations of section 1981 when the official is not alleged to have participated in the actual discrimination against the plaintiff . . . . Personal liability is imposed only when the officer is alleged to have taken part in the *illegal act* initially giving rise to the corporation's liability.") (citing *Wheaton-Haven*, 517 F.2d at 1144, among other authorities).

[22] 784 F.2d 505 (3d Cir. 1986).

[23] *Id.* at 518 (citing Goodman v. Lukens Steel, 777 F.2d 113, 118 (3d Cir. 1985); Zubik v. Zubik, 384 F.2d 267, 275-76 (3d Cir. 1967)).

participated in the alleged discriminatory conduct."[24] The Third Circuit has reiterated this holding as recently as 2020.[25] The Sixth Circuit reached the same conclusion in 1986.[26] The Tenth Circuit concurred as early as 1991[27] and expressly reiterated the point in 2002.[28] The Second Circuit did the same in 2020.[29] Slightly less clearly, the Fifth[30] and Eleventh[31] Circuits have agreed. So have district courts outside these circuits.[32]

I have identified *no* counter-authority. *No* court of appeals has rejected this approach and read Section 1981 to hold discriminating corporations liable while holding harmless the individuals through which those corporations act. With one voice, the courts that have considered the topic agree that Section 1981 leaves the individuals responsible for violations personally liable for the resulting damages.

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[24] *Id.*

[25] Pedro v. City Fitness LLC, 803 F. App'x 647, 652 n.9 (3d Cir. 2020).

[26] Jones v. Continental Corp., 789 F.2d 1225, 1231 (6th Cir. 1986) ("[T]he law is clear that individuals may be held liable for violations of § 1981," including when acting as "'agents' of the employer.") (internal citations omitted).

[27] Allen v. Denver Pub. Sch. Bd., 928 F.2d 978, 983 (10th Cir. 1991), *overruled on other grounds* Kendrick v. Penske Transp. Servs., 220 F.3d 1220, 1228 (10th Cir. 2000).

[28] Flores v. Cty. of Denver, 30 F. App'x 816 (10th Cir. 2002) ("[A]n individual defendant can be held liable under § 1981 if the individual defendant was personally involved in the discriminatory conduct.").

[29] Whidbee v. Garzarelli Food Specialties, Inc., 223 F.3d 62, 75 (2d Cir. 2020) ("We now explicitly hold what has been implicit in our previous cases: individuals may be held liable under § 1981 [when] a plaintiff [has] demonstrate[d] 'some affirmative link to causally connect the actor with the discriminatory action[ ]' [and the claim is so] 'predicated on the actor's personal involvement.'") (internal citations omitted).

[30] Foley v. Univ. of Houston Sys., 355 F.3d 333 (5th Cir 2003) ("recogniz[ing] . . . a tension" in prior assertion that "it has not yet been decided [in the Circuit] 'whether a § 1981 claim lies against an individual defendant not a party to a contract giving rise to a claim'" while nonetheless reiterating that the Circuit has "accepted that § 1981 liability will lie against an individual defendant if that individual is 'essentially the same as the [contracting party] for the purposes of complained-of conduct'") (citing Felton v. Polles, 315 F.3d 470, 481 (5th Cir. 2002)).

[31] Powell v. Am. Remediation & Envt'l, Inc., 618 F. App'x 974 (11th Cir. 2015) (faulting district court for having "overlooked the fact that [while] '[i]ndividual capacity suits under Title VII are . . . inappropriate [since] [t]he relief granted under Title VII is against the employer, not individual employees whose actions would constitute a violation of the Act' . . . [A]n employee may be held personally liable under 42 U.S.C. § 1981 for intentionally infringing rights that statute protects.") (citing Busby v. City of Orlando, 931 F.2d 764, 772 (11th Cir. 1991); Faraca v. Clements, 506 F.2d 956, 595 (5th Cir. 1975)).

[32] *See, e.g.*, Plymale v. Dyer, 837 F. Supp. 2d 1077, 1086-89 (E.D. Cal. 2011) (agreeing that where a plaintiff "establish[es] that [a] defendant was involved personally in . . . adverse action and intentionally infringed on Section 1981 rights," such individual defendants would bear personal liability under § 1981, before assessing evidence and finding no such personal involvement).

II. CORPORATE LEADERSHIP'S LIABILITY TO SHAREHOLDERS

Above and beyond Section 1981's direct assignment of personal liability to the corporate actors responsible for a company's discriminatory contracting decisions, the structure of American corporate law strongly suggests that officers and directors face personal liability for corporate discrimination for a broader reason: our law holds them personally responsible for harming their corporations through a decision to illegally discriminate.

Corporations are creatures of state law, leaving the duties of corporate officers defined by each state's discrete corporate code. In theory, this could mean that the obligations of American corporate officers and directors could vary across each of the fifty states, not to mention the District of Columbia and the other sovereign or quasi-sovereign entities enjoying the power to charter corporations.[33] But in practice, the corporate codes show remarkable convergence on this point. Most relevantly, all those I have examined (a) impose fiduciary obligations on officers and directors; (b) include among them—however styled—a duty to conduct business lawfully; and (c) exempt from the usually applicable business-judgment rule an intentional decision to violate substantive law.[34]

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[33] All sovereign native American tribes have this power, as do incorporated overseas territories (such as Puerto Rico) and unincorporated overseas territories (such as American Samoa).

[34] A number of examples are discussed in depth below. To matter-of-factly state that *all* American jurisdictions share these rules would require a comprehensive survey of all such jurisdictions. While I have not verified the law of *every* American jurisdiction, the pattern appears clear from the concurrence on at least one of these points (without known exception) of:

1. California (CAL. CORP. CODE § 204 (specifying that corporations "may not eliminate or limit the liability of directors (i) for acts or omissions that involve . . . a knowing and culpable violation of law")),
2. Delaware (described in body text, below),
3. Illinois (*e.g.*, Davis v. Dyson, 900 N.E.2d 698, 713-14 (Ill. App. 2008) ("[A] violation of a statute . . . that has caused detriment to the organization . . . also constitutes a breach of fiduciary duty.")),
4. Louisiana (*e.g.*, Fair Farms, Inc. v. Holt, 124 So.3d 25, 34 n.8 (La. App. 2013) (citing La.R.S.12:96) (provision subsequently amended in 2015 to La.R.S. 12:1-831-32) (continuing to bar indemnification of officers or directors who violate their duty of loyalty, intentionally inflict harm on the corporation, or intentionally violate criminal law)),
5. Massachusetts (Harhen v. Brown, 730 N.E.2d 859, 866 n.7 (Mass. 2000) (recognizing that where challenged action or inaction "is an illegal act or results in the continuation of an illegal act, the business judgment rule does not apply")),
6. Nevada (Kahn v. Dodds (*In re* AMERCO Derivative Litig.), 252 P.3d 681, 700 (Nev. 2011) ("[T]o show that a director breached his or her fiduciary duty, a shareholder must

As a result, it appears that American corporate law's consensus holds personally liable the officers and directors who adopt, implement, or fail to eliminate discriminatory policies.

A. Fiduciary Duty to Conduct Lawful Business

Among the fiduciary duties state laws impose on corporate officers and directors are duties of loyalty and of care. While different states' courts describe it differently, they consistently hold that there is a duty to comply with substantive law that falls under one or the other of these duties.

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prove that the director's 'act or failure to act constituted a breach of his or her fiduciary duties' and that the 'breach of those duties involved intentional misconduct, fraud or a knowing violation of the law.'"); *In re* Allegiant Travel Co. Stockholder Derivative Litig., 2020 U.S. Dist. LEXIS 239566, *14-*16 (D. Nev. 2020)),

7. New Jersey (N.J. STAT. ANN. § 14A2-7(3) (barring corporations from "reliev[ing] a director or officer from liability for any breach of duty based upon an act or omission . . . involving a knowing violation of law")),
8. New York (Roth v. Robertson, 118 N.Y.S. 351, 353 (N.Y.S. 1909) (holding "directors and officers of a corporation [who] engage[d] in *ultra vires* transactions" through illegal bribes "jointly and severally liable"); *In re* Leasing Consultants, Inc., 592 F.2d 103, 110 (2d Cir. 1979) ("New York courts have recognized that commission by a corporation of illegal acts, even if intended to be advantageous to the corporation, may entail hazards to the corporation [and] its stockholders . . . who may, therefore seek relief in court.")),
9. North Carolina (Seraph Garrison, LLC v. Garrison, 787 S.E.2d 398, 406-7 (N.C. Ct. App. 2016)) ("[A] director or officer's failure to ensure the corporation is operated according to law amounts to a breach of fiduciary duty. . . . [T]he business judgment rule cannot protect defendant's failure to remedy problems he both created and ignored.")),
10. Washington (discussed in body text, below), and
11. Wyoming (*see* WYO. STAT. §§ 17-11-110 (holding officers and directors liable for losses from "willful misconduct"), 17-16-202 (barring articles of incorporation from eliminating personal liability for an "intentional violation of criminal law"), and 17-19-842 (specifying that exemption of officers from liability of corporations "does not affect individual liability for intentional torts or illegal acts")).

Federal courts have—without contradiction by any relevant state forums—similarly interpreted the laws of at least:

1. Florida (*e.g.*, Amerifirst Bank v. Bomar, 757 F.Supp. 1365, 1376-77 (S.D. Fla. 1991) ("The Amended Complaint alleges throughout that Defendants acted . . . illegally . . . . If true, these allegations would take the Defendants' management decisions beyond the protection of the business judgment rule.") and
2. Texas (*In re* Life Partners Holdings, Inc. S'holder Derivative Litig., 2015 U.S. Dist. LEXIS 168198, *62-*63 (W.D. Tex. 2015) ("If a disinterested director approves a corporate act that violates positive law with 'actual knowledge' of its illegality, he is liable for breach of fiduciary duty, which, as a 'knowing violation of law,' cannot be exculpated.")).

Take—as almost all state courts do—Delaware law as exemplary of the pattern. Delaware Chancery Courts describe the duty to comply with known law as a species of "the duty of loyalty," which can be breached by "acting in bad faith."[35] They reason that while "Delaware law allows corporations to pursue diverse means to make a profit, [it imposes] a critical statutory floor, which is the requirement that Delaware corporations only pursue 'lawful business' by 'lawful acts.'"[36] As the same Delaware court concluded:

> In short, by consciously causing the corporation to violate the law, a director would be disloyal to the corporation and could be forced to answer for the harm he has caused. Although directors have wide authority to take lawful action . . . they have no authority knowingly to cause the corporation to become a rogue, exposing the corporation to penalties from criminal and civil regulators.[37]

Every other state I have examined finds its way to a parallel interpretation of its corporate code. By way of geographically representative examples, despite their dissimilarities, both North Carolina and Washington State so read their statutes.[38]

Accordingly, American fiduciary law appears to uniformly require officers and directors to abide by substantive law in how they run a corporation. As with other fiduciary principles, this one is usually policed by shareholders bringing derivative suits in the name of the corporation they partly own.

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[35] City of Hialeah Emples. Ret. Sys. v. Begley, 2018 Del. Ch. LEXIS 1442, *10 (Del. Ch. 2018).

[36] *Id.* (citing *In re* Massey Energy Co., 2011 Del. Ch. LEXIS 83, *20 (Del. Ch. 2011)).

[37] *Id.* (quoting Desimone v. Barrows, 924 A.2d 908, 934-35 (Del. Ch. 2007)). This reasoning highlights the availability of a theory largely paralleling the right of shareholders to derivatively assert claims for fiduciary breach against officers and directors adopting, implementing, and retaining policies they know to violate substantive law: that such actions are definitionally ultra vires. Because, as another Delaware Chancery Court memorably put it, "this state does not 'charter lawbreakers,'" *no* illegal action by such officers or directors can be authorized actions on behalf of a corporation. Kanell v. Niv, 2017 Del. Ch. LEXIS 640, *50 (Del. Ch. 2017). The point has been further developed in other jurisdictions, including Washington State. Harstene Pointe Ass'n v. Diehl, 979 P.2d 854 (Wash. App. 1999) ("[T]o hold that [a member's] challenge is barred by ultra vires would be to hold the regularly adopted corporate procedures a nullity. If, as [the chartered enterprise] suggests, [the Washington statute under which it was organized] prevents [the member's] challenge, the corporation would be free to disregard its own bylaws . . . . In short, the corporate articles and bylaws would be largely meaningless.").

[38] *See* Durand v. HIMC Corp., 214 P.3d 189, 199 (Wash. Ct. App. 2009) (approving of an action against officers and directors who authorized intentional illegal actions, where "the legislature has specifically expressed the public policy that" such acts are illegal); *Seraph Garrison*, 787 S.E.2d at 406 (finding ". . . a director or officer's failure to ensure the corporation is operated according to law amounts to a breach of fiduciary duty").

B. Exception to Business Judgment Rule for Intentional Violations of Law

Normally, a challenge to a corporate act as a fiduciary breach would need to overcome the high hurdle imposed by the business judgment rule. That rule generally protects corporate officers and directors from personal liability for decisions they make in the exercise of their reasonable business judgment that such acts would benefit a corporation. However, just as every state I've examined carves out knowing decisions to violate substantive law from the universe of allowed options for corporate fiduciaries, every state I've examined that has addressed the issue also carves out such decisions from the application of the business judgment rule.

Again, Delaware cases provide a clear explanation. "Under Delaware law, a fiduciary may not choose to manage an entity in an illegal fashion, even if the fiduciary believes that the illegal activity will result in profits for the entity."[39] More pointedly, "a fiduciary of a Delaware corporation cannot be loyal to a Delaware corporation by knowingly causing it to seek profits by violating the law."[40] And, again, other states agree. Washington courts, for example, have similarly rejected assertions of the business judgment rule to shield intentional violations of law for more than a decade.[41]

This makes sense. After all, there is a deeper question at issue when an agent decides to expand corporate operations to sell crack than whether he reasonably anticipates crack sales to prove profitable. The same principle applies to all other corporate decisions to knowingly violate substantive law. The business judgment rule, which otherwise would shield such decisions from Monday morning quarterbacking, simply does not apply when legislatures have declared the judgment at issue verboten.

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[39] *City of Hialeah Emples. Ret. Sys.*, 2018 Del. Ch. LEXIS at *10 (citing Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs. Inc., 854 A.2d 121, 131 (Del. Ch. 2004)).

[40] *Id.*

[41] *Durand*, 214 P.3d at 199 (denying application of the business judgment rule as a defense "because the legislature has specifically expressed the public policy" by outlawing the challenged corporate behavior); Thompson v. Datamarine Int'l, 2009 Wash. Super. LEXIS 836, *30 (Wash. Super. 2009) (holding that the defendant "breached his fiduciary duties . . . when he became aware of and permitted" illegal acts, because, "[w]hile the above actions may have been taken for the benefit of the companies, they were *ultra vires* and illegal acts").

III. ADVICE OF COUNSEL DEFENSES

Individual officers and directors will face personal liability for *knowingly* adopting, implementing, and retaining illegal, discriminatory policies. So what counts as "knowingly"?

That question could arise in litigation where individual defendants assert their reliance on the advice of counsel as a defense. How such an assertion plays out will obviously depend on the facts of each case,[42] but it will also turn on what kinds of claims the individual defendants assert their defense against. The defense may very well protect at least some individual defendants from personal liability for breaching their fiduciary duties. However, it *should not* ever protect *any* individual defendant who was personally involved in the decision to discriminate from personal liability under Section 1981.

A. Applicability and Limits of Advice of Counsel Defense in Fiduciary Breach Litigation

Since the species of fiduciary breach claim at issue relies on a showing that a fiduciary *knowingly* violated the law, a well-grounded advice of counsel defense could serve as a get-out-of-jail-free card for some officers and directors. Some, but not all.

An advice of counsel defense applies to fiduciary breaches almost everywhere.[43] It generally "requires the defendant show that he made a full

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[42] As an example of how specific facts can bear on such a defense, consider how the matter was raised—though the district court did not address it—in *NCPPR v. Schultz*, Case No. 2:22-CV-00267-SAB (E.D. Wa. 2023). That case saw a shareholder bring fiduciary breach and ultra vires claims against the officers and directors of Starbucks. The defendants sought (and obtained on other grounds) a dismissal of the action. *Id.*, Dkt. 35. But in the company's motion to dismiss, it raised the "assessments" it had "commissioned . . . former U.S. Attorney General Eric Holder Jr." to perform on "Starbucks['] progress on civil rights," including "recommendations for how Starbucks can better advance DEI." *Id.*, Dkt. 19, at pp. 4-5. As the plaintiff countered, the company never actually asserted that this supposed authority had told any individual defendant that any program at issue was legal, and the "assessments" themselves failed to include any opinion as to the legality of any policy the case discussed. *Id.*, Dkt. 26, at pp. 18-19. To the extent that any officers or directors of any corporation intend to rely on a document produced by outside counsel to support an advice of counsel defense, they should verify that the document *actually provides advice concerning the legality of the policy at issue*. Forward-looking corporations should only commission and pay for the prophylactic work of outside counsel that provides advice on the (il)legality of such policies.

[43] *E.g.*, Aimone v. Aimone, 529 P.3d 35, *P33 (Wyo. 2023) ("[R]eliance on advice of counsel can be a defense to an alleged breach of a fiduciary duty" when a fiduciary "rel[ies] in good faith upon opinions, reports, statements or other information provided by another person that [he] reasonably believes is a competent and reliable source for the information.") (internal citations

disclosure of all material facts to his attorney and that he then relied 'in good faith on the specific course of conduct recommended by the attorney.'"[44] Generally, even where a defendant disclosed all relevant facts and followed a lawyer's advice, the defense will apply only if that lawyer was competent and if a reasonable person would have relied on his advice.[45]

In making such a determination, a court would likely consider whether the reliance was undertaken "in good faith." The common law of trusts (from which the states' corporate laws' fiduciary requirements arose) has long provided that fiduciaries "may rely on the advice of counsel when reasonably justified under the circumstances."[46] This makes the "fundamental question" "whether a prudent [fiduciary] in those particular circumstances would have acted in reliance on counsel's advice. Of course, reliance would be improper if there were significant reasons to doubt the course counsel suggested."[47]

As Delaware courts have explained, not all defendant reliance on the advice of counsel will trigger the defense because "[o]btaining advice of counsel . . . is not dispositive" in determining whether "a fiduciary is not acting disloyally."[48] Yes, "[t]aking the advice of legal counsel . . . evidences prudence," but "[r]eliance . . . is not a complete defense . . . [since] that would reward a [fiduciary] who shopped for legal advice that would support the [fiduciary]'s desired course of conduct or who otherwise acted unreasonably in procuring or following legal advice."[49]

While the exact parameters of unreasonably relying on legal advice have not been fully mapped, it is sufficiently clear that "*subjective* good faith

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omitted); Hyde Park Venture v. FairXchange, LLC, 292 A.3d 178, 207 (Del. Ch. 2023) ("[D]irectors benefit from legal advice about what course of action to take, and they gain a potential affirmative defense in the form of reliance on advice of counsel, which renders them 'fully protected' under Delaware law.") (internal citations omitted).

[44] U.S. v. Bush, 626 F.3d 527, 539 (9th Cir. 2010) (citing U.S. v. Ibarra-Alcarez, 830 F.2d 968, 973 (9th Cir. 1987)).

[45] *See, e.g.*, New Phoenix Sunrise Corp. & Subs. v. Comm'r, 408 F. App'x 908, 917-18 (6th Cir. 2010); Litt v. Wycoff, 2003 Del. Ch. LEXIS 23, *28 (Del. Ch. 2003) ("There can be no personal liability of a director for losses arising from 'illegal' transactions if a director were financially disinterested, acted in good faith, and relied on advice of counsel reasonably selected in authorizing a transaction.") (citing Gagliardi v. Trifoods Int'l, 683 A.2d 1049, 1051 n.2 (Del. Ch. 1996)).

[46] Clark v. Feder Semo & Bard, P.C., 739 F.3d 28, 31-32 (D.C. Cir. 2014) (citing Restatement (Third) of Trusts § 77 cmts. b and b(2) (2005); George G. BOGERT ET AL., THE LAW OF TRUSTS AND TRUSTEES § 541 (2013)).

[47] *Id.* at 32 (citing Restatement (Third) of Trusts § 77 cmt. b(2); BOGERT, *supra* note 46, § 541 & n.57).

[48] Paradee v. Paradee, 2010 Del. Ch. LEXIS 212, *28 (Del. Ch. 2010).

[49] *Id.* at *29 (citing Restatement (Third) of Trusts § 77 cmt. b(2) (2007)).

standing alone is not a defense" when such reliance "fell short of *reasonable* standards."[50] This means that even if a fiduciary acted in reliance on legal advice he actually believed to be valid, he cannot enjoy the defense if his belief was unreasonable. It is worth noting that the opposite should not be inferred: subjective *bad* faith (reliance on advice a fiduciary does *not* actually believe to be valid) should negate a reliance on the advice of counsel defense *even where* a hypothetical reasonable fiduciary would have followed that advice.[51]

This distinction means that an advice of counsel defense to a fiduciary breach claim against officers and directors who adopt, implement, or retain discriminatory policies could pan out differently for different defendants. What a non-lawyer defendant could reasonably rely on may well differ from what a lawyer defendant could accept as reasonable legal advice. Put differently, in litigation of such claims, all non-lawyer individual defendants' first line of defense would almost surely be to blame their lawyer co-defendants (especially those in a general counsel's office) for their decisions in terms that would most likely leave those co-defendants fully exposed to liability.[52]

B. Inapplicability of Advice of Counsel Defense in Section 1981 Litigation

However applicable an advice of counsel defense may be in shareholder derivative litigation over the harms worked by officers' and directors' fiduciary breaches, that defense will have *no bearing* on the litigation of Section 1981 claims against those directly involved in contractual discrimination.

Wheaton-Haven, the foundational court of appeals case referenced above, explains why. Section 1981 created a statutory tort. "Generally, a tortfeasor

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[50] *Id.* (emphases added).

[51] *Cf.* U.S. ex rel. Schutte v. SuperValu Inc., 143 S. Ct. 1391, 1401 n.5 (2023) (ruling subjective belief in falseness of a submission was sufficient to trigger False Claims Act liability regardless of the correctness of that belief, while highlighting that the Court was not addressing the converse situation where a defendant subjectively believed its submission to be correct despite "an unjustifiably high risk of illegality that was so obvious it should have been known, even if the defendant was not actually conscious of that risk").

[52] Another way to state this point would be to imagine the cause of action a non-lawyer co-defendant or corporation would assert against a general counsel who unreasonably advised of the legality of an illegal policy (or unreasonably allowed either the corporation or its officers and directors to unreasonably rely on the advice of outside counsel). At a minimum, the corporation and non-lawyer co-defendants would have a malpractice claim against the general counsel for providing unreasonable legal advice (or for allowing reliance on the unreasonable legal advice of outside counsel). Such a claim would squarely differentiate the reasonableness of the lawyer defendant's reliance on advice of counsel from that of any non-lawyer defendants, in ways that the lawyer defendant could not defend by citation to the mere existence of outside counsel's advice devoid of an assessment of its content.

who acted intentionally cannot defend on the ground that he mistook the law."[53] Mistaking it in reliance on a lawyer changes nothing.[54] "Due diligence is a defense for corporate directors who are charged with failing to exercise reasonable care. Its genesis is the law of negligence."[55] Those root cases about the duties of fiduciaries do "not support the contention that a director may violate the law with impunity if he relies on counsel."[56]

IV. PUBLIC POLICY AGAINST COVERAGE OR INDEMNIFICATION OF INDIVIDUAL DAMAGES LIABILITY

Should one expect the economic incidence of liability to actually fall on individual defendants? After all, many (if not most) corporations maintain D&O insurance to protect their officers and directors from job-related liabilities, and even more provide for the indemnification of such officers and directors by the corporation for the same. But as a matter of public policy, generally speaking, no corporation or corporate insurer *can* cover or indemnify an award of damages that results from an officer or director knowingly violating the law.

For more than a century, courts have rejected as contrary to public policy contracts to indemnify or insure parties for their own intentional violations of law.[57] For this reason, courts routinely note that enforcing contracts that would exculpate wrongdoers for intentional illegal acts is incompatible with laws prohibiting those acts.[58] This makes sense, as a policy covering damages

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[53] *Wheaton-Haven*, 517 F.2d at 1143.

[54] *Id.* at 1146 ("Their ignorance of the law, though engendered by lawyers' advice and corroborated by lower federal courts, is no defense.").

[55] *Id.* at 1144.

[56] *Id.*

[57] *E.g.*, Goldman v. Mitchell-Fletcher Co., 141 A. 231, 235 (Pa. 1928) (despite reining back public policy against indemnity for *negligent* torts, reiterating that the "rule that no contribution lies between trespassers applies only to cases where the persons have engaged together in doing wantonly or knowingly a wrong") (citing Acheson v. Miller, 2 Ohio St. 203 (Ohio 1853)); Sutton v. Morris, 44 S.W. 127, 127 (Ky. 1898) ("Where there has been an intentional violation of law, or where the wrongdoer is presumed to have known that the act is unlawful, no right of contribution existed."); Spalding v. Admin. of Oakes, 42 Vt. 343, 349 (Vt. 1869) ("The rule that there can be no contribution among wrong-doers . . . applies properly only to cases where there has been an intentional violation of law.") (internal citation omitted).

[58] Banc of Am. Sec. LLC v. Solow Bldg. Co. II, LLC, 847 N.Y.S.2d 49, 53 (1st Dep't 2007) ("The common business practice of limiting liability by restricting or barring recovery by means of an exculpatory provision . . . is accorded judicial recognition where it does not offend public policy; however, that policy does not extend to acts that are either 'willful or grossly negligent.'") (internal citations omitted).

resulting from intentional violations of law is better described as a criminal conspiracy than as an insurance arrangement.

Given this general rule, officers and directors should consider the likelihood that, should claims against them arise and be fully litigated,[59] the resulting liabilities' incidence would almost surely fall *entirely* on their shoulders.[60] Here, personal liability really should mean *personal* liability.

V. POTENTIAL RAMIFICATIONS: A NOT-SO-HYPOTHETICAL SCENARIO

Consider the following hypothetical:

Imagine a corporation's leadership publicly committed itself to remedying systemic, society-wide inequalities in America and to "doing better" in terms of its own internal, racially-measured, demographic diversity. Imagine that its leadership specified that it would require the pursuit of so-called "equitable hiring practices" to avoid hiring candidates that were white or male at a rate greater than those groups' share of the whole, undifferentiated population (without consideration of the demographics of the relevant pool of qualified, interested applicants) and promised to integrate diversity metrics into its structure to assure "accountability from individual employees all the way to our CEO." Imagine it hired a Chief Diversity and Inclusion Officer (a "CDO") and entrusted him with both management of the company's recruitment policies and oversight of its pursuit of greater workforce diversity (measured through racial demographics).

Imagine this company saw an executive-level vacancy arise and conducted a nationwide talent search to fill that vacancy. Imagine a white male applicant applied, underwent rounds of interviews, and emerged as what the company's emails referred to as the "frontrunner" with "resounding," positive feedback

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[59] This qualification is material. Before a judgment, an insurer's duty to defend would require coverage of an alleged claim asserting an intentional violation of law (at least pending a reservation of rights by the insurer). However, if an individual defendant neither settled nor defeated that claim, not only would the prohibition of indemnification kick in to deny coverage to the resulting damages, but it would also kick in to require the liable defendant to reimburse the costs of his defense.

[60] This likelihood remains a likelihoood rather than a certainty, in part due to the tension between (1) Section 1981 cases attributing individual liability to individual directors directly involved in acts constituting violations of law, even those lacking knowledge of the acts' illegality, and (2) insurance law cases requiring an intentionally wrongful act to bar indemnification. One could imagine a court differentiating for these purposes the willfulness of an *act* from the willfulness of the *violation* resulting from that act. Of course, in spotting-the-issue for officers and directors, it is equally true to say that a court would stand on solid ground in *refusing* to carve out the intentional acts sufficient to generate personal liability under Section 1981 from the willful or grossly negligent acts (usually a larger set, clearing a lower bar) that are sufficient to bar indemnification.

from the "leadership team" for his selection. Imagine that the company offered this applicant a position, with a stated salary (including a signing bonus and a grant of stock), and—on his raising follow-up questions—emailed a proposed benefits package the same day, along with a promise of a final, comprehensive offer to come the next day.

Imagine that this final offer never came because the CDO intervened to block the hire and to insist on the selection of a "more diverse" candidate. Imagine that, eventually, the company decided to go in a "safer direction" by hiring a black woman for the role.

One might expect from the foregoing discussion that the applicant might sue, challenging the open racial discrimination pursued against him in employment contracting. One might anticipate that, when he did, he would sue not only the company (under Title VII of the Civil Rights Act of 1964 and Section 1981) but also the CDO in his personal capacity (under Section 1981). One might predict that—at least should he prevail—shareholders might pursue the matter further by suing the directors who adopted and retained the policies the CDO implemented that gave rise to the corporate liability for his intentional violation of very well-settled law (along with the other officers involved in the implementation of those policies).

As it turns out, with the exception of that last-stated future possibility, this isn't a hypothetical. These are essentially the alleged facts of *Kascsak v. Velasco*, a case pending in the Western District of Texas.[61] Admittedly, in March 2024, the district court dismissed the Section 1981 claim against the CDO,[62] but it did so *solely* for lack of personal jurisdiction in Texas over the CDO (seemingly a New York resident, working in the employer's New York office, never alleged to have entered or done business in Texas), while rejecting the argument that the Section 1981 claim asserted against him was otherwise inadequate to survive Rule 12 dismissal practice.

Kascsak thus underscores both the current state and clear current direction of the law. Presumably, Mr. Kascsak's counsel will refile his personal claims against the CDO in the Southern District of New York. Given the facts alleged, the Western District of Texas's ruling, and the precedents referenced above—including especially the Second Circuit's *Whidbee v. Garzarelli Food Specialties, Inc.*—one would expect that when that suit follows, it will survive a dismissal motion. Should it not settle, and should the plaintiff prove his

[61] Case No. 1:23-cv-1373.

[62] *Id.*, Dkt. 19.

allegations, one should expect it to culminate in a ruling against the CDO. Meanwhile, if the Western District of Texas case does not settle and instead goes forward to judgment against the company, one should expect shareholders to file a successor case against the broader set of officers and directors who adopted, implemented, and retained the underlying policies of intentional racial discrimination. One should expect that, following judgment(s), the liabilities at issue will be personal liabilities that neither the company nor its insurer will cover, and that one, the other, or both will then pursue from those same liable parties the reimbursement of the incurred costs of defending the suit(s).

VI. CONCLUSION

The legal world has already begun paying heed to the illegality of the policies of faddish discrimination that have sprouted across corporate America over the past decade. The corporate world should pay more heed to the liabilities these illegal policies create—especially for the individual officers and directors who could eventually bear the costs of those policies in their personal capacities.

Other Views:

- Michael J. Yelnosky, *Racial Preferences in Employment After* Students for Fair Admissions v. Harvard, 112 GEO. L.J. ONLINE 74, *available at* https://web.uri.edu/schmidt/wp-content/uploads/sites/2186/Michael-Yelnosky-GLJOFinal.pdf.

- Michael J. Fellows, *Civil Rights—Shades of Race: An Historically Informed Reading of Title VII*, 26 W. NEW ENG. L. REV. 387 (2004), *available at* https://digitalcommons.law.wne.edu/lawreview/vol26/iss2/5/.

- *DAGA Co-chairs Condemn Republican AG Letter That Threatens Businesses over Diversity*, DEMOCRATIC ATT'YS GEN. ASS'N (July 14, 2023), https://dems.ag/daga-co-chairs-condemn-republican-ag-letter-that-threatens-businesses-over-diversity/.

THE CURTAIN FALLS ON *CHEVRON*: WILL THE *CHEVRON* TWO-STEP GIVE WAY TO A SIMPLER *LOPER BRIGHT*-LINE RULE?*

RONALD A. CASS**

Traditionally, administrative law cases don't make news. Instead, they make snooze. They can be exciting to a relatively small circle of "ad. law nerds," as we're affectionately called, but they're not the stuff of demonstrations outside the Supreme Court. Even casual Court observers can remember quite a few constitutional law decisions—on topics such as integration, criminal defendants' rights, voting rights and rules, abortion, marriage rights (I could go on)—that sparked anger and joy on different sides. Many of these led to demands for impeachment of Justices or restructuring of the Supreme Court by those who thought the Court got the matter wrong. But administrative law? Not so much.

Yet, against all odds, the Court's 1984 decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[1] not only became well-known in judicial and academic circles (it is, by far, the most written-about and most cited administrative law decision ever).[2] It also became a matter of public note, controversy, and partisan debate—something nominees for the Supreme Court were questioned about and pundits offered prescriptions for

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

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[1] 467 U.S. 837 (1984).

[2] *See* Christopher J. Walker, *Most Cited Supreme Court Administrative Law Decisions*, YALE J. ON REGUL. NOTICE & COMMENT (Oct. 9, 2014), https://www.yalejreg.com/nc/most-cited-supreme-court-administrative-law-decisions-by-chris-walker.

altering, strengthening, or eliminating. This essay briefly recounts *Chevron*'s story, details how it ended, and anticipates what might come next.

I. *CHEVRON*'S BACKGROUND AND BEGINNING

Some cases are instantly notable and controversial. *Chevron* wasn't one of these cases. It was decided unanimously by six Justices (the missing Justices weren't absent for any reason connected to the essence of the decision). And nothing in the Court's twenty-seven-page opinion immediately suggested its future importance.[3]

The *Chevron* opinion focused almost exclusively on the details of a particular agency decision, scrutinizing the basis for the policy-driven framework through which the agency chose to implement one statutory requirement for regulating new or modified "stationary sources" of pollutants.[4] The central question was whether the law at issue (the Clean Air Act, or CAA) required the Environmental Protection Agency (EPA) to implement regulations that separately controlled emissions from each individual smokestack or permitted it to control emissions from an entire plant taken as a whole (an approach known as the "bubble" concept).[5] The details of that inquiry, however, have (for the most part) been roundly ignored. Instead, *Chevron* became famous for what it said about the terms for judicial review of administrators' decisions, a matter generally governed by the Administrative Procedure Act (APA)—a World War II-era law that sets ground rules for most federal agency procedures.[6]

The APA directs that "[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret

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[3] *See, e.g.*, Gary S. Lawson & Stephen Kam, *Making Law Out of Nothing At All: The Origins of the* Chevron *Doctrine*, 65 ADMIN. L. REV. 1 (2013); Peter M. Shane & Christopher J. Walker, Chevron *at 30: Looking Back and Looking Forward*, 83 FORDHAM L. REV. 475, 477 (2014) ("When Justice Stevens, writing for the Court in 1984, articulated the *Chevron* two-step approach, at first blush it may have seemed like a fairly straightforward rule that would be easily administrable in the lower courts.").

[4] *See Chevron*, 467 U.S. at 859–66.

[5] The term came from imagining that the entire industrial plant site was covered by a plastic bubble with one hole at the top. The question, then, would be what emissions were permitted from all of the site's smokestacks taken together.

[6] The story of the *Chevron* decision, its apparent meaning to those who authored it, and its evolution to canonical status as a prescription for judicial review are well-chronicled and critically evaluated in many writings. For a particularly comprehensive and thoughtful account, see, e.g., THOMAS W. MERRILL, THE *CHEVRON* DOCTRINE: ITS RISE AND FALL, AND THE FUTURE OF THE ADMINISTRATIVE STATE (2022).

constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."[7] It adds that courts reviewing agency action shall "hold unlawful and set aside . . . agency action . . . found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."[8] It also declares that courts should set aside agency actions found to be "arbitrary, capricious, [or] an abuse of discretion."[9] And it permits courts to overturn agency factfinding in many settings only if a court finds that the agency fact determinations are not supported by substantial evidence.[10]

The APA's standard for review of fact-finding and its instruction for review of exercises of discretion both imply that the law calls for a degree of judicial deference to agency decisions. The "substantial evidence" test means courts defer even when they might have made a different determination on some critical fact. So, too, limiting judicial reversal of other decisions to instances where a court finds arbitrariness, capriciousness, or abuse of discretion implies a recognition that the law commits discretion to agencies and requires judicial deference to them unless there are significant departures from standard exercises of discretion. The instruction respecting the meaning of statutes, however, doesn't include any limitation on judicial decisions, nor does the general statement that "the reviewing court shall decide all relevant questions of law [and] interpret constitutional and statutory provisions."[11]

The obvious reading of the statute, in keeping with the weight of pre-APA judicial decisions, is that courts don't defer on matters of law, including matters of interpretation, but they do defer on factfinding and matters of discretion.[12] Put differently, although APA directions for judicial review don't include the word "deference," the law plainly directs courts to give some degree of deference to agency decisions when statutes grant an agency *fact-finding* authority or discretion over *implementation* of a particular law but not to

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[7] 5 U.S.C. § 706.

[8] *Id.* § 706(2)(C).

[9] *Id.* § 706(2)(A).

[10] *See id.* § 706(2)(E).

[11] *Id.* § 706.

[12] *See, e.g.*, Burnet v. Chi. Portrait Co., 285 U.S. 1, 16 (1932) ("The court is not bound by an administrative construction, and if that construction is not uniform and consistent, it will be taken into ac[c]ount only to the extent that it is supported by valid reasons.") (citations omitted)). To be sure, some cases, notably *NLRB v. Hearst Pubs., Inc.*, 322 U.S. 111 (1944), showed a degree of deference to agency determinations, but they generally characterized those decisions as matters of "application" in contrast to matters of "interpretation": "[u]ndoubtedly questions of statutory interpretation . . . are for the courts to resolve." *Id.* at 130-31.

give deference to agency *interpretations* of law. In the main, fact-finding is self-defining. The line between implementation and interpretation, not so much.[13]

II. DANCING AROUND *CHEVRON*'S TWO-STEP

The decision in *Chevron* didn't directly rest on the APA, but it did involve review authorized by a law with almost identical provisions on judicial review (so it's fair to consider the case as if it involved review under the APA's terms). Yet the parameters for review were not the central issue argued to the Court or addressed in the Court's opinion.

The Court spent most of its time and energy examining how the EPA implemented one of several provisions in different sections of the CAA dealing with regulation of "a stationary source" of harmful emissions.[14] The Court approached the *Chevron* case as if the law gave the EPA discretion over implementation of the relevant CAA provision. On that assumption, the Court's task was simply to review the agency's exercise of discretion to assure that it did not transgress the limits of reasonableness that generally capture requirements to set aside actions that are arbitrary, capricious, or an abuse of discretion. And the Court's extended evaluation of the EPA's decision respecting regulation of the particular category of stationary-source emissions at issue seemed unexceptional. It emphasized the policy aspects of the controversy, the fit between policy considerations and expressions of congressional concern underlying the CAA, and the EPA decision's reasonableness in fitting those considerations to the circumstances of the regulation at issue.

At the same time, the very small amount of the *Chevron* opinion that explained—or, more accurately, suggested—how the Court approached *its* review function led to overlapping waves of confusion, enthusiasm, and outrage as agencies, judges, lawyers, and professors grappled with what a few passages and phrases in *Chevron* meant. In the course of two paragraphs and two important footnotes, *Chevron* declared that "the judiciary is the final authority on issues of statutory construction,"[15] and that if a court, "using traditional tools of statutory construction, finds that Congress had an

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[13] For discussion of the difference between these concepts, see, e.g., Ronald A. Cass, *Fixing Deference: Delegation, Discretion, and Deference Under Separated Powers*, 17 NYU J.L. & LIBERTY 1, 50–55 (2024); Lawrence B. Solum & Cass R. Sunstein, Chevron *as Construction*, 105 CORNELL L. REV. 1465, 1471–72 (2020).

[14] *See Chevron*, 467 U.S. at 859–66.

[15] *Id.* at 843 n.9.

intention on the precise question in issue, that intention . . . must be given effect."[16] On the other hand, if the reviewing court does not find a clear intention on the precise issue—if the court concludes that the statute is silent or ambiguous on that issue—*Chevron* directs that a court should only decide whether the agency administering the statute made a reasonable decision about the law's meaning.[17] This completes the *Chevron* Two-Step: (1) the court sees if the law has a clear meaning; if not, (2) the court asks if the agency's construction of the law is reasonable, a conclusion that mandates acceptance of the agency's position.

The way the opinion reads, however, isn't entirely in line with this vision of the *Chevron* Two-Step. Immediately after the statements cited above, the Court explained its view by quoting its decision a decade earlier in *Morton v. Ruiz*: "The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."[18] This statement casts the agency as *implementing* the law, making the question not the propriety of an *interpretation* of law but of a policy choice on how to give it effect.

Yet the footnote that immediately precedes that statement instructs that courts should uphold an agency's reasonable "construction" of the law, even if it is not "the reading the court would have reached if the question initially had arisen in a judicial proceeding."[19] In other words, unlike the text, the note treats the agency as having primacy in the *interpretive* task. Adding to the confusion, later in the opinion, *Chevron* returns to the interpretation v. implementation distinction to underline its view of the court as deferring not to the agency as interpreter of law but as implementer within the ambit of a reasonable exercise of discretion—and only within bounds set by law as interpreted by the courts. *Chevron*'s final substantive explanation of its test declares:

> When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail.[20]

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[16] *Id.*
[17] *Id.* at 843 n.11.
[18] *Id.* at 843 (quoting Morton v. Ruiz, 415 U.S. 199, 213 (1974)).
[19] *Id.* at 843 n.11.
[20] *Id.* at 866.

The specific phrases of *Chevron*'s directions on how courts should review agency actions administering laws and what those directions meant for court decisions—and, derivatively, agency actions—led to divergent readings of the decision. Putting the *Chevron* Two-Step into practice spawned a web of explanations, applications, exceptions, and a whole separate genre of academic commentary.[21] This outpouring of administrative law provided enough material to occupy a huge chunk of administrative law casebooks (83 pages of the most recent edition of Cass, Diver, Beermann & Mascott, for example).[22] Differences over what the decision said and how it applied became increasingly contentious. And, over forty years, *Chevron*'s relatively modest effort at articulating how the Court reviews agency decisions evolved into a public *cause célèbre*.

III. DEFINING *CHEVRON*'S MIS-STEP: *LOPER BRIGHT* IDEAS

After growing calls for the courts to clarify the framework for judicial review, including from some of the Justices,[23] the Supreme Court granted

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[21] *See*, *e.g.*, Kenneth A. Bamberger & Peter L. Strauss, Chevron*'s Two Steps*, 95 VA. L. REV. 611 (2009); Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779 (2010); Cary Coglianese, Chevron*'s Interstitial Steps*, 85 GEO. WASH. L. REV. 1339 (2017); Daniel J. Hemel & Aaron L. Nielson, Chevron *Step One-and-a-Half*, 84 U. CHI. L. REV. 757 (2017); Kristin E. Hickman & David Hahn, *Categorizing* Chevron, 81 OHIO ST. L.J. 611 (2020); Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597 (2009); Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight,"* 112 COLUM. L. REV. 1143 (2012); Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187 (2006).

[22] RONALD A. CASS, COLIN S. DIVER, JACK M. BEERMANN & JENNIFER L. MASCOTT, ADMINISTRATIVE LAW: CASES AND MATERIALS 206–289 (Aspen Publ'g, 9th ed. 2024).

[23] By the time the Court granted cert. in *Loper Bright* to address the state of *Chevron*, Justices (past and present) Gorsuch, Kavanaugh, Kennedy, Scalia, and Thomas had expressed skepticism about the Court's *Chevron* jurisprudence, and others, including Justice Alito and Chief Justice Roberts, had objected to some major applications of *Chevron* deference. So too had many lower-court judges, *see* Solar Energy Indus. Ass'n v. Fed. Energy Reg'y Comm'n, 59 F.4th 1287, 1291–93 (D.C. Cir. 2023) (Walker, J., concurring in part and dissenting in part); BNSF Ry. Co. v. EEOC, 385 F. Supp. 3d 512, 522 n.9 (N.D. Tex. 2018) (O'Connor, J.), and administrative-law scholars, *see* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 989–90 (2017); Kent H. Barnett & Christopher J. Walker, Chevron *Step Two's Domain*, 93 NOTRE DAME L. REV. 1441 (2018); Beermann, *supra* note 21; Clark Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of* Chevron*'s Step Two*, 2 ADMIN. L.J. AM. U. 255 (1988); Ronald A. Cass, *Is* Chevron*'s Game Worth the Candle? Burning Interpretation at Both Ends*, *in* LIBERTY'S NEMESIS: THE UNCHECKED EXPANSION OF THE STATE 57, 57–58 (Dean Reuter & John Yoo eds., Encounter Books 2016); Christopher J. Walker, *Attacking* Auer *and* Chevron *Deference: A Literature*

certiorari in two cases—*Loper Bright Enterprises v. Raimondo* and *Relentless, Inc. v. Department of Commerce*—strictly to resolve the question "what to do about *Chevron*?" Deciding the issue jointly under the *Loper Bright* heading, the Court announced that *Chevron* deference at its core was contrary to the underlying statutory provisions on review and to core constitutional rules as well.[24]

The Court's legal argument begins with a recapitulation of the Constitution's separated-powers framework—advancing a view that the Constitution itself limits the executive branch's ability to adjudicate, in particular by committing "the judicial power of the United States" to Article III courts.[25] Because interpretation of the law is a core component of the judicial power, Chief Justice John Roberts' opinion for the Court and both concurring opinions declare deference to agency interpretations of law inconsistent with the vesting clause of Article III as well as with our constitutional history.[26] Justice Neil Gorsuch's concurrence, although primarily focused on the issue of stare decisis, also explains *Chevron*'s tension with constitutional commands. His opinion emphasizes that requiring deference to administrators undermines the judiciary's independent authority and its obligation to "say what the law is" (in Chief Justice John Marshall's words).[27] He stresses that deference, thus, risks depriving the people of a critical protection against government manipulation of the law—a historically important consideration that was known to and noted by the Framers and provided a guiding principle for American law.[28] Justice Clarence Thomas adds in his concurrence that treating administrative action as a matter of choosing among policy options rather than giving precise meaning to the law does not improve *Chevron*'s constitutional standing. In Justice Thomas's view, it merely converts a problem of administrators unlawfully exercising *judicial* power to one of administrators unlawfully exercising *legislative* power.[29]

Review, 16 GEO. J.L. & PUB. POL'Y 103 (2018); Ann Woolhandler, *Judicial Deference to Administrative Action—A Revisionist History*, 43 ADMIN. L. REV. 197 (1991).

[24] *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

[25] *See id.* at 2257–58.

[26] *See id.* at 2257–60; *id.* at 2274–75 (Thomas, J., concurring); *id.* at 2277–79 (Gorsuch, J., concurring).

[27] *Id.* at 2275 (Gorsuch, J., concurring) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

[28] *See id.* at 2277–79 (Gorsuch, J., concurring).

[29] *See id.* at 2274–75 (Thomas, J., concurring).

While it acknowledges the importance of the constitutional framework to understanding limitations on what Congress *may* commit to agency discretion, *Loper Bright* focuses primarily on the terms of APA review—that is, on what Congress *did* commit to agencies and to courts—and that is where the analytical heavy lifting takes place. The Chief Justice's opinion for the Court takes pains to detail the history of judicial review of administrative actions, case law in the years leading up to adoption of the APA, the particular language and structure of the APA, and the original understanding of what the APA directed.[30] The opinion sums up the APA's posture on reviewing courts' duty regarding statutory interpretation this way:

> [W]hen the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is . . . to independently interpret the statute and effectuate the will of Congress subject to constitutional limits. The Court fulfills that role by recognizing constitutional delegations, "fix[ing] the boundaries of [the] delegated authority," and ensuring the agency has engaged in "reasoned decisionmaking" within those boundaries.[31]

The Court then turns to address *Chevron* head-on, making clear from the outset that *Chevron* deference "cannot be squared with the APA."[32] The chief complaint is that deference on a matter of law "defies the command of the APA that 'the reviewing court'—not the agency whose action it reviews—is to 'decide *all* relevant questions of law' and 'interpret . . . statutory provisions.'"[33] Because, on this view, *Chevron* requires "binding" deference to the agency's reading of the law, it demands that judges "*ignore*, not follow," their view of the best interpretation of the law—the opposite of the APA's command.[34] *Chevron*'s presumption that ambiguity in the relevant law reflects a commitment of authority to the agency implementing the law to determine the law's scope is, in the *Loper Bright* Court's view, not merely a fiction, but a fiction that is contrary to both fact and reason.[35]

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[30] *See id.* at 2257–63 (majority opinion).

[31] *Id.* at 2263 (internal citations omitted) (first quoting Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 27 (1983); then quoting Michigan v. EPA, 576 U.S. 743, 752 (2015); and then citing Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins., 463 U.S. 29 (1983)).

[32] *Id.* at 2263.

[33] *Id.* at 2265 (quoting 5 U.S.C. § 706 (emphasis added)).

[34] *Id.*

[35] *See id.* at 2265–68.

Justice Elena Kagan, joined in dissent by Justices Sonia Sotomayor and Ketanji Brown Jackson, urges the Court to retain *Chevron*, or at least a version of *Chevron*.[36] In addition to lamenting the abandonment of *Chevron* as a violation of principles of stare decisis, Justice Kagan argues that *Chevron* deference is consistent with basic rules of statutory construction. She states that statutes invariably have gaps and ambiguities and that, where government regulation is concerned, Congress generally prefers that those gaps and ambiguities be resolved by agencies.[37] After all, the dissent stresses, these are the entities "Congress has charged with administering the statute," and they are run by the people who have expertise in the statute's functioning—on its own and in conjunction with other laws and regulations.[38] The expertise theme looms large in the dissent, overshadowing other considerations such as what it is reasonable to assume respecting legislative intent and legislative meaning. It's safe to say that the dissenters were not ready to throw in the towel on *Chevron* deference—and probably still haven't lost all hope of a resurrection.

IV. BEYOND *CHEVRON*: THE NEW CHOREOGRAPHY OF JUDICIAL REVIEW

Looking to the future requires further clarity on both doctrinal and practical issues, most of all what *Loper Bright*'s rule is and what the reaction to *Chevron*'s demise suggests about the shape of decisions to come.

The most difficult doctrinal issue is defining the limitations on what Congress may commit to agencies. *Loper Bright* plainly assumes substantial constitutional restrictions on the assignment of authority to agencies—not only of rulemaking authority, but of adjudication authority as well. The day before the Court issued *Loper Bright*, it issued its decision in *Securities and Exchange Commission v. Jarkesy*.[39] After *Jarkesy*, the scope of at least one constitutional restraint on agency adjudication is clear: there is a Seventh Amendment right to a jury trial in civil-penalty cases.

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[36] Justice Kagan's dissent includes both a spirited defense of *Chevron* deference and an interpretation of *Chevron* deference that incorporates a number of limitations on it. *See id.* at 2294–2311 (Kagan, J., dissenting).

[37] *See id.* at 2294–95.

[38] *Id.* at 2294.

[39] 144 S. Ct. 2117 (2024).

But the extent to which Congress may assign authority to agencies to determine the mechanisms for and terms of enforcing laws remains unclear.[40] The lack of clear boundaries in this arena may be traced in part to the Court's failure to clearly delineate public and private rights, and in part to the fact that the nondelegation doctrine appears to be in flux. The division between private and public rights affects the scope of authority the Court will tolerate assigning to administrators—the executive branch generally has leeway to affect public rights, but its power is more circumscribed where private rights are at issue. Despite its importance, that division has eluded bright-line articulation for a very long time.[41] Greater clarity on how courts will review agency actions also likely requires a clear—or, at least, clear-*ish*—demarcation of what discretion can be given to agencies to implement legal mandates without running afoul of nondelegation strictures. The Court has taken stabs at clarifying boundaries on delegation with its expanded embrace of a "major questions" doctrine, most notably in its 2022 *West Virginia v. Environmental Protection Agency* decision.[42] And a minority that could grow into a majority offered its roadmap for a reinvigorated nondelegation doctrine three years before that.[43] But bringing real clarity to this issue remains a significant task, and the difficulty of that task has even prevented some skeptics of agency

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[40] For discussion of the adjudicative side of this issue, see, for example, Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts under Article III*, 65 IND. L.J. 233 (1990); William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511 (2020); Richard H. Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915 (1988); John C. Harrison, *Public Rights, Private Privileges, and Article III*, 54 GA. L. REV. 143 (2019); Daniel J. Meltzer, *Legislative Courts, Legislative Power, and the Constitution*, 65 IND. L.J. 291(1990); Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559 (2007); Martin H. Redish, *Legislative Courts, Administrative Agencies, and the* Northern Pipeline *Decision*, 1983 DUKE L.J. 197. For broader treatment of the issue, including the rulemaking side, see, for example, Cass, *supra* note 133; Ilan Wurman, *Nonexclusive Functions and Separation of Powers Law*, 107 MINN. L. REV. 735 (2022).

[41] *See*, *e.g.*, Michael Collins & Ann Woolhandler, *The Public/Private Rights Critics*, 99 NOTRE DAME L. REV. (forthcoming 2024); Harrison, *supra* note 40.

[42] 142 S. Ct. 2587, 2607–14 (2022); *id.* at 2621–24 (Gorsuch, J., concurring); *see also* King v. Burwell, 576 U.S. 473, 497 (2015) ("Congress 'does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions.'") (quoting Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001)).

[43] *See* Gundy v. United States, 588 U.S. 128, 149–73 (2019) (Gorsuch, J., dissenting); *see also* U.S. Dep't of Transp. v. Ass'n of Am. R.R., 575 U.S. 43, 61 (Alito, J., concurring); *id.* at 74–76 (Thomas, J., concurring in judgment); Paul v. United States, 140 S. Ct. 342 (2019) (Kavanaugh, J., statement respecting denial of cert.); U.S. Telecomm. Ass'n v. Fed. Comms. Comm'n, 855 F.3d 381, 419–22 (D.C. Cir. 2016) (Kavanaugh, J., dissenting from denial of reh'g en banc).

discretion from supporting a meaningful, judicially enforced nondelegation doctrine.[44]

On the statutory side, *Loper Bright* established that the courts must decide what discretion Congress has given to an agency by statute to implement the law, and it also charged courts with enforcing the boundaries of that discretion. The dissenters staked out territory for continued resistance, effectively endorsing elimination of the boundary between implementation and interpretation. They see both tasks as broadly requiring the expertise of administrators, not the skills of judges.[45]

Staying on the track laid out by the majority in *Loper Bright* will require sharpening the Court's tools for identifying what language in what context mandates what degree of discretion for those charged with implementing the law. This is the hard work of interpretation without deference. As *Loper Bright* recognizes, some words on their face suggest that the law confers discretion. For example, the Communications Act of 1934 directs the FCC to allocate broadcast frequencies and take other regulatory actions as "the public interest, convenience, and necessity" require (a phrase used more than forty times in that law).[46] But other statutory instructions are less obvious commitments of discretion to agencies.

Finding ways to make the division of tasks simpler will be helpful to a *Chevron*-less regime for judicial review. After all, *Chevron*'s allure was its promise of an easier mechanism for courts policing complex regulatory constructs — which is what made the doctrine attractive to courts of appeal (the D.C. Circuit most of all) far more than to the Supreme Court.[47] The end of an assumption of discretion for agencies to expound the details of delegated regulatory authority doesn't end the incentives of courts and agencies to find ways of making each of their tasks easier. The durability of those incentives

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[44] *See*, *e.g.*, Mistretta v. United States, 488 U.S. 361, 415–17 (Scalia, J. dissenting). *But see* Larry Alexander & Saikrishna Prakash, *Delegation Really Running Riot*, 93 VA. L. REV. 1035, 138–39 (2007); Cass, *supra* note 13, at 42–44; Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J.L. & PUB. POL'Y 147, 193–96 (2017); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 328–30, 334 (2002); David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1224–28, 1240–41 (1985); *see also* Antonin Scalia, *A Note on the Benzene Case*, 4 REGUL. 25, 28 (July/Aug. 1980).

[45] *See Loper Bright*, 144 S. Ct. at 2310–11 (Kagan, J., dissenting).

[46] *See* Communications Act of 1943, Pub. L. No. 73-416, 48 Stat. 1064 (codified at 47 U.S.C. § 151 et seq.).

[47] *See*, *e.g.*, MERRILL, *supra* note 6; Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1 (2017).

probably is reflected in the relative constancy of the percentage of cases in which the government succeeds when agency actions are challenged, something observed in studies of pre- and post-*Chevron* decisions.[48] The percentage of cases won and lost, though, doesn't account for changes to the composition of cases brought or to the conformity of agency behavior to statutory commands.[49]

Substantively, *Loper Bright* moves the law in a good direction, making it more consistent with both constitutional command and statutory instructions. But it doesn't provide a simple, easily effectuated rubric for deciding cases challenging agency decisions as inconsistent with governing legal commands. Reverting to the Supreme Court's decision in *Skidmore v. Swift & Co.*[50] does not provide the same simplicity; "*Skidmore* deference" is an oxymoron, standing for the proposition that courts should "defer" when an agency's approach is persuasive as to the meaning of the law. Nor does *Loper Bright* dramatically alter the incentives members of Congress have for favoring ambiguous statutory language, or the incentives administrative officials have for favoring particular options in implementing laws. Moreover, it remains to be seen how the new *Chevron*-less approach to review fits with the acknowledged ability of Congress to grant authority to agencies to make decisions that are not subject to judicial review.[51]

How much the new, post-*Chevron* regime changes the way law works in practice remains an open question. Despite the dissenters' protests to the contrary, fear that *Loper Bright* will usher in a less regulator-friendly atmosphere really is the heart of their argument against abandonment of the *Chevron* Two-Step. From a legal standpoint, the effect on regulation isn't the right test,

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[48] *See*, *e.g.*, Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992) (finding little change from pre-*Chevron* to post-*Chevron* success rate for government and challengers); Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984 (finding relatively small and temporary increase in government success rate following *Chevron*).

[49] *See*, *e.g.*, Linda R. Cohen & Matthew L. Spitzer, *Solving the* Chevron *Puzzle*, 57 L. & CONTEMP. PROBS. 65 (1994) (explaining increase in agency willingness to argue for questionable legal authority in response to increased judicial deference); E. Donald Elliott, Chevron *Matters: How the* Chevron *Doctrine Redefined the Roles of Congress, Courts and Agencies in Administrative Law*, 16 VILL. ENV'T L.J. 1 (2005) (finding that the composition of *decisions* challenged changed following *Chevron*, with agencies pursuing more statutorily questionable approaches to implementing law, and finding that the composition of *cases* brought on appeal also changed to exclude challenges with lower chances of succeeding post-*Chevron*).

[50] 134 U.S. 134 (1944).

[51] *See*, *e.g.*, Heckler v. Chaney, 470 U.S. 821 (1985).

as that focus mixes policy and law in just the way that prompted complaints about *Chevron*. The better question is whether judicial review freed from *Chevron* yields a method of reviewing agency action that is both lawful and practically sustainable. Put differently, it is worth waiting to see if a new dance between agencies and Congress—and agencies and courts—emerges that better hews to the Constitution's divisions between making law and implementing it, and between implementing law and interpreting it. Even if this seems to be dancing around a strong conclusion, one might say give it a minuet—and remember, wherever lines are drawn, it takes two to tango, in life and in law.

Other Views:

- Cass R. Sunstein, *The Consequences of* Loper Bright (July 8, 2024) (unpublished manuscript), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4881501.
- Sapna Kumar, *Scientific and Technical Expertise After Loper Bright*, 74 DUKE L.J. (forthcoming 2025), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4939536.
- Ian Millhiser, *The Supreme Court Just Made a Massive Power Grab It Will Come to Regret*, VOX (June 28, 2024), https://www.vox.com/scotus/357900/supreme-court-loper-bright-raimondo-chevron-power-grab.

PREDISTRIBUTION, LABOR STANDARDS, AND IDEOLOGICAL DRIFT: WHY SOME CONSERVATIVES ARE EMBRACING LABOR UNIONS (AND WHY THEY SHOULDN'T)*

ALEXANDER MACDONALD**

Common ground isn't always a good thing. For example, consider the growing popularity of "predistribution." Predistribution is an alternative to redistribution: rather than taxing people's incomes and spending the revenue on social programs, predistribution structures markets so they allocate income more evenly at the front end.[1] Though originally a progressive concept, predistribution has recently gained currency on the right.[2] Right-of-center thinkers have held it up as a way to shift power from an increasingly progressive corporate elite to an increasingly conservative blue-collar workforce.[3] These conservative thinkers have especially praised predistribution's approach to labor unions, which they say can help replace government regulation by

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

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[1] *See* Tyler Smith, *Predistribution vs. Redistribution*, AM. ECON. ASS'N (Oct. 27, 2022), https://www.aeaweb.org/research/charts/equality-predistribution-europe-us; *see also* John O. McGinnis, *Predistribution: The New Road to Serfdom*, LAW & LIBERTY (June 27, 2024), https://lawliberty.org/predistribution-the-new-road-to-serfdom.

[2] *See generally, e.g.*, SOHRAB AHMARI, TYRANNY INC.: HOW PRIVATE POWER CRUSHED AMERICAN LIBERTY—AND WHAT TO DO ABOUT IT (2023); Rob Atkinson, *Growth vs. Redistribution: The New Fault Line in U.S. Politics of Economic Policy*, AM. COMPASS (Feb. 18, 2020), https://americancompass.org/growth-vs-redistribution-the-new-fault-line-in-u-s-politics-of-economic-policy.

[3] *See* Sohrab Ahmari, *Josh Hawley's Labor Revolution*, COMPACT MAG. (Apr. 17, 2024), https://www.compactmag.com/article/josh-hawleys-labor-revolution.

negotiating workplace standards in private.[4] And that sort of bottom-up standard-setting, they argue, promotes "industrial democracy."[5]

There's only one problem: predistribution doesn't work. It is not just an academic idea ensconced in an ivory tower; it is a real-world policy prescription, and it is already being put into practice. In a dozen states and cities, local governments are establishing labor-standards boards, sectoral-bargaining schemes, and other predistributional labor models.[6] These models are constructed to circumvent federal labor and antitrust laws, which have become increasingly unpopular on the left.[7] And in practice, these models achieve few of their supposed benefits. They both increase government regulation and suppress worker voice.[8] They are, in short, everything their supporters on the right supposedly want to avoid.

Modern policy debates could stand to be a little less partisan. Ideas shouldn't be dismissed solely because they originated in opposing intellectual camps. But policies also should not be embraced solely for the sake of consensus. They should be embraced when they work—and predistributional labor policies decidedly do not. These policies do none of the things they're

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[4] *See* Wells King, *Give Workers Power to Boost Productivity, Reduce Inequality*, AM. COMPASS (Sept. 29, 2020), https://americancompass.org/give-workers-power-to-boost-productivity-reduce-inequality.

[5] *See* Oren Cass & Brad Littlejohn, *Conservatives Should Embrace Labor Unions*, PUB. DISCOURSE (Sept. 26, 2020), https://www.thepublicdiscourse.com/2020/09/71843 (interviewing Oren Cass).

[6] *See, e.g.*, SEATTLE, WASH., MUN. CODE ch. 14.23 (promulgating standards for domestic workers in Seattle); N.Y. DEP'T OF LAB., ORDER OF COMMISSIONER OF LABOR ROBERTA REARDON ON THE REPORT AND RECOMMENDATIONS OF THE 2022 FARM LABORERS WAGE BOARD (Sept. 22, 2022), https://dol.ny.gov/system/files/documents/2022/09/fwwb_signed_order_093022.pdf (outlining recommended standards for New York farm laborers); N.Y. LAB. L. § 674-a (standards board for agricultural workers); COLO. REV. STAT. § 8-13.5-205 (same); COLO. REV. STAT. § 8-7.5-104 (standards board for direct care workers); NEV. REV. STAT. 608.640 (standards board for home care workers); Detroit, Mich. Ordinance No. 2021-42 (Nov. 3, 2021) (standards board for multiple industries); CAL. LAB. CODE § 1475 (standards board for fast-food workers); *see also* David Madland, *Sectoral Bargaining Can Support High Union Membership*, CTR. FOR AM. PROGRESS (May 30, 2024), https://www.americanprogress.org/article/sectoral-bargaining-can-support-high-union-membership (describing recent burst of standard-board laws at state and local levels)

[7] *See* Cynthia Estlund, *The Case for Sectoral Co-Regulation*, 98 CHI.-KENT L. REV. 539, 540–41 (2024) (describing search of labor-left for new schemes to supplant federal labor law); ERIC POSNER, HOW ANTITRUST FAILED WORKERS 6 (2022) (pointing to the "historical neglect" antitrust law has shown for labor markets).

[8] *See generally* U.S. CHAMBER OF COM., STANDARDS BOARDS, BALLOT INITIATIVES, AND "INDUSTRIAL DEMOCRACY": HOW UNIONS ARE USING GOVERNMENT TO CIRCUMVENT THE NLRA AND END LABOR-MARKET COMPETITION (forthcoming 2024) (on file with author) (describing new models and their function).

supposed to do; and, in fact, they amplify the problems they're supposed to solve. So if conservatives want to find more common ground, they should look elsewhere.[9]

I. Old Wine in New Wineskins

Predistribution is a new label for an old idea. Ostensibly, it is a strategy to reduce income inequality.[10] The United States mostly has addressed inequality through social spending: it collects taxes and uses the revenue to fund programs like Social Security and Medicare.[11] These programs are "redistributive" in the sense that they capture income after it is earned and reallocate it. Predistribution strategies, by contrast, address inequality from the opposite direction. They attempt to structure the market so that more income goes to lower-income people from the start.[12] A common example is the minimum wage.[13] Minimum-wage laws require employers to pay more to employees at the lowest end of the earnings ladder.[14] So in theory, these laws "predistribute" wealth to those with the smallest incomes.[15]

Another common strategy for reducing income inequality is unionization.[16] Unions theoretically can do that in two ways.[17] *First*, they can increase workers' bargaining power vis-à-vis their employers.[18] Enhanced bargaining power allows workers to demand higher wages, thus raising their relative

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[9] *See* McGinnis, *supra* note 1 (arguing that predistribution is a "terrible prescription for addressing economic inequality" because it exacerbates misallocation of income and distorts political power).

[10] *See* Smith, *supra* note 1.

[11] *See* Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 620; Medicare and Medicaid Act of 1965, Pub. L. No. 89-97, 79 Stat. 286.

[12] *See* Ben Jackson & Martin O'Neill, *The Politics of Predistribution*, 21 Renewal 54, 54 (2013), https://journals.lwbooks.co.uk/renewal/vol-21-issue-2/abstract-8824 (interviewing Jacob Hacker); *see also* McGinnis, *supra* note 1.

[13] Alan S. Blinder, *Shore Up the Social Safety Net with "Predistribution,"* Wall St. J. (June 6, 2024), https://www.wsj.com/articles/shore-up-the-social-safety-net-with-predistribution-14ac0f8d (citing minimum wage as an example of predistribution).

[14] *See, e.g.*, 29 U.S.C. § 206 (federal minimum wage); Seattle, Wash., Mun. Code ch. 14.19 (city minimum wage).

[15] *See* Blinder, *supra* note 13.

[16] *See* King, *Give Workers Power*, *supra* note 4; Jackson & O'Neill, *supra* note 122, at 58.

[17] *See* Bruce Western & Jake Rosenfeld, *Unions, Norms, and the Rise in U.S. Wage Inequality*, 76 Am. Socio. Rev. 513, 513 (2011) (arguing that decline in union density has led to greater wage inequality).

[18] *See* NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967).

economic standing.[19] *Second*, unions can flatten wages across a single employer by negotiating fixed pay structures.[20] These fixed structures ensure that employees in similar jobs earn roughly the same thing; they leave less room for wage inequality within a bargaining unit.[21]

These general ideas have long been favored by progressive thinkers. Since at least the mid-19th century, leftist activists have tried to reduce inequality through regulation and collective bargaining.[22] More recently, Yale economist Jacob Hacker has relabeled the strategies and championed them as "predistribution."[23] Likewise, Alan Blinder, former vice chair of the Federal Reserve, has written in support of predistributional policies.[24] And even the Biden administration has weighed in, directing federal agencies to consider the distributional effects of their regulations.[25]

But more surprisingly, the idea has also gained traction on the right. Leading the charge has been Oren Cass, chief economist of American Compass. Cass and his American Compass colleagues have spoken openly and often in

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[19] *See id.* ("National labor policy has been built on the premise that by pooling their strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions.").

[20] *See* David Card, Thomas Lemieux, & W. Craig Riddell, *Unionization and Wage Inequality: A Comparative Study of The U.S., The U.K., and Canada* 2–3 (Nat'l Bureau of Econ. Rsch., Working Paper No. 9473, 2003).

[21] *See id.*; *see also* Maureen Soyars Hicks, *Can Unions Significantly Reduce Wage Inequality? Depends on Whether You're in the Public or Private Sector*, U.S. BUREAU OF LAB. STATS. (Jan. 2019), https://www.bls.gov/opub/mlr/2019/beyond-bls/can-unions-significantly-reduce-wage-inequality-depends-on-whether-youre-in-the-public-or-private-sector.htm (reporting on greater effects on inequality in private sector); Kate Andrias, *An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act*, 128 YALE L.J. 616, 637–38 (2019) (arguing that decline of unions has accounted for up to one third of increase in income inequality in United States in recent decades).

[22] *See, e.g.*, NORMAN WARE, THE INDUSTRIAL WORKER: 1840–1860, at 143–44 (Hart, Schaffer & Marx ed. 1990) (discussing labor-union support for "ten hour" laws limiting amount of daily work in factories); Frank T. de Vyver, *Regulation of Wages and Hours Prior to 1938*, 6 LAW & CONTEMP. PROBS. 323, 327 (1939) (describing tripartite boards convened to set minimum wages in Massachusetts, Wisconsin, Minnesota, Oregon, California, Utah, Colorado, Nebraska, and the District of Columbia).

[23] *See* Jackson & O'Neill, *supra* note 12, at 54–55. In fact, Hacker is sometimes credited with coining the term. *See Jacob Hacker on Predistribution*, YALE INST. SOC. & POL'Y STUDS., https://isps.yale.edu/news/blog/2012/11/jacob-hacker-on-predistribution-bbc (last visited Sept. 3, 2024) (calling Hacker "the man who came up with the idea").

[24] Blinder, *supra* note 13.

[25] Exec. Order No. 14,094 § 3(a), 88 Fed. Reg. 21,879 (Apr. 6, 2023) ("Regulatory analysis, as practicable and appropriate, shall recognize distributive impacts and equity, to the extent permitted by law.").

favor predistribution, especially the idea's approach to labor unions.[26] Cass himself has argued that unions are an ideal way to distribute the economic pie more fairly.[27] Unions require no government intervention in labor markets: they can raise wages through purely private bargaining.[28] Even better, they are democratically chosen by workers themselves.[29] They therefore promote free markets, industrial democracy, and economic justice. They are nearly a panacea to modern America's woes.[30]

But to promote unions, Cass says, we first need to remake U.S. labor law.[31] By his telling, labor law has two big problems. First, it makes union organizing too hard. Labor organizing is governed mainly by the National Labor Relations Act (NLRA).[32] The NLRA uses an "enterprise" bargaining system, where workers in each separate enterprise choose whether to join a union for themselves.[33] So to organize them, unions have to go shop by shop.[34] And that makes organizing slow and expensive.[35] It results in fewer unionized workers than we might see in a different system.[36]

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[26] Cass & Littlejohn, *supra* note 5.

[27] *See id.*

[28] *See id.*; *see also* King, *Give Workers Power*, *supra* note 4 (arguing that unions offer a form of predistribution with "minimal state interference and greater worker input").

[29] *See* Cass & Littlejohn, *supra* note 5; King, *Give Workers Power*, *supra* note 4.

[30] *See* Cass & Littlejohn, *supra* note 5 ("Ensuring that workers have power and can bargain on equal footing should be a core principle for setting up a well-functioning market economy.").

[31] *See id.* (calling current labor law "worse than useless").

[32] National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–69).

[33] *See* Cass & Littlejohn, *supra* note 5 (calling enterprise bargaining a "serious" problem). *See also* 29 U.S.C. § 159(b) (describing appropriate bargaining units as a single "employer unit, craft unit, plant unit, or subdivision thereof"); Estlund, *supra* note 7, at 545 ("The near-collapse of enterprise-based collective bargaining in the United States has led U.S. labor scholars to explore alternatives strategies for workers.").

[34] *See* NLRB v. Phoenix Programs of N.Y., Inc., 2 F. App'x 166, 168 (2d Cir. 2001) (observing that when selecting an appropriate bargaining unit, the NLRB applies a "single-facility" presumption"); Bry-Fern Care Ctr., Inc. v. NLRB, 21 F.3d 706, 711 (6th Cir. 1994) (same); *cf.* Charles D. Bonanno Linen Serv., Inc. v. NLRB, 454 U.S. 404, 412 (1982) (recognizing that the NLRA allows multi-employer bargaining, but only when the parties agree to it; they cannot be required to participate in a multi-employer unit (though withdrawal can be limited)).

[35] *See* Cass & Littlejohn, *supra* note 5; *see also* Suresh Naidu, *Is There Any Future for a US Labor Movement?*, 36 J. ECON. PERSPS. 3, 18 (2022) (identifying NLRA's enterprise-level election system as main hurdle to organizing); Andrias, *supra* note 21, at 636 ("[W]orkers must organize unions worksite by worksite, facing significant resistance from both their direct employers and other employers in their supply chains, with little hope of building power throughout an industry.").

[36] *See* Cass & Littlejohn, *supra* note 5 (blaming enterprise structure for decline of labor unions) ("Private sector unions have been in such terminal decline because the legal framework we have set up for them is a very bad one."); *see also* Aneurin Canham-Clyne, *How the Biggest Private Sector*

Second, U.S. labor law balkanizes the labor market. Because unions have to organize shop by shop, only some employers get organized. And those employers are at a competitive disadvantage.[37] After all, the whole point of a union is to raise wages; and higher wages for workers translate into higher labor costs for employers.[38] An employer saddled with higher costs is unlikely to thrive, or even survive, in a competitive market.[39] So employers naturally resist organization tooth and claw.[40] Organizing campaigns are hard fought, sometimes vicious.[41] And even when a union wins, bitterness from the campaign is likely to linger. According to Cass, the whole system is inherently and irredeemably adversarial.[42]

Union Wants to Transform the Restaurant Workforce, RESTAURANT DIVE (May 1, 2023), https://www.restaurantdive.com/news/how-labor-union-seiu-wants-to-transform-the-restaurant-workforce/648986 (interviewing SEIU President Mary Kay Henry) (stating that workers could "never" organize a restaurant chain going store to store under the NLRA); SHARON BLOCK & BENJAMIN SACHS, CLEAN SLATE FOR WORKER POWER: BUILDING A JUST ECONOMY AND DEMOCRACY 37–38 (2020), https://assets.website-files.com/5ddc262b91f2a95f326520bd/5e28fba29270594b053fe537_CleanSlate_Report_FOR-WEB.pdf (arguing that enterprise bargaining and workplace-by-workplace organizing "has left millions of workers without the protection of a collective-bargaining agreement").

[37] Cass & Littlejohn, *supra* note 5.

[38] *Id.*; *see also* Alex Bryson, *Union Wage Effects*, IZA WORLD OF LAB. (2014), https://wol.iza.org/articles/union-wage-effects/long (reporting average union wage premium of 17% in the United States).

[39] Cass & Littlejohn, *supra* note 5 (arguing that union victory is sometimes "pyrrhic" because it cripples employer with uncompetitive costs); *see also* Richard Posner, *Some Economic Effects of Labor Law*, 51 U. CHI. L. REV. 998, 1001 (1984) ("[T]he intended and actual effect of unionization is to raise the price of labor above the competitive level . . . ."); David S. Lee & Alexandre Mas, *Long-Run Effects of Unions on Firms* 35–37 (Nat'l Bureau of Econ. Rsch., Working Paper No. 14709, 2009), https://www.nber.org/digest/may09/long-run-effects-unions-firms (reporting that unionization reduces firm value by $40,500 in 1998 dollars per worker eligible to vote); Wells King, *Workers of the World*, AM. COMPASS (Sept. 18, 2020), https://americancompass.org/workers-of-the-world (noting that employment in unionized manufacturing declined more than 80% from 1979 to 2019, while employment in nonunionized manufacturing firms grew over the same period).

[40] *See* Posner, *supra* note 39, at 1000–02 (explaining that employer resistance to unionization is a rational economic reaction to higher labor costs); *see also* Estlund, *supra* note 7, at 551 (attributing difficulty in organizing in part to "vehement" employer resistance).

[41] *See* MARTY JAY LEVITT, CONFESSIONS OF A UNION BUSTER 164–225 (1993) (describing hard-fought campaign at Copeland Oaks nursing home in which employer went to extraordinary lengths to block union drive among nurses); U.S. CHAMBER OF COM., HARDBALL: THE TACTICS OF UNION CORPORATE CAMPAIGNS 4–6 (2018) (describing similarly extreme tactics by union in campaign to organize employees at Sodexo, Inc.).

[42] Cass & Littlejohn, *supra* note 5 ("[T]hat system obviously creates an incredible amount of adversarialism right off the bat.").

Cass's proposed solution is "sectoral bargaining." Sectoral bargaining is a model borrowed from Europe and Latin America.[43] It involves simultaneously organizing many employers—maybe even an entire industry.[44] These employers negotiate a single collective-bargaining agreement with a union, and that agreement imposes uniform labor costs across the whole sector.[45] And because every covered employer faces the same costs, none is left at a disadvantage.[46] Employers can essentially call a truce over labor competition.[47]

Cass's colleagues at American Compass have also spoken warmly of wage boards.[48] Wage boards are essentially industry-specific labor councils.[49] They bring together representatives from business and labor, who figure out standards for the whole sector.[50] They work a bit like sectoral bargaining, except that the government bargains alongside private parties.[51] These kinds of boards were historically used to set minimum wages in the Progressive Era,[52] and they were even included in the original Fair Labor Standards Act.[53] But they were eventually disbanded, in part because mid-century conservatives saw them as Trojan horses for unions.[54] Now, pro-predistribution conservatives are lauding these boards as a targeted, responsive way to set working conditions.[55] Yes, the boards may involve the government to some degree; but

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[43] *See* King, *Workers of the World*, *supra* note 39 (describing European models); BLOCK & SACHS, *supra* note 36, at 38 (describing European and South American systems).

[44] Cass & Littlejohn, *supra* note 5; *see also* BLOCK & SACHS, *supra* note 36, at 38 (explaining that under sectoral bargaining, "collective bargaining takes place between many unions and all of the employers in the industry").

[45] Cass & Littlejohn, *supra* note 5 ("The agreements they reach then govern the sector as a whole, regardless of whether individual firms are unionized or not.").

[46] *Id.*

[47] *Id.*; *cf.* Estlund, *supra* note 7, at 559 (arguing that "[s]ectoral labor standards can partially avoid the Achilles' heel of enterprise-based collective bargaining by constraining labor-cost-based competition from non-union firms").

[48] *See* King, *Workers of the World*, *supra* note 39 (arguing that sectoral bargaining, wage boards, and similar systems "point the way toward a new labor law").

[49] *See* Estlund, *supra* note 7, at 543 (describing boards).

[50] *See* Madland, *supra* note 6 (surveying modern standards boards).

[51] *See id.*

[52] Andrias, *supra* note 21, at 650–54 (describing Progressive-Era wage boards used to set minimum wages in some states).

[53] *See* Fair Labor Standards Act of 1938 §§ 5, 8, Pub. L. No. 75-718, 52 Stat. 1060, 1064.

[54] *See* Andrias, *supra* note 21, at 665, 687 (describing political opposition leading to the FLSA boards' repeal).

[55] *See* King, *Workers of the World*, *supra* note 39 (favorably citing state efforts to establish wage boards).

they draw their standards mainly from the knowledge and desires of local people. That makes them a more flexible, allegedly democratic way to regulate the workplace.[56]

These ideas might once have been dismissed as think-tank musings. But they have recently gained traction in powerful circles. Some GOP lawmakers have signaled their support for predistributional ideas, including ways to make labor law less adversarial.[57] Others, including the current Republican nominee for vice president, have endorsed sectoral bargaining as a conservative solution.[58] The problem with unions, these conservatives say, isn't that unions raise labor costs or make American companies less competitive.[59] Rather, the problem is that unions embrace progressive social causes.[60] If unions were only less political and more (small-d) democratic, they could support conservative goals such as strengthening the American family and reviving American manufacturing.[61]

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[56] *See* King, *Give Workers Power*, *supra* note 4 (arguing that predistributional wage strategies are better than regulatory solutions because they involve "minimal state interference and greater worker input").

[57] *See, e.g.*, Teamwork for Employees and Managers Act of 2024, S. 3600, 118th Cong. (2024) (proposing to establish "employee involvement organizations" which, among other things, could place nonvoting members on corporate boards); *see also* Press Release, Off. of Sen. Marco Rubio, Rubio, Vance Reintroduce Bill to Empower Worker Voice (Jan. 17, 2024), https://www.rubio.senate.gov/rubio-vance-reintroduce-bill-to-empower-worker-voice.

[58] *See* Sohrab Ahmari, *The New Face of the Republican Party*, NEW STATESMAN (July 15, 2024), https://www.newstatesman.com/international-content/2024/07/jd-vance-vice-president-donald-trump-republican-ticket ("Vance noted that he supports a regime of sectoral bargaining like the ones that prevail in continental Europe, rather than shop-by-shop organising bequeathed by the New Deal.").

[59] *See* Marco Rubio, *Amazon Should Face Unionization Drive Without Republican Support*, USA TODAY (Mar. 12, 2021), https://www.usatoday.com/story/opinion/2021/03/12/amazon-union-not-helping-working-class-economy-column/6947823002 ("Adversarial relations between labor and management are wrong. They are wrong for both workers and our nation's economic competitiveness.").

[60] *See* Press Release, Off. of Sen. Marco Rubio,, *supra* note 57 ("Employees who consider unionization are often dissuaded by the failures of Big Labor, which too often puts its political stances over workers' best interests."); Editorial, *Pro-Worker Republicans Will Never Support Big Labor's PRO Act*, WASH. EXAMINER (Sept. 27, 2023), https://www.washingtonexaminer.com/opinion/editorials/2571797/pro-worker-republicans-will-never-support-big-labors-pro-act ("Asked to identify why they don't want to join a union, 75% of nonunion workers identify 'union political involvement' as the top reason they don't want to join.").

[61] *See* Cass & Littlejohn, *supra* note 5 (arguing that Republicans reject labor unions only because unions support Democrats and progressive causes) ("[L]abor has become a partisan, political issue."); *see also* Jonathan Berry, *Department of Labor and Related Agencies*, *in* HERITAGE FOUND., MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE 581, 581 (2024) ("The role that labor policy plays in that promise is twofold: Give workers the support they need for rewarding, well-paying,

II. THE HARSH LIGHT OF BAD LAW

Nice as that idea might sound, it ignores how predistributional policies have played out on the ground. In cities and states across the country, these policies are already being implemented. And none of them has reduced regulation or enhanced workplace democracy. Instead, they have offered only more government entanglement and less worker voice.

First, consider the new wave of "labor standards boards." Like the old wage boards, these new standards boards are tripartite, quasi-regulatory bodies.[62] They include representatives from workers, business, and government, who come up with workplace standards for an entire industry.[63] In theory, some of these boards only "recommend" new standards to government officials—sometimes a department head, sometimes a city council.[64] But in practice, their "recommendations" are usually rubber-stamped; there is no daylight between their proposals and the ultimate regulations.[65]

What's more, some of these boards go even further. For example, in 2023, California delegated regulatory power to a "Fast Food Council."[66] This Council can effectively raise wages for the entire fast-food industry in the state.[67] It technically has to clear its regulations with the state labor commissioner.[68] But the commissioner's review is meager. She can check the Council's regulations only to ensure that they are "consistent with" its statutory powers.[69] If they are, she publishes them.[70] And once published, they bind all covered restaurants and workers in the state.[71]

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and self-driven careers, and restore the family-supporting job as the centerpiece of the American economy.").

[62] *See, e.g.*, COLO. REV. STAT. § 8-13.5-205 (tripartite agricultural work standards board); NEV. REV. STAT. § 608.610 (tripartite home-care standards board); CAL. LAB. CODE § 1475 (tripartite fast-food workers board).

[63] *See, e.g.*, N.Y. LAB. L. § 674-a (directing board to develop overtime standards for farmworkers); CAL. LAB. CODE § 1475(b) (directing board to develop standards for wages, hours, and other working conditions for fast-food workers).

[64] *See, e.g.*, CAL. LAB. CODE § 1475(d)(1)(C)(ii) (submission to state labor commissioner); 3.5 § 14.23.020(I) (submission to city council).

[65] *See* N.Y. DEP'T OF LAB., *supra* note 6 (approving board's "recommendations" without change).

[66] *See* A.B. 1228, Reg. Sess. (Cal. 2023) (as codified at CAL. LAB. CODE § 1475).

[67] CAL. LAB. CODE § 1475(d)(2)(D).

[68] *Id.* § 1475(d)(1)(C)(iii).

[69] *Id.*

[70] *Id.*

[71] *See id.* § 1475(j)(1) (stating that standards developed by council are the legal minimum standards for fast-food workers). The statute appears to require closer review for antidiscrimination and workplace-safety standards. If the Council wants to regulate on those subjects, it must petition the

The Council may be the board with the highest profile,[72] but it is hardly the only one. Since 2018, at least ten cities and states have adopted similar boards.[73] These boards usually cover only a single industry—for example, agriculture, home care, or domestic service.[74] But some sweep more broadly. For example, one proposed board in Minneapolis would have the power to convene sub-boards to regulate any industry in the city.[75] And another proposed board in New York would regulate not only working conditions, but also consumer prices.[76]

Beyond labor boards, a few states have experimented with Cass's favored strategy—sectoral bargaining. Most of these new sectoral schemes have covered homecare and domestic workers.[77] In one sense, the schemes are only a half-step toward real sectoral bargaining: they designate the workers as

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responsible agencies. *See* CAL. LAB. CODE § 1475(e), (f). It is not clear, however, how responsive those agencies will be to the Council's petitions or how closely they will review the Council's proposals. The Council first met in March 2024, and it has not yet petitioned either agency.

[72] *See, e.g.*, Noam Schieber, *California Passes Bill to Regulate Fast-Food Industry*, N.Y. TIMES (Aug. 29, 2022), https://www.nytimes.com/2022/08/29/business/economy/california-fast-food-ab-257.html; Heather Haddon, *California Restaurants Cut Jobs and Fast-Food Wages Set to Rise*, WALL ST. J. (Mar. 25, 2024), https://www.wsj.com/business/hospitality/california-restaurants-cut-jobs-as-fast-food-wages-set-to-rise-eb5ddaaa; Erica Werner, *A California Law That Takes Wage-Setting Power from Fast-Food Bosses Sparks Fight*, WASH. POST (Nov. 16, 2022), https://www.washingtonpost.com/us-policy/2022/11/16/fast-food-wages-california.

[73] *See* U.S. CHAMBER OF COM., *supra* note 8 (surveying boards); Madland, *supra* note 6 (same).

[74] *See, e.g.*, SEATTLE, WASH. MUN. CODE ch. 14.23 (standards board for domestic workers); N.Y. LAB. L. § 674-a (standards board for agricultural workers); NEV. REV. STAT. § 608.640 (standards board for home care workers).

[75] *See* MINNEAPOLIS PUB. HEALTH & SAFETY CMTE., REPORT TO THE CITY COUNCIL FROM THE PUB. HEALTH & SAFETY COMMITTEE (Feb. 14, 2024), https://lims.minneapolismn.gov/Download/CommitteeReport/3596/PHS-02142024-CommitteeReport.pdf (stating that ordinance would create "a new Article VIII creating a process to establish a Labor Standards Board study and report on working conditions in specific industries"); *see also* Susan Du & Katelyn Vue, *Minneapolis Mayor, City Council Members Propose New Labor Board to Address Worker Dissatisfaction*, MINNEAPOLIS STAR TRIB. (June 15, 2022), https://www.startribune.com/minneapolis-mayor-city-council-members-to-create-a-new-labor-board-to-address-worker-dissatisfaction/600182460 (describing proposal).

[76] S.B. S1800, Reg. Sess. (N.Y. 2023); *See also* Press Release, Off. of N.Y. State Sen. Jessica Ramos, Ramos, Bronson Introduce New Legislation to Establish Minimum Standards Council for Nail Salon Industry (Jan. 26, 2022), https://www.nysenate.gov/newsroom/press-releases/2022/jessica-ramos/immediate-release-ramos-bronson-introduce-new (describing prior version of the same legislation).

[77] *See, e.g.*, WASH. REV. CODE § 7439A.270 (sectoral bargaining for home care workers); 5 ILL. COMP. STAT. 315/7 (same); CAL. GOV'T CODE § 7926.300 (same).

"limited" public employees, and the union bargains with the state.[78] But more aggressive versions are on the way. For example, a ballot initiative in Massachusetts would create the nation's first sectoral-bargaining system for app-based rideshare drivers.[79] These drivers would be collected into a single bargaining unit, where they would be represented by a single union.[80] That union would then negotiate with every rideshare company.[81] And the resulting agreement would bind every driver and company in the state.[82]

Like the new labor-standards boards, this sectoral-bargaining law would require review by a state official: the state secretary of labor would have to approve any agreement before it went into effect.[83] But this approval mechanism would be less a check against private mischief than a way to circumvent federal law. Rideshare drivers are usually classified as independent contractors.[84] And under the Sherman Antitrust Act,[85] independent contractors cannot collectively bargain.[86] Collective bargaining by independent contractors is effectively price-fixing, and price-fixing violates antitrust law per se.[87]

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[78] *See supra* note 6 (citing authorities); *see also* Harris v. Quinn, 573 U.S. 616, 624 (2014) (describing system under Illinois law).

[79] *See* Initiative Petition for Law No. 23-35: An Act Giving Transportation Network Drivers the Option to Form a Union (Mass. 2023), https://www.mass.gov/doc/initiative-petition-for-an-act-giving-transportation-network-drivers-the-option-to-form-a-union-and-bargain-collectively/download [hereinafter Initiative Pet. No. 23-35].

[80] *Id.* § 5(B).

[81] *Id.* § 6.

[82] *Id.* § 6(A) (requiring bargaining by all transportation network companies with the designated union for a single agreement).

[83] *Id.* § 6(F).

[84] *See, e.g.*, Uber Techs., Inc., Uber Platform Access Agreement (P2P) ¶ 1.1 (Jan. 1, 2022), https://tb-static.uber.com/prod/reddog/country/UnitedStates/licensed/f5f1f4a9-4e6d-4810-8aa3-21b663290294.pdf ("The relationship between the parties is solely as independent business enterprises, each of whom operates a separate and distinct business enterprise that provides a service outside the usual course of business of the other."); Lyft, Inc., Lyft Terms of Service ¶ 19 (Jan. 22, 2024), https://www.lyft.com/terms ("[T]he relationship between the parties under this Agreement is solely that of independent contracting parties."); *see also* Razak v. Uber Techs., Inc., 2024 WL 3584324, at *11 (E.D. Pa. July 30, 2024) (concluding that "no reasonable jury" could conclude that plaintiffs, UberBlack drivers, were improperly classified as independent contractors under the Fair Labor Standards Act).

[85] Pub. L. No. 51-647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1–38).

[86] *See* Colum. River Packers Ass'n v. Hinton, 315 U.S. 143, 146–47 (1942) (holding that independent fishermen did not qualify for antitrust labor exemption); Taylor v. Local No. 7, Int'l Union of Journeymen Horseshoers, 353 F.2d 593, 606 (4th Cir. 1965) (same for independent horse farriers).

[87] *See Hinton*, 315 U.S. at 146–47; *see also* Chamber of Com. of the U.S. of Am. v. City of Seattle, 890 F.3d 769, 780–81 (9th Cir. 2018) (assuming without deciding that collective bargaining by independent rideshare drivers would be price-fixing under the Sherman Act).

Courts have, however, carved out an exemption for otherwise-anticompetitive activity authorized and supervised by a state.[88] The idea is that regulation is often anticompetitive, and antitrust law was never meant to stop states from regulating markets.[89] So if a state adopts an explicit policy promoting sectoral bargaining, and the state actively supervises the bargaining process, the Sherman Act won't apply.[90] The state will be able to establish a sectoral scheme free from the limits of antitrust.[91]

The state-approval structure also helps avoid another federal law—the NLRA. Again, the NLRA is built on "enterprise" bargaining.[92] And that enterprise model is generally exclusive: courts have interpreted the NLRA to preempt any conflicting or alternative state laws.[93] That means states cannot simply opt out of the enterprise model and create alternative organizing schemes.[94] If workers are covered by the NLRA, the enterprise process is their only option.[95]

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[88] *See* Parker v. Brown, 317 U.S. 341, 360 (1943); Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 106 (1980); *see also* Thomas B. Nachbar, *Antitrust and the Politics of State Action*, 60 WM. & MARY L. REV. 1395, 1399–1407 (2019) (surveying development of "state action" immunity from antitrust).

[89] *See Parker*, 317 U.S. at 360; *see also* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE § 20.2a (3d ed. 2005) (describing the historical basis and rationale of the state-action exemption).

[90] *See Midcal Aluminum*, 445 U.S. at 106; N.C. State Bd. of Dental Exam'rs v. FTC, 574 U.S. 494, 503–04 (2015).

[91] *See City of Seattle*, 890 F.3d at 780–81 (applying *Midcal* framework to proposed law to authorize bargaining by independent rideshare drivers); *see also* Josh Jacob, *Avenues for Gig Worker Collective Action After* Jinetes, 123 COLUM. L. REV. F. 208, 224 (2023) ("Because city or state collective bargaining frameworks for gig workers generally involve private parties organizing themselves, usually through another private party like a union, restraints on trade resulting from such arrangements do not flow directly from sovereign state action and thus must be able to pass the *Midcal* test in order to survive antitrust suits.").

[92] *See* 29 U.S.C. § 159(c).

[93] *See* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 242 (1959); Machinists v. Wis. Emp. Rels. Comm'n, 427 U.S. 132, 144 (1976); *See also* Estlund, *supra* note 7, at 555–57 (proposing "co-regulation" schemes as a way to overcome the preemption "problem")

[94] *See* Chamber of Com. of the U.S. v. Brown, 554 U.S. 60, 65, 76 (2008) (holding that state law conditioning state funds on business's waiver of its speech rights under the NLRA was preempted).

[95] *See id; see also* Estlund, *supra* note 7, at 555–56 (recognizing preemption as a barrier to state- and local-level pro-union legal reforms).

But there is a potential workaround. While the NLRA regulates the bargaining process, states can still establish minimum labor standards.[96] Those standards can include minimum wages, mandatory benefits, and job protections.[97] These minimum standards do affect bargaining indirectly; they take certain proposals off the table (e.g., pay rates below the minimum wage).[98] But they don't disrupt the bargaining process. They simply set a new floor, and the parties bargain up from there.[99]

Both sectoral schemes and labor boards try to fit into that gap. They create new workplace standards through quasi-private negotiations.[100] And while those negotiations mirror collective bargaining, a public official decides whether the negotiated standards take effect.[101] So local governments can present them as essentially regulatory processes. Functionally, they replace private bargaining. But formally, they set minimum work standards by law.[102]

That approach might solve predistribution's preemption problems.[103] But it effectively wipes out the idea's supposed benefits from the conservative point of view. Remember, predistribution policies are supposed to *reduce* the

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[96] *See* Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 21 (1987) (explaining that the NLRA accommodates state minimum-labor standards, which serve as a floor for bargaining); Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 756 (1985) (same).

[97] *See, e.g.*, *Fort Halifax Packing*, 482 U.S. at 21 (mandatory severance payments under state law); *Metro. Life Ins.*, 471 U.S. at 756 (mandatory minimum health benefits); Am. Hotel & Lodging Ass'n v. City of Los Angeles, 834 F.3d 958, 963 (9th Cir. 2016) (local minimum-wage ordinance); Nw. Grocery Ass'n v. City of Seattle, 526 F. Supp. 3d 884, 890–91 (W.D. Wash. 2021) (premium-pay ordinance for grocery workers).

[98] *See* Nat'l Broad. Co. v. Bradshaw, 70 F.3d 69, 71 (9th Cir. 1995) (explaining that "the enforcement of state minimum standards creates a 'backdrop' that must be taken into account in the collective bargaining negotiations").

[99] *See Am. Hotel*, 834 F.3d at 963 ("By providing a basic minimum wage and time-off compensation, the Wage Ordinance alters the backdrop of negotiations, not the mechanics of collective bargaining."). *But see* Chamber of Com. of U.S. v. Bragdon, 64 F.3d 497, 502 (9th Cir. 1995) (finding prevailing-wage law inconsistent with NLRA's bargaining scheme when law dictated the entire package of wages and benefits, allowing no upward bargaining).

[100] *See, e.g.*, Initiative Pet. No. 23-35 § 6(A), *supra* note 79 (requiring companies to "bargain with the exclusive bargaining representative concerning wages, benefits, and terms and conditions of work"); CAL. LAB. CODE § 1475(d)(1)(A) (empowering council to convene and jointly determine minimum standards of employment); *see also* Estlund, *supra* note 7, at 542 (describing sectoral "co-regulation" as a "mid-point" between private collective bargaining and state regulation).

[101] *See, e.g.*, Initiative Pet. No. 23-35 § 6(F), *supra* note 79 (requiring approval by state secretary of labor); CAL. LAB. CODE § 1475(d)(1)(C)(iii) (requiring review by state labor commissioner).

[102] *See* Estlund, *supra* note 7, at 555–56 (arguing that state "co-regulation" schemes solve the "preemption problem" by setting new terms through regulatory processes).

[103] *See id.* (arguing that "federal labor law does not preempt higher substantive labor standards at the state or city level").

need for government intervention.[104] But in practice, these schemes only embed the government even further into the workplace. Labor-standards boards can dictate everything from wages and hours to training and hiring policies.[105] And they impose those terms through binding regulations, enforced by state officials.[106] This is not the soft touch of the market, but the iron fist of the law.[107]

Second, predistribution are supposed to make workplace regulation more democratic.[108] But these new models effectively squash workplace choice. Under some sectoral laws, unions can be certified with support from only a fraction of the workforce. For example, the proposed Massachusetts law would allow a union to trigger an election with the support of only 5% of "active drivers." [109] And it would define "active drivers" to include only drivers who have completed more than the median number of rides in the last year.[110] In other words, the law would immediately exclude half of the driver population from the selection process.[111] A tiny fraction of drivers could trigger an election.[112] And if the union won more than half of the votes actually cast, it would represent all drivers, whether they wanted a union or not.[113]

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[104] *See* King, *Give Workers Power*, *supra* note 4.

[105] *See* CAL. LAB. CODE § 1475(d)(1)(A) ("The council is charged with developing minimum fast food restaurant employment standards, including, as appropriate, standards on wages, working conditions, and training, as are reasonably necessary or appropriate to protect and ensure the welfare, including the physical well-being and security, of fast food workers or to otherwise meet the purposes of this section . . . .").

[106] *Id.* § 1475(d)(2)(D) (stating that standards developed by the council are "enforceable by the Labor Commissioner" under procedures applicable to other parts of the state labor code). *Cf.* Estlund, *supra* note 7, at 567 (arguing that the "payoff" for co-regulation comes in the enforcement process); César F. Rosado Marzán, *Can Wage Boards Work in America?*, LPE PROJECT (April 3, 2023), https://lpeproject.org/blog/wage-boards-labor-america (arguing that labor-standards boards such as Seattle's domestic-worker board offer "more lawmaking and enforcement potential").

[107] *See* McGinnis, *supra* note 1 ("Even worse than predistribution's economic effects are its political ones. It allows the state to intervene in the market while making it harder for citizens to evaluate the costs of these policies.").

[108] *See* King, *Give Workers Power*, *supra* note 4. *See also* Estlund, *supra* note 7, at 558 (arguing that "co-regulation" could make "the law of work more democratic").

[109] *See* Initiative Pet. No. 23-35 § 5(D)(1)–(2), *supra* note 79.

[110] *Id.* § 2(A).

[111] *See id.* §§ 5(D), 2(A).

[112] *See id.*

[113] *See id.* § 6(A) (authorizing the union to bargain with all transportation-network companies on behalf of all drivers in the state). *See also* Veena Dubal, *Sectoral Bargaining Reforms: Proceed with Caution*, 31 NEW LAB. F. 11 (2022), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4006698 (criticizing sectoral-bargaining proposals for offering "limited democratic worker participation and voice in the conditions created through bargaining"); Estlund, *supra* note

The new standards boards are even less democratic. Workers are ostensibly represented on the boards by designated board members. But workers have no say on who these members are. Instead, the members are appointed by a government official.[114] And they cannot be recalled—nor can they even be required to listen to the workers they represent. Instead, they stay in their seats until their terms expire, and they make their own decisions about what is best for workers.[115] This is not worker voice, but the absence of it.[116]

III. THE PERILS OF CONSENSUS

None of this promotes conservative ideals. Conservatives say they want to reduce regulation and enhance workers' voice in the workplace. But predistribution promotes neither goal. It is neither voluntary nor light touch, nor does it make unionism any more consistent with conservative goals than it ever was. Consensus is not always bad, but nor is it always good. Ideas should not be judged on their ubiquity, but on their merits. And on the merits, predistribution has nothing to offer workers. Conservatives who want to support workers should look for consensus elsewhere.

Other Views:

- Oren Cass, *America Needs a Conservative Labor Movement*, WALL ST. J. (Sept. 17, 2020), https://www.wsj.com/articles/america-needs-a-conservative-labor-movement-11600379608.
- Eric Levitz, *The Conservative Case for Organized Labor*, INTELLIGENCER (Sept. 8, 2020), https://nymag.com/intelligencer/2020/09/conservative-case-for-organized-labor.html.

7, at 543 (arguing that the proponents of sectoral bargaining "tend[] to overstate the role that workers' own bargaining power and organizations, diminished as they are, can play within the new hybrid strategies").

[114] *See, e.g.*, CAL. LAB. CODE § 1475(a)(3)–(4); COLO. REV. STAT. § 8-7.5-103(2)(I); SEATTLE MUN. CODE § 14.23.030(B); N.Y. LAB. L. § 674-a.

[115] *See, e.g.*, CAL. LAB. CODE § 1475(a)(4) (term of four years); SEATTLE MUN. CODE § 14.23.030(C) (terms of two to three years). *But see* NEV. REV. STAT. § 608.610 (no explicit limit on terms).

[116] *See* Estlund, *supra* note 7, at 566 (noting that the appointments process raises questions about why and how workers can participate in the boards and whether there "should be a more rigorous process" for designating worker representatives).

• Jonathan Rauch, *The Conservative Case for Unions*, THE ATLANTIC (July/Aug. 2017), https://www.theatlantic.com/magazine/archive/2017/07/the-conservative-case-for-unions/528708/.

THE TWIN COMMANDS: STREAMLINING EQUALITY LITIGATION BASED ON *STUDENTS FOR FAIR ADMISSIONS*[*]

DANIEL P. LENNINGTON & SKYLAR CROY[**]

Each year, government contracting programs dole out tens of billions of dollars to businesses that meet certain racial criteria. For example, in 2023, the State of Wisconsin spent over $200 million with "diverse suppliers."[1] Under Wisconsin state law, state agencies can give minority-owned businesses a 5% "bid preference" when those businesses bid to supply products or services.[2] For example, an agency may judge a minority-owned business offering to sell pencils to the state for $100 as if the business bid $95.[3] This hypothetical minority-owned business could qualify as the lowest bidder even if a white-owned business bid $96.[4] The state still pays the minority-owned business $100 even though it was treated as having bid $95. The federal

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

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[1] STATE OF WIS. DEP'T OF ADMIN., STATE OF WISCONSIN SUPPLIER DIVERSITY REPORT: FISCAL YEAR 2023, at 3 (2024), *available at* https://supplierdiversity.wi.gov/PublishingImages/Pages/AnnualReports/FY23/FY23%20Supplier%20Diversity%20Report.pdf.

[2] *Id.* at 4–6.

[3] *Id.* at 6 (citing WIS. STAT. § 16.75(3m)(b)3.).

[4] *See id.*

government and most states have similar programs.[5] Some programs have been enjoined, but many more have not been challenged.[6]

These race-based contracting programs are inconsistent with equal protection under the law, which is guaranteed by the U.S. Constitution. One of the primary drafters of the Fourteenth Amendment noted that the nation fought a Civil War to bring about "the absolute equality of all citizens . . . ."[7] Another similarly explained, "free government demands the abolition of all distinctions founded on color and race."[8]

Given that these programs are unconstitutional, why have they remained in effect? The answer lies largely in the litigation strategies that have been deployed to challenge them. Under U.S. Supreme Court precedent, such programs are illegal if the government cannot satisfy the so-called "strict scrutiny" test, which requires the government to prove that it has a "compelling" interest and that the use of race is "narrowly tailored" to achieve that interest.[9] To date, most plaintiffs have focused on the compelling-interest prong. This emphasis has led to expensive and time-consuming discovery and motion practice. Although intended to be a high bar, "compelling" is not an especially clear threshold (or at least, so government attorneys have argued). Government attorneys have taken advantage of this subjectivity, bogging down cases in statistical analyses and expert depositions, often leading to records with thousands of pages. Many cases have been filed only to trundle on for years, allowing the government to change its position and even moot some cases.

A new path is now available. In 2023, the U.S. Supreme Court decided *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* (*SFFA*).[10] The Court held that affirmative action programs are

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[5] George R. La Noue, *Racial Preferences in Economic Benefits: From Widely Accepted to Legally Indefensible*, 25 FEDERALIST SOC'Y REV. 72, 74 (2024), *available at* https://fedsoc.org/fedsoc-review/racial-preferences-in-economic-benefits-from-widely-accepted-to-legally-indefensible (estimating 47 states plus Washington D.C. and Puerto Rico have minority and women-owned business enterprise programs); NAT'L ASS'N OF STATE PROCUREMENT OFFICIALS, SUPPLIER DIVERSITY SNAPSHOT: 8 STATES IN REVIEW 8 (2022) (noting approximately 35 states have "procurement diversity initiatives"), *available at* https://cdn.naspo.org/RI/SupplierDiversitySnapshot_8StatesinReview.pdf.

[6] *E.g.*, MAMCO v. U.S. Dep't of Trans., No. 3:23-cv-00072-GFVT, 2024 WL 4267183, at *13 (E.D. Ky. Sept. 23, 2024); Ultima Servs. Corps. v. U.S. Dep't of Agric., 683 F. Supp. 3d 745, 774–75 (E.D. Tenn. 2023).

[7] CONG. GLOBE, 39th Cong., 1st Sess. 431 (1866) (statement of Rep. Bingham).

[8] 2 CONG. REC. 4083 (1874) (statement of Sen. Pratt).

[9] Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995).

[10] 600 U.S. 181 (2023).

unconstitutional unless they satisfy the "twin commands" of equal protection in addition to the traditional strict scrutiny test.[11] The twin commands are that "race may never be used as a 'negative[,]' and . . . it may not operate as a stereotype."[12] The Court further explained that in a "zero-sum" fact pattern, like college admissions, any consideration of race is necessarily negative and likely based on stereotypes.[13] The twin-commands test allow plaintiffs an opportunity to streamline otherwise expensive and time-consuming litigation because the twin commands raise legal questions for which factual development—i.e., discovery—is mostly (maybe even entirely) unnecessary.

This article proceeds in three parts. Part I presents the problem of focusing on the compelling-interest prong of strict scrutiny, and how that focus has led to a forty-year stalemate in equality litigation. Part II discusses *SFFA* and the twin commands. Lastly, Part III lays out how the twin commands offer a better path to challenge race-based spending and other affirmative action programs.

I. THE LONG SLOG OF EQUALITY LITIGATION

Race-based spending emerged in the 1960s largely because of a shift in the way many conceptualized "discrimination,"[14] and it has been a hallmark of government ever since.[15] Before that era, across the political spectrum,[16] most understood "discrimination" to mean "a distinction in treatment given to different individuals because of their different race."[17] Indeed, according to one legal scholar and historian, "[i]n the whole of the congressional debate over the Civil Rights Act of 1964, no theme is more prominent than the exasperated insistence of the bill's supporters, in answer to repeated southern fears, that a law prohibiting discrimination must necessarily prohibit preferential treatment."[18] Presidential administrations prior to the 1960s prohibited explicit racial discrimination in government contracting—they did not

[11] *Id.* at 218.
[12] *Id.*
[13] *Id.* at 218–20.
[14] ANDREW KULL, THE COLOR-BLIND CONSTITUTION 182 (1992).
[15] CONG. RSCH. SERV., SBA'S "8(A) PROGRAM": OVERVIEW, HISTORY, AND CURRENT ISSUES 3 (2022), https://sgp.fas.org/crs/misc/R44844.pdf.
[16] KULL, *supra* note 14, at 182.
[17] 10 CONG. REC. 5423 (1964) (statement of Sen. Humphrey).
[18] KULL, *supra* note 14, at 182–83.

implement affirmative action programs,[19] which are designed to give certain racial minorities a preference.

Racial preference programs, under the banner of "affirmative action," first began to take root with an executive order from President John F. Kennedy in 1961.[20] Similar to his predecessors, he required that government contractors agree "not to discriminate against any employee or applicant for employment because of race . . . ."[21] He took things a step further, though, by also stating, "[t]he contractor will take *affirmative action* to ensure that applicants are employed, and that employees are treated during employment, without regard to their race . . . ."[22] In 1965, President Lyndon B. Johnson expanded the order, directing federal contractors to increase participation rates for minorities and women.[23]

In 1977, Congress formally backed race-based spending when it created the "Minority Business Enterprise" (MBE) program.[24] It authorized $4 billion in federal grants to state and local governments,[25] but it provided "no grant shall be made . . . for any local public works project unless the applicant gives satisfactory assurance to the Secretary [of Commerce] that at least 10 per centum of the amount of the grant shall be expended for minority business enterprises" (defined as a business that is at least half owned by certain minorities).[26] In subsequent years, Congress enacted similar programs, such as Section 8(a) of the Small Business Act and the Disadvantaged Business Enterprise Program.[27]

By the late 1970s, litigation against race-based spending had been generally unsuccessful. Speaking in favor of the 1977 MBE legislation, Representative Parren J. Mitchell of Maryland remarked that federal race-based spending had been "tested in the courts more than 30 times" and "found to be

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[19] CONG. RSCH. SERV., *supra* note 15, at 3.

[20] KULL, *supra* note 14, at 200.

[21] Exec. Order No. 10,925, 26 Fed. Reg. 1977 (Mar. 6, 1961), *available at* https://www.federalregister.gov/executive-order/10925.

[22] *Id.* (emphasis added). *But see* KULL, *supra* note 14, at 200–01 (arguing "[a]s late as 1968," no one seemed to think that the "affirmative action" requirement "imposed any obligation beyond good-faith adherence to nondiscriminatory practices").

[23] Exec. Order No. 11,246 (Sept. 24, 1965); *see also* Exec. Order No. 11,375 (Oct. 13, 1967).

[24] Public Works Employment Act of 1977, Pub L. No. 95-28, 91 Stat. 116 (May 13, 1977).

[25] KULL, *supra* note 14, at 208.

[26] Public Works Employment Act § 102(B)(2).

[27] *E.g.*, To amend the Small Business Act and the Small Business Investment Act of 1958, Pub L. No. 95-507, 92 Stat. 1757 (Oct. 24, 1978).

legitimate and bona fide."[28] The MBE program itself was upheld by the U.S. Supreme Court in *Fullilove v. Klutznick*, with the Court applying intermediate scrutiny and holding that Congress was not required to "act in a wholly 'color-blind' fashion."[29]

Many states followed the federal government's lead. In 1980, for example, the state of Ohio implemented an MBE contracting program, which was upheld by the Sixth Circuit.[30] Michigan passed a similar law in 1980, which was also upheld.[31]

The first major win for plaintiffs challenging race-based preferences came in a challenge to a local program in *City of Richmond v. J.A. Croson Co.*[32] In 1983, the City of Richmond, Virginia, mandated that at least 30% of all contracts be awarded to minority-owned businesses.[33] After six years of litigation, the U.S. Supreme Court sided with the plaintiff, holding that the program was not narrowly tailored to serve a compelling interest.[34] In a fractured opinion, the Court criticized the government's attempt to "remedy various forms of past discrimination," specifically noting that "societal discrimination" was not something that could be constitutionally remedied with affirmative action.[35] The Court rebuffed Richmond's argument that affirmative action could be justified based upon the "generalized assertion that there has been past discrimination in an entire industry."[36]

A plurality in *Croson*, however, suggested how a government could justify race-based spending. It explained that discrimination justifying affirmative action could be proven through an appropriate disparity study, even though such studies would seem to prove little more than "generalized assertion[s] that there has been past discrimination . . . ."[37] Specifically, the plurality said: "Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the

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[28] 123 CONG. REC. 5097 (1977) (statement of Rep. Mitchell).

[29] 448 U.S. 448, 482 (1980).

[30] Ohio Contractors Ass'n v. Keip, 713 F.2d 167, 168 (6th Cir. 1983), *abrogated by* Associated Gen. Contractors of Ohio v. Drabik, 214 F.3d 730 (6th Cir. 2000).

[31] Mich. Rd. Builders Ass'n v. Milliken, 834 F.2d 583, 584 (6th Cir. 1987), *aff'd*, 489 U.S. 1061 (1989).

[32] 488 U.S. 469 (1989).

[33] *Id.* at 478.

[34] *Id.* at 511.

[35] *Id.* at 498, 505.

[36] *Id.* at 498.

[37] *Id.*

locality's prime contractors, an inference of discriminatory exclusion could arise."[38] The plurality allowed for "some form of narrowly tailored racial preference" to "break down patterns of deliberate discrimination."[39] It mentioned that "significant statistical disparit[ies]" could be used as evidence.[40]

The plurality's suggestion that "disparities" might justify a race-conscious cure spurred a generation of race-based spending, purportedly justified by so-called "disparity studies." Professor George La Noue, a nationally renowned expert on supplier-diversity litigation, remarked in one article that "[g]overnments latched on" to the suggestion, "leading to a massive investment in so-called disparity studies, which sought to create a predicate for the creation or continuation of . . . [race-based spending] programs."[41] He noted the existence of a cottage industry for such studies, explaining that "[m]ore than 600 such studies were commissioned over the ensuing years, at an estimated cost of more than 300 million dollars."[42] The vast majority of these studies were performed by "for-profit consultants"—hired guns "who understood the results the market demanded."[43]

In practice, the upshot of *Croson* was that governments implemented the same programs but sought to offer enough evidence of "statistical disparities" to justify them. Dozens of lawsuits challenged race-based spending, and government attorneys defended the programs with mountains of statistical information intended to prove the government's compelling interest in remedying racial disparities.[44] In many cases, plaintiffs endured weeks-long trials and expensive expert testimony.[45]

The best example is *Adarand v. Peña*.[46] In 1989, Adarand, a guardrail subcontracting business, submitted the lowest bid for a portion of guardrail work

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[38] *Id.* at 509 (plurality opinion).

[39] *Id.*

[40] *Id.*

[41] La Noue, *supra* note 5, at 77.

[42] *Id.*

[43] *Id.*

[44] *Id.* at 75 (citing Associated Gen. Contractors v. City of Columbus, 936 F. Supp. 1363 (S.D. Ohio 1996); Contractors Ass'n of E. Pa. v. City of Phila., 735 F. Supp. 1274 (E.D. Pa. 1990), *aff'd*, 945 F.2d. 1260 (3d Cir. 1991); Builders Ass'n of Greater Chi. v. Cnty. of Cook, 123 F. Supp. 2d 1087 (N.D. Ill. 2000), *aff'd*, 256 F.3d 642 (7th Cir. 2001); Builders Ass'n of Greater Chi. v. City of Chi., 298 F. Supp. 2d 725 (N.D. Ill. 2003)).

[45] *Id.*

[46] 515 U.S. 200 (1995).

on a Colorado highway project.[47] The bid was rejected, and the work went to a minority-owned business with a higher bid, so Adarand sued.[48]

The district court, and then the Tenth Circuit, applied intermediate scrutiny and upheld the program.[49] In 1995, the U.S. Supreme Court vacated and remanded, holding that strict scrutiny applied.[50]

In 2000, after eleven years of discovery and appeals, including subsequent trips to the U.S. Supreme Court, the Tenth Circuit applied a "searching judicial inquiry" to review the record and determine whether the government's evidence established a compelling interest.[51] The Tenth Circuit considered "direct and circumstantial evidence," including both "statistical and anecdotal evidence."[52] In justifying the program's race-consciousness, the court cited evidence from more than thirty congressional hearings and a 26,000-word "Compelling Interest Report" with 135 footnotes and dozens of disparity studies and other evidence of discrimination in the contracting industry.[53] According to the Tenth Circuit, this massive record "more than satisfie[d] the government's burden" to prove that "Congress has a compelling interest in eradicating the economic roots of racial discrimination in highway transportation programs funded by federal monies."[54]

Because Adarand did not rebut all of this evidence, it lost. The Tenth Circuit focused on the quantity, not the quality, of the evidence.[55] The disparity studies were treated as nearly dispositive, though they cannot provide any meaningful evidence of actual, concrete race discrimination.[56]

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[47] *Id.* at 205.

[48] *Id.*

[49] Adarand Constructors, Inc. v. Peña, 16 F.3d 1537, 1539, 1544 (10th Cir. 1994), *vacated and remanded*, 515 U.S. 200 (1995), *sub nom.* Adarand Constructors, Inc. v. Slater, 228 F.3d 1147 (10th Cir. 2000).

[50] *Adarand*, 515 U.S. at 238–39.

[51] *Adarand*, 228 F.3d at 1166.

[52] *Id.* at 1166, 1168.

[53] *Id.* at 1168 (citing Prop. Reforms to Affirmative Action in Fed. Procurement, 61 Fed. Reg. 26042-01 (May 23, 1996)).

[54] *Id.* at 1176.

[55] *See id.* at 1175. Ultimately, the Tenth Circuit also held that the program was narrowly tailored because it had been amended by the agency to include an "individualized determination of economic disadvantage," thereby eliminating "its offending 1996 practices." *Id.* at 1185.

[56] Disparity studies are based on statistical evidence, which can at best show that disparities exist, but these studies do not amount to a "strong basis" in evidence of intentional discrimination. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986). Courts have noted that statistics should not be "accorded talismanic significance." Peightal v. Metro. Dade Cnty., 26 F.3d 1545, 1556 (11th Cir. 1994). The statistics must account for "race-neutral explanation[s] for the apparent statistical disparities." Eng'g Contractors Ass'n v. Metro. Dade County, 943 F. Supp. 1576, 1573 (S.D. Fla.

Subsequent litigation against race-based spending has tracked *Adarand*. The government typically offers mountains of evidence to prove a compelling interest, with courts in many cases giving short shrift to the narrow-tailoring analysis. Consequently, every circuit to have considered the constitutionality of the federal Disadvantaged Business Enterprise Program has upheld it,[57] and the focus of every case was whether the plaintiff was able to oppose the government's proffered evidence. As the Eighth Circuit said (relying on *Adarand*), "Congress has spent decades compiling evidence of race discrimination in government highway contracting, of barriers to the formation of minority-owned construction businesses, and of barriers to entry."[58]

Like *Adarand*, many of these cases slogged on for over a decade. Concrete Works of Colorado, Inc. filed a lawsuit in 1992 against the City and County of Denver challenging race-based spending goals for construction projects.[59] In 2003, after eleven years of litigation, the Tenth Circuit upheld the

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1996), *aff'd* Eng'g Contractors Ass'n v. Metro. Dade County, 122 F.3d 895 (11th Cir. 1997); *see also Eng'g Contractors*, 122 F.3d at 919 n.4 (aggregating data can create illusory disparities). Disparity studies, however, cannot appropriately control for all race-neutral factors, such as firm size, revenues, employment size, bonding limits, insurance, licensing, experience, and geography. *See Eng'g Contractors*, 122 F.3d at 917 ("More simply put: Because they are bigger, bigger firms have a bigger chance to win bigger contracts."); Mich. Road Builders v. Milliken, 834 F.2d 583, 592 (6th Cir. 1987) ("Small businesses, as a result of their size, were unable to effectively compete for state contracts."); Rothe Dev. Corp. v. Dep't of Def., 545 F.3d 1023, 1042–43 (Fed. Cir. 2008) ("We are even more troubled, however by the failure of five of the studies to account sufficiently for potential differences in size, or relative capacity, of the businesses included in those studies."). The district court noted in *Engineering Contractors* that "non-social factors . . . may distort the final result." *Eng'g Contractors*, 943 F. Supp. at 1555 (giving the following examples: "deficiencies in working capital, inability to meet[] bonding requirements, unfamiliarity with bidding procedures, and disability caused by an inadequate track record"). "These problems face any new entrant into the construction industry, regardless of race." *Id.* Bidding on federal contracts is time-intensive and expensive, *id.* at 1583, and who bids and how often impact whether contracts are awarded. *See* George R. La Noue, *Setting Goals in the Federal Disadvantaged Business Enterprise Programs*, 17 GEO. MASON U. CIV. RTS. L.J. 423, 436 (2007); MICHAEL KENIG, PROJECT DELIVERY SYSTEMS FOR BUILDING MANAGEMENT 64–65 (Assoc. Gen. Contractors of Am. 1997). Small minority-owned firms, which may bid less frequently or may not have the capacity to bid on major federal projects, cannot be compared to larger, more sophisticated firms that might not be owned by minorities. *Eng'g Contractors*, 122 F.3d at 917 (noting a county's own expert admitted that "firm size plays a significant role in determining which firms win contracts"). In short, many factors can explain racial disparities, and it is wrong to assume all disparities equate to racial discrimination.

[57] Midwest Fence Corp. v. U.S. Dep't of Transp., 840 F.3d 932, 941, 935–36 (7th Cir. 2016); W. States Paving Co. v. Wash. State Dep't of Transp., 407 F.3d 983, 995 (9th Cir. 2005); Sherbrooke Turf, Inc. v. Minn. Dep't of Transp., 345 F.3d 964, 967–68 (8th Cir. 2003); *Adarand*, 228 F.3d at 1155.

[58] *Sherbrooke Turf*, 345 F.3d at 970.

[59] Concrete Works of Colo., Inc. v. City & Cnty. of Denver, 321 F.3d 950, 992 (10th Cir. 2003).

program, holding that a voluminous record of statistical and anecdotal evidence justified it.[60] The court did not even consider whether the program was narrowly tailored, claiming that the plaintiffs did not sufficiently raise the issue.[61] Other cases similarly went on for ten years or more with overwhelming amounts of evidence considered by the court.[62]

In another case, Midwest Fence litigated against the U.S. Department of Transportation and the Illinois Department of Transportation for six years and endured punishing expert discovery.[63] At the end of what must have been an immensely expensive lawsuit, Midwest Fence not only lost, but it was also ordered to pay Illinois's costs.[64] The government's litigation strategy in these cases makes plaintiffs' lives difficult, to say the least.

II. A NEW TEST: THE TWIN COMMANDS

Plaintiffs now have a new way to challenge race-based spending. In *SFFA*, the U.S. Supreme Court struck down affirmative action in college admissions on various grounds, including its inconsistency with "the twin commands of the Equal Protection Clause": "race may never be used as a 'negative[,]' and . . . it may not operate as a stereotype."[65] By focusing litigation on the twin commands, future lawsuits against race-based spending can be reasonable and nimble, rather than expensive and lengthy. The twin commands raise legal questions for which factual development—i.e., discovery—is largely unnecessary. The twin commands are absolute or at least near absolute: the Court said they can "never" be violated, not that they may be violated if the government has a compelling interest.

In *SFFA*, the U.S. Supreme Court stated: (1) "University programs must comply with strict scrutiny," (2) "they may never use race as a stereotype or negative," and (3) "at some point—they must end."[66] The Court emphasized

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[60] *Id.* at 994.

[61] *Id.* at 992–93.

[62] *See, e.g.*, Rothe Dev. Corp. v. U.S. Dep't of Def., 606 F. Supp. 2d 648 (W.D. Tex. 2009); Rothe Dev. Corp. v. U.S. Dep't of Def., 49 F. Supp. 2d 937 (W.D. Tex. 1999).

[63] *See* Midwest Fence Corp. v. U.S. Dep't of Transp., No. 10 C 5627, 2014 WL 322059, at *7 (N.D. Ill. Jan. 28, 2014).

[64] Midwest Fence Corp. v. U.S. Dep't of Transp., No. 10 C 5627, 2018 WL 1535081 (N.D. Ill. Mar. 29, 2018).

[65] 600 U.S. at 218.

[66] *Id.* at 213.

that the admissions policies at issue were "invalid[]" under "each of these criteria."[67]

Each holding is explicated in its own section of the opinion.[68] Section IV.A is a strict scrutiny analysis.[69] Sections IV.B on the twin commands and IV.C on logical end point never use the phrase "strict scrutiny"—they do not even contain the words "interest" or "tailoring."[70]

Section IV.B begins with this statement: "The race-based admissions systems that respondents employ *also* fail to comply with the twin commands . . . ."[71] The U.S. Supreme Court reasoned that "[c]ollege admissions are zero-sum. A benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter."[72] In a zero-sum situation, effectively any consideration of race is necessarily negative.[73] The Court then said that the admissions policies "were infirm *for a second reason as well*": "We have long held that universities may not operate their admissions programs on the 'belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue.'"[74]

The best reading of *SFFA*, based on its text and structure, is that the U.S. Supreme Court made three separate—alternative—holdings governing how equal-protection claims should be analyzed. In addition to text and structure, at least three other arguments support this reading.

First, the only other way to construe *SFFA* would be to suggest that an affirmative action program need only satisfy one of the criteria—which would be absurd. *SFFA* is a landmark decision because it made affirmative action programs harder—not easier—to implement.

Second, the U.S. Supreme Court endorsed the notion that "[o]ur Constitution is color-blind."[75] Colorblindness is often misunderstood. It is not an empirical statement about how the nation actually operates, but rather a goal to strive towards, perhaps best summed up by the Court in *Shaw v. Reno*,

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[67] *Id.*; *see also id.* at 230 ("Both programs lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points.").

[68] *Id.* at 214–21.

[69] *Id.* at 214–18.

[70] *Id.* at 218–25.

[71] *Id.* at 214 (emphasis added).

[72] *Id.* at 218–19.

[73] *Id.*

[74] *Id.* at 219 (emphasis added) (quoting Grutter v. Bollinger, 539 U.S. 306, 333 (2003)).

[75] *Id.* at 230 (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), *overruled by* Brown v. Bd. of Ed., 347 U.S. 483 (1954)).

when it explained that "ideally" race should "bear[] no relationship to an individual's worth or needs."[76] An affirmative action program might be able to satisfy the strict scrutiny test; however, if it cannot also satisfy the twin commands, it necessarily moves away from the goal of treating individuals without regard to their race. As Justice Clarence Thomas wrote in his *SFFA* concurrence, "[f]ar from advancing the cause of improved race relations in our [n]ation, affirmative action highlights our racial differences with pernicious effect."[77]

Third, in other contexts, the U.S. Supreme Court has been departing from the strict scrutiny test. For example, in 2022, it held that "means-end scrutiny" was inappropriate for evaluating Second Amendment claims, instead adopting a text and history approach.[78] In light of this trend, reading *SFFA* as imposing additional requirements makes a lot of sense.

Normally, alternative holdings have equal weight;[79] however, many legal commentators appear to be disregarding portions of *SFFA* and, in particular, Section IV.B's language about the twin commands. These attorneys seem to read the "twin commands" language as somehow intertwined with Section IV.A's discussion of strict scrutiny. Only a few law review articles (notably by authors critical of the twin commands) have suggested the U.S. Supreme Court might have been articulating a new requirement that is in addition to the strict scrutiny test.[80]

A Westlaw search indicates that *SFFA* has been cited in 138 lower-court opinions, but so far only two have referenced the "twin commands" language. In one of these two, *Nuziard v. Minority Business Development Agency*, the district court sided with plaintiffs, noting that race-based spending—like college admissions—is "zero sum," at least "[a]bsent a theoretical program with boundless coffers."[81] The court treated the twin commands as part of the

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[76] 509 U.S. 630, 643 (1993) (quoting United Jewish Orgs. of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 173 (1977) (Brennan, J., concurring in part)).

[77] *SFFA*, 600 U.S. at 274 (Thomas, J., concurring).

[78] *See, e.g.*, N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 19 (2022); *see also id.* at 24 ("This Second Amendment standard accords with how we protect other constitutional rights.").

[79] *E.g.*, Texas v. United States, 809 F.3d 134, 178 n.158 (5th Cir. 2015) (quoted source omitted) ("This circuit follows the rule that alternative holdings are binding precedent and not obiter dictum.").

[80] *E.g.*, Larry J. Pittman, *The Supreme Court's Erroneous Equal Protection Clause Analysis: Societal Discrimination, the Harvard College Decision as the New Plessy v. Ferguson-Lite, and the Thirteenth Amendment*, 57 CREIGHTON L. REV. 189, 234 (2024) (noting the twin commands "appear[]" to be a new requirement, separate from strict scrutiny).

[81] No. 4:23-cv-00278-P, 2024 WL 965299, at *36 (N.D. Tex. Mar. 5, 2024).

narrow-tailoring prong of the strict scrutiny test rather than as a separate test altogether; however, the result was much the same as if the twin commands had been treated as an analytically distinct requirement.[82] In the other case, a different district court read the twin commands as intertwined with the compelling-interest prong, ultimately denying a motion to preliminarily enjoin an affirmative action policy at the U.S. Naval Academy.[83] However, the plaintiff never mentioned the twin commands in the memorandum in support of the motion.[84]

At the state level, one judge on the Wisconsin Court of Appeals recently signaled support for reading *SFFA* to require separate analysis of the twin commands, albeit at an oral argument (an opinion has yet to be issued): "University programs must (1) comply with strict scrutiny; (2) they may never use race as a stereotype or negative; and (3) at some point, they must end. That looks to me like all three need to be satisfied. Not just strict scrutiny . . . ."[85]

The main counterargument to this reading of *SFFA* is based on footnote 4. In the same paragraph that notes that an affirmative action program must satisfy each of the criteria, the U.S. Supreme Court appended this footnote:

> The United States as *amicus curiae* contends that race-based admissions programs further compelling interests at our [n]ation's military academies. No military academy is a party to these cases, however, and none of the courts below addressed the propriety of race-based admissions systems in that context. This opinion also does not address the issue, in light of the potentially distinct interests that military academies may present.[86]

This footnote could be read to suggest that the twin commands need not be satisfied if national security is at stake. In other words, when the Court said race may "never" be used as a negative or a stereotype, maybe it really meant "almost never."

Nearly all legal principles have exceptions, and perhaps the twin commands are no different. Likely, the U.S. Supreme Court was contemplating

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[82] *See id.*

[83] Students for Fair Admissions v. U.S. Naval Acad., No. RDB-23-2699, 2023 WL 8806668 (D. Md. Dec. 20, 2023).

[84] Mem. Law Supp. Mot. Prelim. Inj., SFFA v. U.S. Naval Acad., 2023 WL 8806668 (Dec. 20, 2023) (No. RDB-23-2699), *available at* https://storage.courtlistener.com/recap/gov.uscourts.mdd.545858/gov.uscourts.mdd.545858.9.1.pdf.

[85] Oral Argument at 0:55:38, Rabiebna v. Higher Ed. Aids Bd., No. 2022AP002026 (Wis. Ct. App. July 11, 2024), *available at* https://www.wicourts.gov/CaAudioSearch?docket_number=2022AP002026&begin_date=07-11-2024&end_date=07-11-2024&Submit=Search.

[86] *SFFA*, 600 U.S. at 213 n.4.

unique interests that only a military academy could have. For example, if the U.S. Army were to invade a Middle Eastern nation, it may want Arab Americans in its ranks on the theory that they may make a police-like force more effective. Perhaps an affirmative action policy could help achieve this result. Race would be employed as a negative but not necessarily in a manner that egregiously violates colorblind principles—recognizing that other nations might be anything but colorblind and may not even want colorblindness is qualitatively different from abandoning the notion that the United States should be colorblind. At bottom, the footnote should be read narrowly. Even "national security" is not a "trump card" that can be employed willy-nilly to avoid equal protection jurisprudence.[87]

III. A PROPOSAL: LITIGATE THE TWIN COMMANDS, NOT COMPELLING INTEREST

The twin commands, as articulated in *SFFA*, should usher in a new era of equality litigation. Experts are expensive to hire; depositions are expensive to take; disparity studies are confusing and subjective; and getting courts to understand statistical analyses is onerous. Yet plaintiffs' attorneys have been forced to undertake these tasks when litigating under the compelling-interest prong; they must attempt to refute the government's stated justifications and pore over thousands of pages of records.[88]

Nuziard, mentioned above, is an example. In that case, people of certain races were presumed disadvantaged for the purpose of a government benefit, while individuals of other races had to prove that they were disadvantaged.[89] Even though the district court held that the program served a compelling interest in remedying past discrimination (after a lengthy discussion, which was necessitated by a lengthy record), it still held that the program was unconstitutional.[90]

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[87] Dan Lennington & Skylar Croy, Opinion, *Affirmative Action Has No Place at Military-Service Academies*, NAT'L REV. (Feb. 11, 2024), https://www.nationalreview.com/2024/02/affirmative-action-has-no-place-at-military-service-academies/.

[88] Plaintiffs' attorneys may be operating under the assumption that it will disadvantage their clients to give up on a strategy. This is not always true. If litigating compelling interest is time-consuming, expensive, and focuses the case on the wrong legal issue, attorneys who cling to their traditional litigation strategies could be doing their clients a disservice. It is not a sign of weakness to abandon a losing argument—it is good lawyering to win in the most efficient way possible.

[89] *See Nuziard*, 2024 WL 965299, at *36.

[90] *Id.* at *31.

As the district court reasoned, "'[a] benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter.' MBDA Business Centers have finite resources and offer finite services."[91] Accordingly, the presumption necessarily used race as a negative—some people could not get the benefit, and race was a factor.[92] Additionally, the presumption was premised on a stereotype.[93] In the court's words, the administrative agency believed "race is a reliable proxy for disadvantage, at least with respect to the listed groups. Thus, if a business owner belongs to an enumerated group, he or she is entitled to services without regard to their life circumstances, financial performance, or any social or economic metrics of 'disadvantage.'"[94]

As *Nuziard* suggests, the fact-finding necessary for a plaintiff to win a challenge to race-based spending under the twin commands is minimal. The plaintiff likely need only show that the government's resources are finite (which is practically a truism) and that race is somehow being used as a factor in distributing those resources. Such facts establish that race is necessarily being used as a negative—which alone renders the program unconstitutional. Additionally, unless the government randomly picked a few races to favor (which would likely create other issues), it presumably relied on stereotypes. For example, even if the government has mounds of evidence to suggest that, on average, blacks have less successful businesses, if it presumes that a particular black-owned business needs help based on that data, it would be employing a stereotype. Absent the bigotry of low expectations, the government has no basis to believe that a particular business is doing as poorly as other businesses owned by people with the same skin color.

To plaintiffs' attorneys still not convinced, consider this: the plaintiffs' attorneys in *Nuziard* did not take a single deposition, hire a single expert, or commission an expensive rebuttal disparity study.[95] They won the case because the government used race as a "negative" and a "stereotype." Whether the government was attempting to remedy past discrimination was, for all intents and purposes, irrelevant to the outcome.[96]

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[91] *Id.* at *36 (quoting *SFFA*, 600 U.S. at 218–19).

[92] *Id.*

[93] *Id.* at *35.

[94] *Id.*

[95] One of this article's authors, Daniel P. Lennington, was the lead attorney for the plaintiffs.

[96] This article has focused on the "twin commands," but similar reasoning also applies to the "logical end point" test set forth in *SFFA*. *See SFFA*, 600 U.S. at 221. While this test is arguably not new, the *SFFA* Court made exceedingly clear that an affirmative action program must sunset. It

IV. CONCLUSION

Plaintiffs should seriously consider whether they need to argue about strict scrutiny at all given the twin commands. Plaintiffs may be loath to let a government attorney get away with arguing that race-based spending serves a compelling interest. But they may be more successful if they are able to frame their complaints in such a way that the government's supposed interest—and all the costly evidence-gathering needed to support and refute it—is completely irrelevant. This strategy will likely be more successful and achieve plaintiffs' desired outcomes at a substantially lower cost.

Other Views:

- Ralph Capio & Erin M. Carr, *Assessing the Potential Consequences of Students for Fair Admissions, Inc. (SFFA) on the Small Business Development Program*, 60 CAL. W. L. REV. 525 (2024), *available at* https://scholarlycommons.law.cwsl.edu/cgi/viewcontent.cgi?article=1773&context=cwlr.
- Gabriela Dionisio, *Henderson and the Objective Observer Standard: The Future of Race-Conscious Standards Post-Students for Fair Admissions,* 48 SEATTLE U. L. REV. 255 (2024), *available at* https://digitalcommons.law.seattleu.edu/sulr/vol48/iss1/9/.
- Larry J. Pittman, *The Supreme Court's Erroneous Equal Protection Clause Analysis: Societal Discrimination, the Harvard College Decision As the New Plessy v. Ferguson-Lite, and the Thirteenth Amendment,* 57 CREIGHTON L. REV. 189 (2024), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4870463.

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indicated that any affirmative action program older than 20 to 25 years is especially subject to attack. *Id.* at 224–25; *see also id.* at 225 (rejecting an argument that a sunset is not necessary when an affirmative action program is "frequently reviewed . . . to determine whether . . . [it] remain[s] necessary"). Many affirmative action programs are decades old, especially in the contracting space. Little discovery or factfinding is needed to challenge these programs solely on their failure to satisfy the logical end point test. *See, e.g.*, MAMCO v. U.S. Dep't of Trans., No. 3:23-cv-00072-GFVT, 2024 WL 4267183, at *10 (E.D. Ky. Sept. 23, 2024) ("Because the DBE program's racial preferences are not tethered to a foreseeable conclusion, the race-based presumption fails to be narrowly tailored.").

WHAT WILL SETTLE DOBBS?*

Clarke D. Forsythe**

A review of ROE V. DOBBS: THE PAST, PRESENT, AND FUTURE OF A CONSTITUTIONAL RIGHT TO ABORTION (Lee Bollinger & Geoffrey Stone eds. 2024)

Dobbs v. Jackson Women's Health Organization[1]—the 2022 Supreme Court decision that overturned *Roe v. Wade*—is one of the most important decisions on constitutional doctrine and precedent since the heyday of the Warren Court. Numerous academic criticisms of *Dobbs* have been published since 2022.[2] *Roe v. Dobbs: The Past, Present, and Future of a Constitutional Right to Abortion* is the first major book, the opening salvo in the campaign to challenge *Dobbs* and keep it *unsettled*—until a future Supreme Court can overturn it—and to propose progressive policy on elective abortion in the meantime.[3]

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

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[1] 597 U.S. 215 (2022).

[2] *See, e.g.*, Aaron Tang, *Lessons from* Lawrence*: How "History" Gave Us* Dobbs*—And How History Can Help Overrule It*, 133 YALE L.J. F. 65 (2023); Aliza Forman-Rabinovici & Olatunde C.A. Johnson, *Political Equality, Gender, and Democratic Legitimation in* Dobbs, 46 HARV. J.L. & GENDER 81 (2023); Reva B. Siegel, *Memory Games*, 101 TEX. L. REV. 1127 (2023); Michele Goodwin, *Opportunistic Originalism:* Dobbs v. Jackson Women's Health Organization, 2022 SUP. CT. REV. 111; Reva B. Siegel, *The History of History and Tradition: The Roots of* Dobbs *'s Method (and Originalism) in the Defense of Segregation*, 133 YALE L.J. F. 99 (2023).

[3] Justice Stephen Breyer also has a chapter criticizing *Dobbs* in his new book. READING THE CONSTITUTION: WHY I CHOSE PRAGMATISM, *NOT* TEXTUALISM (2024).

The book's twenty chapters address many themes, including stare decisis, history, the role and legitimacy of the Supreme Court, speculation about *Dobbs*'s impact on women's lives, and public policies that progressives might support in Congress or the states. *Roe v. Dobbs* could be viewed as an abortion-specific appendix to *The Constitution in 2020*, a 2009 book edited by Professors Jack Balkin & Reva Siegel, two of the contributors to *Roe v. Dobbs*, which brought together progressive scholars to design "a powerful blueprint for implementing a more progressive vision of constitutional law in the years ahead."[4] *Roe v. Dobbs* is likewise designed to bring together progressive legal academics who, in the words of co-editor Professor Lee Bollinger, share "the shock of that reality which pervades nearly all of the essays in this volume": that "the spirit of the Warren Court" will not "continue . . . in the next few decades."[5] Of the twenty-five contributors to the volume, twenty-three are progressives, and two are conservatives.

The co-editors are well-qualified to convene these academics. Bollinger clerked for Chief Justice Warren Burger during the second term that *Roe v. Wade* and *Doe v. Bolton* were considered by the Court, 1972-73.[6] During the same term, co-editor Professor Geoffrey Stone of the University of Chicago clerked for Justice William Brennan.[7] They joined the Court during the summer between the *first* round of arguments in *Roe* and *Doe* before seven Justices in December 1971 and the *second* round of arguments before a full bench in October 1972 (after Justices Lewis Powell and William Rehnquist were confirmed).

I. THE BACKSTORY TO *ROE V. WADE*

Dobbs cannot be accurately understood without a thorough understanding of *Roe* and *Doe*. Bollinger and Stone don't acknowledge, much less tell, the backstory to *Roe* and *Doe*, nor do the contributors to the volume. But that background is essential to understanding the *Roe* and *Doe* opinions and

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[4] THE CONSTITUTION IN 2020, *available at* https://www.goodreads.com/en/book/show/6463833.

[5] ROE V. DOBBS: THE PAST, PRESENT, AND FUTURE OF A CONSTITUTIONAL RIGHT TO ABORTION 339 (Lee C. Bollinger & Geoffrey R. Stone eds., 2024).

[6] *List of Law Clerks of the Supreme Court of the United States (Chief Justice)*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_law_clerks_of_the_Supreme_Court_of_the_United_States_(Chief_Justice) (last visited June 18, 2024).

[7] *List of Law Clerks of the Supreme Court of the United States (Seat 3)*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_law_clerks_of_the_Supreme_Court_of_the_United_States_(Seat_3) (last visited June 18, 2024).

to evaluating the arguments made in *Roe v. Dobbs* because of the procedural, evidentiary, and adjudicative rules that the *Roe* Court evaded in its rush to reach the result.

As I document in my book, *Abuse of Discretion*,[8] the full Court originally took *Roe* and *Doe* in April-May 1971 *not* to address abortion, but to address the application of *Younger v. Harris*[9]—whether state court criminal defendants can take their cases into federal court—to the procedural scenarios of *Roe* and *Doe*.[10] Just before the 1971 Term began, a crisis erupted in the Court when Justices Hugo Black and John Marshall Harlan both abruptly retired in September 1971 due to ill health. That reduced the number of Justices to seven and flipped the balance of the Court. The temporary majority saw this as an opportunity to use *Roe v. Wade*[11] and *Doe v. Bolton*[12] to sweep away state abortion laws before President Richard Nixon, whom several of the Justices loathed, could fill the Black and Harlan vacancies with what were expected to be conservative Justices.[13] Their plan is laid out in Justice Brennan's December 30, 1971, memorandum to Justice William

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[8] CLARKE D. FORSYTHE, ABUSE OF DISCRETION: THE INSIDE STORY OF *ROE V. WADE* (2013).

[9] 401 U.S. 37 (1971).

[10] FORSYTHE, *supra* note 8, at 17-24; *see also* BOB WOODWARD AND SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 165 (1979)

> He [Douglas] knew also that the two cases now before the Court [*Roe v. Wade* and *Doe v. Bolton*] did not signal any sudden willingness on the part of the Court to grapple with the broad question of abortions. They had been taken only to determine whether to expand a series of recent rulings limiting the intervention of federal courts in state court proceedings. Could women and doctors who felt that state prosecutions for abortions violated their constitutional rights go into federal courts to stop the state? And could they go directly into federal courts even before going through all possible appeals in the state court system? Douglas knew the Chief wanted to say no to both these jurisdiction questions. He knew the Chief hoped to use these two cases to reduce the number of federal court cases brought by activist attorneys. The two abortion cases were not to be argued primarily about abortion rights, but about jurisdiction.

Id.

[11] 410 U.S. 113 (1973).

[12] 410 U.S. 179 (1973).

[13] *See, e.g.*, David Savage, *Roe Ruling: More Than Its Author Intended*, L.A. TIMES (Sept. 14, 2005), https://www.latimes.com/archives/la-xpm-2005-sep-14-na-abortion14-story.html (quoting Mark Tushnet, clerk to Justice Thurgood Marshall during the deliberations in *Roe v. Wade*: "All they wanted was to get those laws ["Texas-type laws"] off the books," Tushnet said. "They were not thinking long-term with an overall vision.").

Douglas, which he drafted after the first round of arguments, about how to justify a right to abortion.[14]

But the case selection was terrible. In choosing *Roe* and *Doe*, instead of any of the twenty or more other abortion cases percolating in the federal courts, the temporary majority chose two cases with no adversary proceeding or evidentiary record on abortion.[15] Deciding on the application of *Younger v. Harris* would have required no evidentiary record on abortion. But because they were bent on rushing to decide the abortion issue before Nixon could fill the vacancies, the Justices decided to use *Roe* and *Doe*.[16] Consequently, virtually everything in Justice Harry Blackmun's opinion was derived from his own research or interest group briefs filed in the Supreme Court for the first time.[17] For example, Justice Blackmun's claim that state restrictions on abortion may lead to "specific and direct harm medically diagnosable even in early pregnancy," which Professor Erwin Chemerinsky touts in his *Roe v. Dobbs* chapter, was based on no evidence and no record, and Blackmun cited no data.[18] Professor Stone once told me that the Justices decided to strike down the abortion laws when they learned about back-alley abortions. But

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[14] William J. Brennan, Memorandum re: Abortion Cases, No. 70-40 (Dec. 30, 1971), *in* WILLIAM J. BRENNAN PAPERS, Box I: 285, Folder 9, (Library of Cong.) (quoted in FORSYTHE, *supra* note 8, at 22, 362 n.11 (2013)). *See also* Opinions of William J. Brennan, October Term 1971, *in* WILLIAM J. BRENNAN PAPERS, Box II: 6, Folder 14, pp. 39, 40 (Libr. of Cong.) ("In Conference, according to Justice Brennan's notes, it seemed to be generally agreed that the jurisdictional and other procedural hurdles to reaching the merits could be overcome in one way or another.") (cited in FORSYTHE, *supra* note 8, at 362 n.11).

[15] Randy Beck, *Self-Conscious Dicta: The Origins of* Roe v. Wade*'s Trimester Framework*, 51 AM. J. LEGAL HIST. 505, 511-12 (2011).

[16] The four Justices wanted to hear the cases and vote before the vacancies could be filled. They were able to do that on December 13. But the new majority (with newly-confirmed Justices Powell and Rehnquist) voted to rehear the cases in the fall of 1972.

[17] *See* Henry J. Friendly, *The Courts and Social Policy: Substance and Procedure*, 33 U. MIA. L. REV. 21, 36-37 (1978). Judge Friendly wrote:

> The Court's conclusion in *Roe* that "[m]ortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low as or lower than the rates for normal childbirth" rested entirely on materials not of record in the trial court, and that conclusion constituted the underpinning for the holding that the asserted interest of the state "in protecting the woman from an inherently hazardous procedure" during the first trimester did not exist.
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> If an administrative agency, even in a rulemaking proceeding, had used similar materials without having given the parties a fair opportunity to criticize or controvert them at the hearing stage, reversal would have come swiftly and inexorably.

Id. at 37.

[18] *Roe*, 410 U.S. at 153.

while they might have learned about back-alley abortions from the *New York Times* or at a Washington cocktail party, they didn't learn it from any factual hearing or evidentiary record in *Roe* or *Doe.*

The lack of any evidentiary record had several serious legal consequences. First, it set the stage for two rounds of confused oral arguments, both featuring a dearth of coherent constitutional analysis.[19] Notably, the word "viability" wasn't mentioned once in four hours of argument. The original draft opinions through 1971 and 1972 focused on twelve weeks gestation (the end of the first trimester) as the proposed limit to the proposed abortion right. Only after the second round of arguments in October 1972—in which no party or amicus raised viability as the line to draw—did the Justices begin to negotiate among themselves about what line they were going to draw, and they settled on the viability rule a month before releasing the opinions.[20] This is just one signal that *Roe* was entirely result-oriented. The temporary majority first decided to invalidate abortion laws nationwide, and only then did it decide how to justify and write a decision accomplishing that goal, which took the Justices through 1972 and resulted in a re-argument in October 1972.

Second, virtually half of the Court's opinion in *Roe* is legal history, and because there was no record or evidentiary hearing to draw on, that history came from Justice Blackmun's own research and from interest group amicus briefs.[21] But that history was quickly debunked.[22] Indeed, Justice Blackmun dropped any defense of his historical account in *Roe* by the time *Webster v. Reproductive Health Services* was decided in 1989.[23]

Third, the basic reasoning in *Roe* is a simple *ipse dixit*. The Court declared that the "right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[24] This statement is derivative of Justice Brennan's *ipse dixit* in *Eisenstadt v. Baird*: "If the right of

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[19] FORSYTHE, *supra* note 8, at ch. 3. The transcripts and the original audio of the oral arguments are available at https://www.oyez.org/cases/1971/70-18 (*Roe v. Wade*) and https://www.oyez.org/cases/1971/70-40 (*Doe v. Bolton*).

[20] *See* Beck, *supra* note 15, at 520-26.

[21] *Roe*, 410 U.S. at 129-62.

[22] *Dobbs*, 597 U.S. at 252 & n.38 and accompanying text; JOSEPH W. DELLAPENNA, DISPELLING THE MYTHS OF ABORTION HISTORY 689, 748, 872, 1053-54 (2006). A revised edition of Dellapenna's book was published in 2023, but I refer to the first edition throughout.

[23] 492 U.S. 490, 537-60 (1989) (Blackmun, J., concurring in part and dissenting in part). Blackmun didn't expressly concede the weakness of his historical account, but he didn't defend it after *Roe*.

[24] *Roe*, 410 U.S. at 153.

privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[25] Although Professor Nancy Cott, a contributor to *Roe v. Dobbs*, considers this "significant,"[26] it is not legal reasoning; it is a diktat.

Fourth, the super-structure of *Roe*—the ban on state prohibition of abortion until after viability, the trimester system, deference to abortion providers, the viability rule, the gradation in regulation as gestation progresses, the unlimited "health" exception after viability—was based on the medical assumption that "abortion is safer than childbirth."[27] Without an evidentiary record, Blackmun tentatively asserted that "[m]ortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low as or lower than the rates for normal childbirth."[28] But later in the opinion, he reasserted this assumption as the "now-established medical fact . . . that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth."[29] As with the legal history, however, this assertion was based on Justice Blackmun's own research or interest group amicus briefs. There were no reliable American data in 1971 or 1972 to support the proposition, so Blackmun instead cited numbers from Soviet bloc countries in the 1950s.[30] But the seven medical sources that Blackmun cited to support this key medical assumption were shallow and unreliable,[31] and as Dorothy Beasley, the attorney for Georgia in the *Doe* case, emphatically told the Court, the claimed data were not part of the record.[32] The Court later—in *Akron v. Akron Center for Reproductive Health*[33] and again in *Planned Parenthood v. Casey*[34]—acknowledged that *Roe* was based on "assumptions."

Professor Michele Goodwin's chapter in *Roe v. Dobbs* reminds us that this is how abortion law was litigated with *Roe* as the reigning law: instead of

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[25] Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

[26] ROE V. DOBBS, *supra* note 5, at 207, 214.

[27] *Roe*, 410 U.S. at 149.

[28] *Id.*

[29] *Id.* at 163.

[30] FORSYTHE, *supra* note 8, at 163-70.

[31] *Id.* at 159-70.

[32] *Id.* at 97, 162.

[33] City of Akron v. Akron Ctr. For Reprod. Health, Inc., 462 U.S. 416, 430 n.12 (1983) ("[T]he State retains an interest in ensuring the validity of *Roe*'s factual assumption that 'the first trimester abortion [is] as safe for the woman as normal childbirth at term.'").

[34] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 860 (1992) ("We have seen how time has overtaken some of *Roe*'s factual assumptions.").

parties submitting reliable data that could be tested in the adversarial process, interest groups filed amicus briefs in facial challenges to fill the information vacuum and establish national policy. Goodwin claims that Blackmun "undertook a rigorous empirical review," but her only support for this claim is Blackmun's statement that state abortion restrictions may cause "[s]pecific and direct harm medically diagnosable even in early pregnancy" (the same quotation Chemerinsky praises).[35] Goodwin quotes a Guttmacher Institute article from 2003, a statement by Dr. Alan Guttmacher from 1967, and unsubstantiated claims about Cook County Hospital in Chicago to lend support to Blackmun's conclusion, but none of these claims, nor any data, were part of any factual hearing or evidentiary record in *Roe*.[36] "Deaths," Goodwin claims about the pre-*Roe* era, "were particularly acute among women of color."[37] Again, she supplies no data, nor do her sources. And she claims that "the United States is now the deadliest country in the industrialized world in which to be pregnant."[38] Again, no data.

Finally, *Roe* was a sweeping decision. *Roe* legalized abortion for any reason, at any time during pregnancy.[39] If the Court had been more modest and stuck to the original draft opinions limiting the abortion right to the first twelve weeks—the end of the first trimester—could *Roe* have been more strongly supported by public opinion and thereby become more settled over five decades?[40]

The Court made itself the national abortion control board, taking control of the issue and of every regulation of every clinic from coast to coast. This had a negative impact on the Court, on American politics, and on federal judicial nominations. These negative effects kept *Roe* unsettled for nearly fifty years and significantly contributed to the incoherence, unworkability, and contentiousness of abortion law.[41]

By almost any objective measure, *Roe* was the most controversial Supreme Court decision of the 20th century, perhaps the most controversial since

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[35] ROE V. DOBBS, s*upra* note 5, at 201 (citing *Roe*, 410 U.S. at 153); *see supra* text accompanying note 18.

[36] ROE V. DOBBS, s*upra* note 5, at 201 & n.53.

[37] *Id.* at 201.

[38] *Id.* at 202.

[39] *Dobbs*, 597 U.S. at 252 n.40 (describing the sweeping scope of *Roe* and *Casey*). *See also* FORSYTHE, *supra* note 8, at 1 nn.1-2 and accompanying text.

[40] *See also* Randy Beck, *Fueling Controversy*, 95 MARQ. L. REV. 735 (2011).

[41] *See generally* Clarke Forsythe & Rachel N. Morrison, *Stare Decisis, Workability, and* Roe v. Wade*: An Introduction*, 18 AVE MARIA L. REV. 48 (2020).

Dred Scott. Professor Michael McConnell makes this point in his chapter in *Roe v. Dobbs*.[42] Polls showing that respondents support *Roe* have been unreliable because, as a 1990 Gallup poll made clear, most Americans have no clue what *Roe* did or meant.[43] The fifty years of controversy, starting with these legal defects, kept *Roe* unsettled. And if a precedent is unsettled, stare decisis does not oblige the Court to stand by it; rather, it requires the Court to reexamine the unsettled precedent to decide how to settle the law.[44]

This context, which is not apparent on the face of any of the *Roe* opinions, is necessary for any thorough analysis of *Roe*, its progeny, and its legacy. Yet it is ignored by virtually all the contributors to *Roe v. Dobbs*. Indeed, according to Bollinger, *Dobbs* was a "brazen overturning" which exhibits an "attitude of hostility, even mockery toward the *Roe* Court" and "reflects a breach of judicial norms of respect."[45] Stone sees *Dobbs* as "the product not of a principled approach to law but of aggressive and illegitimate politics," and he argues that "in a system based on stare decisis, it is clear that *Dobbs* was the product not of judicial integrity but of the aggressively partisan distortion of our judicial process."[46] Readers can better evaluate the validity of these statements and the arguments throughout *Roe v. Dobbs* if they understand how *Roe* came to be, but they will have to look elsewhere to find that history.

II. WHY *ROE* WAS UNSETTLED & WHY THAT MATTERS

Roe v. Wade was decided in 1973. One of the most potent and widely-deployed critiques of the *Dobbs* majority is that it allegedly violated the principle of stare decisis by declining to stand by a forty-nine-year-old precedent. But this critique misses a critical point. The common law maxim advising deference to precedent is not simply "stare decisis"—as it is usually taught in law schools—but *stare decisis et quieta non movere*. That means to "stand by the decisions and not disturb what is settled."[47] Stare decisis is not just about standing by previous decisions; it is about settling the law.

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[42] ROE V. DOBBS, *supra* note 5, at 101.

[43] *See* JAMES DAVISON HUNTER, BEFORE THE SHOOTING BEGINS: SEARCHING FOR DEMOCRACY IN AMERICA'S CULTURE WAR 87 (1994) ("After twenty years of ceaseless commentary in the media and heated debate by political pundits, almost half of all Americans still admit to having no knowledge of what *Roe* accomplished, and most of the rest get it wrong.").

[44] *See infra* Section II.

[45] ROE V. DOBBS, *supra* note 5, at 339.

[46] *Id.* at 340.

[47] Clarke D. Forsythe & Regina Maitlen, *Stare Decisis, Settled Precedent, and* Roe v. Wade*: An Introduction*, 34 REGENT U. L. REV. 385, 386-87 (2022).

Over the past two centuries, the Supreme Court has employed several factors to determine whether the law is settled on a particular point, including acquiescence by the Court, criticism by lower court judges, and criticism by the bar or academics.[48] The Justices often distinguish "settled" from "unsettled" law,[49] and they periodically conclude that existing rules are "unworkable."[50] Stare decisis analysis is not the special province of abortion law; there

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[48] *See generally id.*

[49] *See, e.g.*, Vidal v. Elster, 602 U.S. 286, 325 (2024) (Sotomayor, J., concurring in the judgment) (referring to "settled First Amendment precedent"); Great Lakes Ins. SE v. Raiders Retreat Realty Co., 601 U.S. 65, 80 (2024) (Thomas, J., concurring) (referring to "settled practice" governing maritime insurance); Kirtsaeng v. Wiley, 568 U.S. 519, 544 (2013) (Breyer, J.) ("[T]he law has not been settled for long in Wiley's favor."); District of Columbia v. Heller, 554 U.S. 570, 578 n.3 (2008) ("[I]n America 'the settled principle of law is that the preamble cannot control the enacting part of the statute in cases where the enacting part is expressed in clear, unambiguous terms.'"); Wyoming v. Houghton, 526 U.S. 295, 309 (1999) (Stevens, J., dissenting) (referring to a "settled distinction between drivers and passengers"); Bragdon v. Abbott, 524 U.S. 624, 645 (1998) (saying canon applies when "judicial interpretations have settled the meaning of an existing statutory provision"); U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J.) ("[I]t is well settled that the whole people of the United States asserted their political identity and unity of purpose when they created the federal system."); Ferguson v. Skrupa, 372 U.S. 726, 730-31 (1963) (Black, J.) ("It is now settled that States 'have power to legislate . . . .'"); SEC v. Chenery, 332 U.S. 194, 200 (1947) ("[I]t was also clear that the Commission was not bound by settled judicial precedents . . . ."); Watson v. Maryland, 218 U.S. 173, 176 (1910) ("It is too well settled to require discussion at this day . . . ."); Patterson v. Kentucky, 97 U.S. 501, 504 (1878) ("By the settled doctrines of this court . . . ."); Calder v. Bull, 3 U.S. (3 Dall.) 386, 399 (1798) (Iredell, J.) (referring to "the objects of the legislative power, and to restrain its exercise within marked and settled boundaries").

[50] *See* Forsythe & Morrison, *supra* note 41, at 52-53 n.26 (citing Knick v. Twp. of Scott, 139 S. Ct. 2162, 2178 (2019) ("The state-litigation requirement has also proved to be unworkable in practice."); Carpenter v. United States, 138 S. Ct. 2206, 2224 (2018) (Kennedy, J., with whom Thomas & Alito, JJ., joined, dissenting) ("draws an unprincipled and unworkable line between cell-site records on the one hand and financial and telephonic records on the other"); *id.* at 2244 (Thomas, J., dissenting) ("[T]he *Katz* test also has proved unworkable in practice."); Perry v. Merit Sys. Prot. Bd., 137 S. Ct. 1975, 1987 (2017) ("In practice, the distinction [between the Board's 'jurisdictional rulings and the Board's procedural or substantive rulings for purposes of allocating judicial review authority between district court and the Federal Circuit'] may be unworkable."); Oneok, Inc. v. Learjet, Inc., 575 U.S. 373, 392 (2015) (Scalia, J., with whom Roberts, C.J., joined, dissenting) (preemption rule "will prove unworkable in practice"); Salinas v. Texas, 570 U.S. 178, 190 (2013) ("[N]ot persuaded . . . that applying the usual express invocation requirement where a witness is silent during a noncustodial police interview will prove unworkable in practice."); Williams v. Illinois, 567 U.S. 50, 114 (2012) (Thomas, J., concurring) ("[A] primary purpose inquiry [for extrajudicial statement under the Confrontation Clause] divorced from solemnity is unworkable in practice."); Christian Legal Soc'y Ch. of the Univ. of Cal. v. Martinez, 561 U.S. 661, 699 n.1 (2010) (Stevens, J., concurring) ("This proposition [distinction between religious status and belief] is not only unworkable in practice but also flawed in conception.").

are general principles about whether and when the law is settled that the Court applies in many and varied contexts.

Though most contributors to *Roe v. Dobbs* assume that *Roe* was settled right up until *Dobbs* was decided in 2022, numerous factors ensured that *Roe v. Wade* remained unsettled throughout its forty-nine-year reign. *Roe*'s unsettled state was significant for the *Dobbs* Court's stare decisis analysis.[51] But some of the contributors to *Roe v. Dobbs* have difficulty understanding Justice Samuel Alito's arguments in his *Dobbs* opinion about *Roe*'s unsettled state because they do not deal forthrightly with *Roe*'s flaws.

One reason *Roe* was unsettled is that it was controversial from the beginning. Several contributors attempt to rewrite the history of the outcry against *Roe*. Professor Bollinger claims, relying on Professor Siegel, that the outcry didn't happen immediately.[52] Professor Linda Gordon likewise claims that, "when *Roe* was decided, few thought it controversial."[53]

But Professor John Hart Ely's famous criticism was made in 1973,[54] the very year *Roe* was decided. And then-Judge Ruth Bader Ginsburg said in 1992 that the Court had moved too far too fast in deciding *Roe* when and how it did.[55] Justice Blackmun himself repeatedly predicted to his colleagues before *Roe* was issued that the Court would be criticized for the decision.[56] Numerous constitutional amendments—twenty-seven by Professor Mary Ziegler's count—were introduced in Congress within weeks to overturn

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[51] *See, e.g.*, *Dobbs*, 597 U.S. at 226 (criticizing *Roe*'s historical rationale for finding a constitutional right to abortion); *id.* at 228 (arguing that *Roe* reads like a statute); *id.* (pointing out that *Roe* was criticized by a "prominent constitutional scholar," criticized by other Justices, and decided by a divided Court); *id.* at 229 (*Roe* "sparked a national controversy that has embittered our political culture for a half century."); *id.* (pointing out that *Casey* was sharply divided); *id.* (suggesting *Casey* did not reaffirm *Roe*'s reasoning or rationale); *id.* at 230, 280 (arguing that *Casey* did not settle *Roe*); *id.* at 230 (noting that twenty-six states had asked the Court to overrule *Roe* and *Casey*); *id.* at 231 (arguing that the right to abortion is not deeply rooted in the nation's history or tradition); *id.* at 241 (referring to "*Roe*'s faulty historical analysis"); *id.* at 278 ("*Roe*'s reasoning was exceedingly weak," and scholars call it "totally unreasoned."); *id.* at 280-86 (opining that *Casey*'s rules and standard of review are unworkable); *id.* at 280 (saying *Roe*'s "test is full of ambiguities and is difficult to apply").

[52] ROE V. DOBBS, s*upra* note 5, at xviii.

[53] *Id.* at 225.

[54] John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973).

[55] Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185 (1992).

[56] FORSYTHE, *supra* note 8, at 3-4.

Roe.[57] Within three years of the *Roe* decision, more than forty states had enacted conscience-protection laws.[58] The Church Amendment—the first federal conscience law—was introduced on March 8, 1973, and it passed on June 18, 1973, five months after *Roe* was decided in January.[59] Congressional hearings on federal constitutional amendments were convened in 1974-75 and again in 1981-83. And dozens of state abortion laws were passed in 1973-75.[60] Last but not least, twenty-five states joined Mississippi in asking the Court to overrule *Roe* and *Casey* in the *Dobbs* case.[61] Attributing the unsettlement to isolated "conservative segments," as some authors suggest in *Roe v. Dobbs*, disregards these significant institutional responses that kept *Roe* unsettled.[62]

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[57] ROE V. DOBBS, s*upra* note 5, at 231 ("There were twenty-seven personhood amendment proposals circulating in Congress by August 1973."). Even that does not account for *all* the amendments filed in response to *Roe*. There were at least thirty-four abortion-related amendments introduced in 1973 and approximately 330 introduced between 1973 and 2003. *See Human Life Amendments: 1973-2003*, NAT'L COMM. FOR A HUM. LIFE AMEND., https://www.humanlifeaction.org/downloads/sites/default/files/HLAlst7303.pdf (last visited Oct. 25, 2024) (listing amendments compiled from the Library of Congress, the Congressional Record, and the Congressional Information Service).

[58] Robin Fretwell Wilson, *The Limits of Conscience: Moral Clashes over Deeply Divisive Healthcare Procedures*, 34 AM. J.L. & MED. 41, 43 n.16 (2008) ("Conscience clauses arose contemporaneously with *Roe v. Wade*. . . ."); Lynn D. Wardle, *Protecting the Rights of Conscience of Health Care Providers*, 14 J. LEGAL MED. 177 (1993); M. David Bryant, *State Legislation on Abortion After* Roe v. Wade*: Selected Constitutional Issues*, 2 AM. J.L. MED. 101, 116 (1976).

[59] The Church Amendment, Pub. L. No. 93-45, § 401(b), (c), 87 Stat. 91 (1973) (codified at 42 U.S.C. § 300a-7); *The History and Effect of Abortion Conscience Clause Laws*, CONG. RES. SERV. (Jan. 29, 2010), https://www.everycrsreport.com/reports/RL34703.html ("In 1973, Congress passed the first conscience clause law, commonly referred to as the Church Amendment, in response to the U.S. Supreme Court's decision in *Roe v. Wade* . . . .").

[60] *See generally* JOHN T. NOONAN, JR., A PRIVATE CHOICE: ABORTION IN AMERICA IN THE SEVENTIES (1979); LYNN D. WARDLE, THE ABORTION PRIVACY DOCTRINE: A COMPENDIUM AND CRITIQUE OF FEDERAL COURT ABORTION CASES (1980); DELLAPENNA, *supra* note 22, at 837-38, 877-79, 881, 941-42; Beck, *Fueling Controversy*, *supra* note 40; Bryant, *supra* note 58, at 101 ("Over the past three years, a great volume of legislation on abortion has been produced by state legislatures in an attempt to fill the vacuum created by the United States Supreme Court's 1973 decision in *Roe v. Wade*."); Joseph P. Witherspoon, *The New Pro-Life Legislation: Patterns and Recommendations*, 7 ST. MARY'S L.J. 637 (1976); Richard Wasserman, Note, *Implications of the Abortion Decisions: Post* Roe *and* Doe *Litigation and Legislation*, 74 COLUM. L. REV. 237, 254-63 (1974).

[61] Those states were Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming.

[62] ROE V. DOBBS, *supra* note 5, at xxi. *See* Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 381 (1985) ("I earlier observed that, in my judgment, *Roe* ventured too far in the change it ordered. The sweep and detail of the

Ignoring this and other evidence that *Roe* was unsettled, the *Roe v. Dobbs* contributors argue that *Dobbs*' overturning of *Roe* came as a surprise; Professor Khiara Bridge even attributes the overturning to the Court's "mendacity," as though it were a sneak attack on an unsuspecting public.[63]

But these expressions of surprise and charges of deception are not credible. Virtually every national election since 1976 has occasioned predictions of *Roe*'s demise if one candidate prevails. Likewise, every Supreme Court abortion case since 1973 launched aggressive direct mail operations, seeking to stoke fears (or hopes) that *Roe* could fall. If anything, the crescendo only grew over time. In 2016, the Republican presidential and vice-presidential candidates frankly told the public of their aim to have *Roe v. Wade* overturned, and the Democratic candidate raised the alarm about the same possibility in an effort to secure support.[64] In 2019-2020, several states passed laws to expand or restrict the legality of abortion based on the publicly declared fear that *Roe* would be overturned. In 2022, there were no reasonably settled expectations that *Roe* would survive. *Dobbs* did not overturn settled law or upset reasonable reliance interests.

Professor McConnell—one of the two conservative contributors to *Roe v. Dobbs*—offers a more realistic appraisal of stare decisis and thus a more balanced assessment of *Dobbs*. He first points out that the "legal reasoning of the *Roe* opinion was exceptionally weak."[65] He further adopts the

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opinion stimulated the mobilization of a right-to-life movement and an attendant reaction in Congress and state legislatures."); MARIAN FAUX, *ROE V. WADE*: THE UNTOLD STORY OF THE LANDMARK SUPREME COURT DECISION THAT MADE ABORTION LEGAL xv-xvi (1988) ("The decision generated an enormous amount of political activism among supporters and opponents of legal abortion, partly because no one expected that the opinion would be so sweeping. *Roe v. Wade* made abortion legal literally overnight everywhere in the United States. Stunned antiabortion activists immediately set about organizing a campaign to overturn the decision. Meanwhile, pro-choice activists, who had believed that the decision would end any controversy over abortion, were equally shocked when this did not happen. Countless battles have been fought over *Roe v. Wade*, and the war still rages.").

[63] ROE V. DOBBS, *supra* note 5, at 127.

[64] *Id.* at 156 (contributor Richard Re noting that "Trump accomplished exactly what he promised the electorate"); *id.* at 384 n.96 (citing Aaron Blake, *Trump Makes Clear* Roe *is on the Chopping Block*, WASH. POST, July 2, 2018). *See also, e.g.*, Claire Landsbaum, *Mike Pence says* Roe v. Wade *Will be Overturned If Trump is Elected*, THE CUT (July 29, 2016), https://www.thecut.com/2016/07/mike-pence-says-roe-v-wade-will-be-overturned.html; *Pence: 'I believe we'll see Roe vs. Wade consigned to the ash heap of history,'* DEMOCRATIC NAT'L COMM. (July 10, 2018), https://democrats.org/news/pence-i-believe-well-see-roe-vs-wade-consigned-to-the-ash-heap-of-history/ (citing numerous statements in 2016 by Mike Pence in support of overturning *Roe v. Wade*).

[65] ROE V. DOBBS, *supra* note 5, at 101.

traditional understanding that stare decisis is a presumption rather than an iron-clad rule. "Viewed realistically," he argues, "'our practice' cannot support a strict version of the doctrine."[66] Now that *Roe* has been overturned, McConnell suggests, the Justices should reassess the doctrine of stare decisis afresh.

Professor Richard Re aims to defend Chief Justice Roberts's concurrence in the judgment in *Dobbs* by arguing for what he calls "gradualism."[67] Re's argument rests on three assumptions: (1) abortion is a fundamental right, (2) the errors of *Roe* did not require its overruling, and (3) *Dobbs* harms women who desire abortion. A fourth assumption—that *Roe* was settled and *Dobbs* caused unexpected disruption—shows why Re's analysis fails to address the real situation that faced the *Dobbs* Court as it considered whether overturning the decades-old precedent would truly upset settled expectations.

Re's concessions alone show that there was a widespread expectation that *Roe* might be overturned in the years leading up to *Dobbs*, undercutting the notion that the overturning of *Roe* was a shocking break with a settled status quo. "After *Casey*," he notes, "political contestation around abortion had continued for another thirty years."[68] "Curtailing or overruling *Roe*, after all, has long been an explicit goal of Republican politicians."[69] He acknowledges that, during the 2016 campaign, "Clinton agreed that *Roe*'s fate was hanging in the balance."[70] Also in 2016, "Trump famously, or infamously, declared, 'if we put another two or perhaps three Justices on [overruling *Roe*] will happen."[71] Re even admits that the oral argument in *Dobbs* supplied adequate notice of the decision to come.[72]

Other evidence demonstrates that these expectations existed in the legal academy and state capitals too. During a town hall at the National Constitution Center in September 2019, Kathryn Kolbert, the attorney who argued *Planned Parenthood v. Casey*, and Professor Ziegler, a contributor to *Roe v.*

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[66] *Id.* at 108.

[67] *Id.* at 140 ("Should Gradualism Have Prevailed in *Dobbs*?"). *Cf.* Kevin C. Walsh, *The Elevation of Reality Over Restraint in* Dobbs v. Jackson Women's Health Organization, 46 HARV. J.L. & PUB. POL'Y 915 (2023).

[68] ROE V. DOBBS, *supra* note 5, at 154.

[69] *Id.* at 155.

[70] *Id.*

[71] *Id.*

[72] *Id.* at 144.

Dobbs, confidently declared that "this Court will overturn *Roe v. Wade*."[73] And in the years just before *Dobbs*, Delaware, Nevada, Massachusetts, Illinois, New York, Vermont, and Rhode Island passed legislation to *expand* abortion access,[74] with legislative sponsors publicly declaring that they feared *Roe* would be overturned. Finally, the draft opinion in *Dobbs* was leaked on Monday evening, May 2, 2022, alerting the public to the forthcoming decision.

Re acknowledges that "*Dobbs* finds an especially strong foundation in democratic constitutionalism,"[75] by which he means many voters opposed *Roe* and their presidential candidate of choice appointed Justices whose votes overturned it. Yet he still urges gradualism that would have left *Roe* in place with modifications, without any argument that *Roe* was correctly decided as an original matter. Re fails to establish that *Roe* was settled to a degree that the historic common law maxim *stare decisis et quieta non movere* would counsel against overturning it.

The contributors to this book tell a story in which the peaceful, settled reign of *Roe* is suddenly and unexpectedly disrupted by a Supreme Court that drops *Dobbs* out of nowhere. To put it mildly, this story does not comport with our political, legal, legislative, and electoral history since 1973.

III. THE HISTORY OF ABORTION AND ITS REGULATION

Justice Blackmun's account of the history of abortion law in *Roe* took up nearly thirty pages of his opinion.[76] *Dobbs*'s response to *Roe*'s history takes up approximately a dozen pages plus two appendices compiling 19th-century state statutes totaling nearly thirty pages.[77] The history of abortion and its regulation was a major part of the reasoning that was held to justify a constitutional right to abortion. The errors in *Roe*'s telling of that history contributed to the *Dobbs* majority's rationale for holding that there is no such right.

Though *Roe*'s manifold historical errors have been identified and critiqued over the past fifty years, numerous authors in *Roe v. Dobbs* assume

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[73] National Constitution Center, *Should Roe v. Wade Be Overturned?*, YOUTUBE (Sept. 24, 2019), https://www.youtube.com/watch?v=ddSsLg7Zj78.

[74] Helen M. Alvaré, *Nearly 50 Years Post-*Roe v. Wade *and Nearing Its End: What is the Evidence that Abortion Advances Women's Health and Equality?*, 34 REGENT U. L. REV. 165, 168 & n.19 (2022) (citing state statutes).

[75] ROE V. DOBBS, *supra* note 5, at 155.

[76] *Roe*, 410 U.S. at 130-62.

[77] *Dobbs*, 597 U.S. at 241-55, 302-30.

the basic accuracy of *Roe*'s version of legal history, both to criticize *Dobbs* and to argue that there is a tradition of a right to abortion. Virtually all of the contributors ignore the fifty years' worth of criticism of *Roe*'s version of the history that has been published by numerous scholars. *Roe*'s supporters' unwillingness to forthrightly address the weaknesses of *Roe*'s historical rationale helps to explain the fragility of *Roe* after fifty years and the weak response of the *Dobbs* dissenters to the extensive and detailed history set forth by the Court. And the reticence of scholars to engage with opposing historical arguments reveals more about the scholars than about the arguments they elect to ignore.

One of the most noteworthy and insightful historical works on abortion is Professor Joseph Dellapenna's 2006 treatise, *Dispelling the Myths of Abortion History*, on which the *Dobbs* opinion draws.[78] Dellapenna's book is a thorough historical investigation into the political, legal, medical, and sociological history of abortion throughout the common law era. In the book, Dellapenna critiques what he calls the "new orthodoxy" of abortion history, which modern scholars take for granted. Dellapenna's well-sourced history contradicts Justice Blackmun's history—and that accepted by most modern scholars—at numerous key points. He produces abundant evidence that, contrary to Justice Blackmun's assumptions in *Roe*, no abortion techniques existed that were safe and effective before the second half of the 19th century, abortion was a common law crime, numerous states adopted statutory prohibitions of abortion at all stages of development before the Civil War, the statutes were adopted to protect both prenatal human beings and women's health, and elective abortion was never considered a right in American law before the 1960s. Anyone relying on *Roe*'s version of history should grapple with the challenge posed by Dellapenna's arguments and conclusions.

Yet none of the contributors to Part V of *Roe v. Dobbs*, "Historical Perspectives," engages Dellapenna. The authors don't even mention Dellapenna by name, despite the *Dobbs* Court's numerous citations to his work. Only Professor Cott even cites Dellapenna, but only in passing, in a footnote, without comment or response; it's clear she has never *read* Dellapenna's book.[79]

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[78] DELLAPENNA, *supra* note 22. Professor Dellapenna's published insights into abortion law and technology stretch back to Joseph W. Dellapenna, *The History of Abortion: Technology, Morality, and Law*, 40 U. PITT. L. REV. 359 (1979). *See also* JOHN KEOWN, ABORTION, DOCTORS AND THE LAW: SOME ASPECTS OF THE LEGAL REGULATION OF ABORTION IN ENGLAND FROM 1803 TO 1982 (1988).

[79] ROE V. DOBBS, *supra* note 5, at 403 n.41.

Professor Goodwin claims that states in the 19th century passed abortion laws with racist motives—"as concerns about enslaved Black women and men becoming freed from the grips of slavery loomed"—without citing any source.[80] Other contributors attribute state limits on abortion to Dr. Horatio Storer of Boston, apparently not realizing that most state abortion laws preceded Storer.[81] These authors are either unaware of Dellapenna's work—which could have corrected their misconceptions—or refuse to acknowledge that it exists.

The *Dobbs* opinion addresses a wealth of both common law history and 19th century statutory history, bolstered by the scholarly work of Dellapenna, John Keown, and other legal authorities. The dissenters in *Dobbs* mock the majority opinion because it cites 13th and 14th century common law.[82] But Blackmun's opinion in *Roe* also cited sources, such as Bracton and common law cases, going back to the 13th and 14th centuries,[83] and these were purportedly the basis for his conclusion—now demonstrated to be false[84]—that "it now appear[s] doubtful that abortion was ever firmly established as a common law crime even with respect to the destruction of a quick fetus."[85]

Many of the *Roe v. Dobbs* contributors rely on the amicus brief filed by the American Historical Association and the Organization of American Historians (AHA/OAH) in *Dobbs*, but this brief was seriously defective.[86] A key historical assumption of *Roe* was that safe and effective methods of abortion had always been available. But, as Dellapenna has demonstrated in detail,

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[80] *Id.* at 193. Why protecting black children from abortion or black women from coercion would be racist, Goodwin never explains.

[81] *Id.* at 36-38, 193-94, 228-29.

[82] *Dobbs*, 597 U.S. at 371 (Breyer, Sotomayor, and Kagan, JJ., dissenting) ("Of course, the majority opinion refers as well to some later and earlier history. On the one side of 1868, it goes back as far as the 13th (the 13th!) century.").

[83] *Roe*, 410 U.S. at 134-36 & n.26.

[84] *Dobbs*, 597 U.S. at 242-250; DELLAPENNA, *supra* note 22, at 127-52, 195-211. By itself, the prenatal application of the common law born alive rule shows that there was no right to an abortive act. Regina v. Sims, (1601) 75 Eng. Rep. 1075 (K.B.) 1076 (explaining the prenatal application of the born alive rule); Clarke D. Forsythe, *Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms*, 21 VAL. U. L. REV. 563, 583 & n.92 (1987) (quoting Coke); *id.* at 585 (quoting Blackstone).

[85] *Roe*, 410 U.S. at 136.

[86] Brief for Amici Curiae Am. Hist. Ass'n & Org. of Am. Historians in Support of Respondents, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392). *See* Stephen E. Sachs, Dobbs *and the Originalists*, 47 HARV. J.L. & PUB. POL'Y at *12-15 (forthcoming 2024), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4829599 (critiquing arguments found in the AHA-OAH amicus brief).

there were no reliably safe and effective abortion methods available before the 19th century—most likely the second half of that century.[87] None of the three types of abortion methods—injury, ingestion, and intrusion—that were in use before the 19th century were both safe and effective.[88] The AHA/OAH brief and the *Roe v. Dobbs* contributors ignore this important historical fact. Professor Anita Bernstein—not a contributor to *Roe v. Dobbs*—is one of the few who has forthrightly acknowledged that Dellapenna's exhaustive history is convincing: "Dellapenna argues persuasively that this combination [safety and effectiveness] did not come together until the nineteenth century."[89]

Professor Stone claims that:

> [U]ntil the late 1960s, almost everyone assumed that abortion had been illegal from the beginning of Western history. But as . . . justices—especially Justice Harry Blackmun . . . —looked into the history, this turned out to be completely wrong. To the contrary, abortion had been legal (at least up to the midpoint of pregnancy) throughout Western history— . . . in England in the years leading up to the American Revolution, in the American colonies, and in all the states at the time the Constitution was adopted. Indeed, it was not until the mid-nineteenth century that abortion in America began to be criminalized.[90]

Stone provides no citations for these historical claims, but he says that, "[f]or most of the justices, knowledge of this history was both mind-opening and powerful."[91] But recall that this historical account was never part of any adversary proceeding or evidentiary record in *Roe* or *Doe*, and it was therefore never subject to cross-examination disputing the factual basis for its conclusions. *Roe*'s version of the history relied on what the *Dobbs* Court refers to as the "discredited" historical work of Cyril Means.[92] Stone does not acknowledge or attempt to rebut the *Dobbs* opinion's thorough account of the history.

Likewise, Professor Chemerinsky makes the sweeping assertion that "historically abortions were not illegal in the United States," citing the *Dobbs* dissent but ignoring the majority's historical arguments to the contrary.[93] He

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[87] DELLAPENNA, *supra* note 22, at ch. 1.

[88] *Id.* at 20, 32-56.

[89] Anita Bernstein, *Common Law Fundamentals of the Right to Abortion*, 63 BUFF. L. REV. 1141, 1193 (2015).

[90] ROE V. DOBBS, *supra* note 5, at xvi.

[91] *Id.* at xvii.

[92] *Dobbs*, 597 U.S at 252 n.38 and accompanying text.

[93] ROE V. DOBBS, *supra* note 5, at 75.

also asserts that there is "no consensus as to when human life begins," citing one 2003 article.[94] This completely ignores the evidence marshaled in *Dobbs* as well as several areas of law—prenatal injury law, wrongful death law, and fetal homicide law—which protect the prenatal human from the time of conception.[95] Ignoring those areas of tort and criminal law, Chemerinsky claims the idea that life begins at conception is "based not on consensus or science but on religious views."[96] To the contrary, Dellapenna has marshaled a wealth of evidence showing that advances in medical science convinced the states in the mid-19th century to repeal the common law quickening rule and protect prenatal human life from conception.[97] Chemerinsky also claims that abortion became a crime due to "the agitation of Anthony Comstock,"[98] ignoring the common law that long pre-dated him and the state abortion laws enacted before Comstock arrived on the scene.

Professor Cott's chapter, entitled "Where History Fails," attempts to massage the Court's opinion in *Roe* and make it seem more reasonable, accurate, and credible. She acknowledges that the historical analysis in *Roe* was entirely based on "the sources Blackmun read," "Blackmun's historical reading over the summer" of 1972, and "his historical survey."[99] But she downplays the importance of history to the *Roe* opinion.[100] Instead, she argues, "privacy" was dispositive; "[t]he history served merely as a narrative backup."[101] This ignores Justice Blackmun's own statements that history was the foundation for his constitutional conclusions in *Roe*. In addition, the *Dobbs* opinion demonstrates how essential Blackmun's history was to his reasoning and conclusions, and particularly to section IX of the *Roe* opinion which summarized the standard of review by trimester for state regulations.[102] In addition to her questionable arguments that history was not essential to *Roe*, Cott claims that the "first criminalization" of abortion in the U.S. came in 1821.[103] This was

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[94] *Id.*

[95] *See generally* Paul Benjamin Linton, *The Legal Status of the Unborn Child Under State Law*, 6 U. ST. THOMAS J.L. & PUB. POL'Y 141 (2012); Forsythe, *Homicide of the Unborn Child*, *supra* note 84; William J. Maledon, Note, *The Law and the Unborn Child: The Legal and Logical Inconsistencies*, 46 NOTRE DAME L. REV. 349 (1971).

[96] ROE V. DOBBS, *supra* note 5, at 75.

[97] DELLAPENNA, *supra* note 22, at 257-60 & chs. 3 & 4.

[98] ROE V. DOBBS, *supra* note 5, at 75.

[99] *Id.* at 210.

[100] *Id.* at 211.

[101] *Id.*

[102] *Roe*, 410 U.S. at 164-65.

[103] ROE V. DOBBS, *supra* note 5, at 210.

indeed when abortion was first *codified* by a state (Connecticut) as a crime in American law, but it ignores the fact—noted by the *Dobbs* Court and Dellapenna—that the *common law* that preceded codification long treated abortion as a crime and was adopted by the colonies and states.[104] This superficial historical argument might persuade a non-lawyer who supports a right to abortion; it's difficult to understand how it survived editorial review by some of the top legal academics in the country.

Professor Ziegler too relies uncritically on *Roe*'s version of abortion history without engaging with Dellapenna or other legal scholars who have criticized that version of the history. She cites Leslie Reagan, James Mohr, and the aforementioned AHA/OAH brief in *Dobbs*, all of whose historical claims have been called into question by Dellapenna's scholarship. Instead of dealing with contrary historical data, Ziegler states evasively that "historians contest the degree to which the law" has treated abortion as a crime,[105] and she maintains that "most reject the narrative that Alito adopts [in *Dobbs*]."[106] But this is because, like Cott and Ziegler, these historians have refused to engage Dellapenna's arguments and sources.

Ziegler argues that "[t]he criminalization of abortion figured centrally in the Court's decision to dismantle abortion rights in *Dobbs*."[107] She wants to suggest that this is sinister and should make women afraid. But the history of abortion criminalization is mainly relevant because it contradicts the notion that abortion was ever considered a constitutional right, and it signifies the societal and legal respect given to the prenatal human being through most of American history. Drawing attention to the fact that abortion was a crime throughout American history is a direct response to the claim of the *Roe* Court that abortion was considered a right until the 19th century. The *criminalization* of abortion was a specific, documented, historical legal status, adopted by the common law and then by democratic action in virtually all fifty states. Furthermore, the common law of homicide, stretching back at least to 1600, treated the prenatal entity as a human being.[108] The Court's decision in *Roe* rested on an alleged historical right to abortion; *Dobbs*

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[104] *Dobbs*, 597 U.S. at 245-46; DELLAPENNA, *supra* note 22, at 211-28 ("The Reception of the Common Law on Abortion and Infanticide in the American Colonies").

[105] ROE V. DOBBS, *supra* note 5, at 228.

[106] *Id.*

[107] *Id.* at 227.

[108] Regina v. Sims, (1601) 75 Eng. Rep. 1075 (K.B.) 1076 (affirming the born alive rule). *See also* Forsythe, *Homicide of the Unborn Child*, *supra* note 84.

pointed out that in fact abortion had been criminalized, and thus, with its historical foundation undermined, *Roe* had to fall.

Roe v. Dobbs's treatment of history is frozen in 1973. Each of its contributors assumes *Roe*'s history to be basically correct and fails to engage either the common law sources, the 19th century statutes that *Dobbs* thoroughly examined, or the exhaustive history described by legal scholars on which *Dobbs* relied.

IV. EQUAL PROTECTION AS AN ALTERNATIVE RATIONALE FOR A RIGHT TO ABORTION

Equal protection is a dominant theme of *Roe v. Dobbs*. Several contributors argue that, now that *Roe* has been overturned, a constitutional right to abortion could be placed on firmer ground by rooting it in the Equal Protection Clause rather than the Due Process Clause of the Fourteenth Amendment.[109] Professor Stone claims that the Supreme Court didn't rest *Roe* on the Equal Protection Clause for the political reason that the Equal Rights Amendment "had been sent to the states for ratification in 1972 and they believed that it would be inappropriate for the Court to interpret the Equal Protection Clause in a way that would effectively render the Equal Rights Amendment redundant."[110] Actually, the equal protection rationale was dismissed in a memo that Justice Brennan sent to Justice Douglas on December 30, 1971, two weeks after the first round of oral arguments in *Roe* and *Doe*.[111] In the memo, Justice Brennan argued for a privacy rationale instead of Justice Douglas's First Amendment rationale and concluded that "the equal protection claims need not be reached."[112]

Professors Cary Franklin and Siegel claim that the *Dobbs* Court's rejection of an equal protection rationale for a right to abortion was "dictum," and thus that there remains a path for a future Court to re-adopt a right to abortion on this new ground without a stare decisis barrier.[113] But though

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[109] ROE V. DOBBS, *supra* note 5, at 12, 19-21 (Strauss), 22 (Franklin & Siegel),

[110] *Id.* at xxi.

[111] William J. Brennan, "Memorandum re: Abortion Cases, No. 70-40," *supra* note 14 (quoted in FORSYTHE, *supra* note 8, at 22, 362 n.11).

[112] *Id.* at 2-3 ("The gist of those claims is that the Georgia administrative procedures for obtaining an abortion are overly costly. Since I would strike all of those procedures down except for the requirement that the abortion be performed by a licensed physician, the importance of the equal protection claims would seem diminished.").

[113] ROE V. DOBBS, *supra* note 5, at 23 n.8 (citing *Dobbs*, 597 U.S. at 235).

equal protection has been proffered as a rationale for the abortion right in Justice Ginsburg's dissent in *Gonzales v. Carhart*,[114] in numerous amicus briefs in numerous cases by numerous scholars for decades,[115] and in *Dobbs* amicus briefs (including one signed by some *Roe v. Dobbs* contributors on behalf of "Equal Protection Constitutional Law Scholars"[116]), it has never carried the day. The equal protection discussion in *Dobbs* concluded with the Court rejecting it as an alternative *rationale* for the *holding* that the Fourteenth Amendment protects a right to abortion.[117] A court can always address and settle alternative rationales that have been proffered by Justices, parties, or amici, and the *Dobbs* Court did so on this question. The obligation of stare decisis is to settle the law, and leaving the door open to endless arguments about alternative rationales is not a path to settlement.

The argument for a right to abortion grounded in the Equal Protection Clause is based on empirical claims that abortion is necessary for women's health, equality, or autonomy. Yet while many people feel strongly that this is true, there is little reliable empirical data to back up these feelings, as Professor Helen Alvaré has shown.[118] Professor David Strauss argues that a balancing analysis is the best way for courts to address the abortion issue. But conducting such an analysis would require reliable public health data about abortion, which the U.S. does not have on a national basis. There are only

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[114] 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting) ("[L]egal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature."). Justice Blackmun also identified the Equal Protection Clause as an alternative rationale for an abortion right in *Casey*, 505 U.S. at 928 & n.4.

[115] *See, e.g.*, Anita Allen, *The Proposed Equal Protection Fix for Abortion Law: Reflections on Citizenship, Gender, and the Constitution*, 18 HARV. J.L. & PUB. POL'Y 419 (1995). *See generally* Erika Bachiochi, *Embodied Equality: Debunking Equal Protection Arguments for Abortion Rights*, 34 HARV. J.L. & PUB. POL'Y 889 (2011) (responding to many such arguments). *See also* DELLAPENNA, *supra* note 22, at 638 n.68 (citing equal protection advocacy for abortion rights).

[116] ROE V. DOBBS, *supra* note 5, at 347 n.42 (citing Brief of Equal Protection Constitutional Law Scholars Serena Mayeri, Melissa Murray, and Reva Siegel as Amici Curiae in Support of Respondents, Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2022) (No. 19-1392)).

[117] *Dobbs*, 597 U.S. at 236.

[118] Alvaré, *supra* note 74, at 179-81, 198-213 (evaluating the proffered studies, including the so-called Turnaway Study). *See also* Ingrid Skop, M.D., *Fact Check: "Abortion is 14 Times Safer than Childbirth,"* CHARLOTTE LOZIER INST. (Apr. 25, 2024), https://lozierinstitute.org/fact-check-abortion-is-14-times-safer-than-childbirth/; Ingrid Skop, M.D., *Twelve Reasons Women's Health and Maternal Mortality Will Not Worsen, and May Improve, in States with Abortion Limits*, CHARLOTTE LOZIER INST. (Sept. 22, 2023), https://lozierinstitute.org/twelve-reasons-womens-health-and-maternal-mortality-will-not-worsen-and-may-improve-in-states-with-abortion-limitations/.

two organizations that disseminate national data—the Centers for Disease Control and Prevention and the Guttmacher Institute—and reporting to both is entirely voluntary. The *Dobbs* Court disavowed the notion that judges should use such data for setting abortion policy.[119]

Grounding a right to abortion in the Equal Protection Clause—with the balancing analysis and data collection that would require—would not solve the problems of *Roe* and its progeny. The *Dobbs* opinion, in its thorough critique of *Casey*'s balancing analysis, demonstrates that this road would be a dead end.[120] But with the issue of abortion decentralized by *Dobbs* and returned to "the people and their elected representatives," the states are actively engaged in fashioning a variety of policies.[121] Thus, there is reason to believe that Americans may have more reliable empirical data in the years ahead by which to compare contrasting state policies and their impact on women's lives and livelihoods.

V. POLICY ARGUMENTS FOR A RIGHT TO ABORTION

What did the Court really *know* about abortion at the time it decided *Roe* and *Doe*? One of the hallmarks of *Roe* and its progeny is that the Court has repeatedly issued abortion decisions without any evidentiary record on abortion. *Roe* didn't have one because of its strange posture.[122] *Casey* didn't have any facts in the record relating to the reliance rationale that it adopted as a substitute for *Roe*'s historical rationale.[123] Most Supreme Court abortion cases since *Roe* have been facial challenges, evading the need for a factual record about abortion and the actual impact of abortion laws. Abortion litigation has been a fact-free endeavor.

Policy arguments for abortion undergird the opinions of virtually every contributor to *Roe v. Dobbs*: abortion ensures equal opportunity in American society, abortion is health care, abortion is autonomy. For example, Professor Dorothy Roberts' essay is a plea for "the urgency of reproductive

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[119] *Dobbs*, 597 U.S. at 288-89 (citing competing amicus briefs).

[120] *Id.* at 281-86.

[121] *See generally* Clarke D. Forsythe & Carolyn McDonnell, *The States' Response to* Dobbs, 39 NOTRE DAME J.L., ETHICS & PUB. POL'Y (forthcoming 2025).

[122] *See supra* Section I.

[123] To support the new reliance rationale, the Court cited one page from a book by Rosalind Petchesky, though she had argued that contraception, not abortion, had contributed to women's increased labor force participation. *Casey*, 505 U.S. at 856 (citing ROSALIND PETCHESKY, ABORTION AND WOMAN'S CHOICE 109, 133 n.7 (rev. ed. 1990)).

justice."[124] She favors numerous public policies, including "legislation to curtail mandated reporting, guarantee legal representation for parents, and require informed consent for drug testing of pregnant people and their newborns."[125] But though she speculates that returning abortion to the states will result in bad social and legal outcomes, she cannot connect measurable social ills to *Dobbs*. Roberts claims that the "states that enacted the most severe restrictions on abortion are the ones with the highest child poverty rates, worst healthcare systems, and fewest supports for struggling families" as well as "the highest maternal and infant mortality rates in the nation."[126] But even if Roberts is correct about all this, she is relying on *pre*-Dobbs *data* illustrating conditions that existed *with* Roe *in place*.[127]

Knowledge of abortion's impact on women's physical and mental health is constantly developing as medical science advances and sociological evidence is collected and evaluated. Medical surveys of international populations of women have found an increased risk of pre-term birth, breast cancer, and mental trauma after abortion.[128] Some studies have come to different conclusions, including the so-called Turnaway Study, which is cited by contributors in *Roe v. Dobbs*.[129] However, the Turnaway Study is fatally flawed, using a small and biased sample of women to draw far-reaching conclusions about how abortion affects women.[130]

Dobbs returned responsibility for decisions about how to regulate abortion to "the people and their elected representatives."[131] Hopefully, this will give rise to a more open and better-informed debate about the risks and benefits of abortion. The states and civil society can, unlike the Court, address

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[124] ROE V. DOBBS, *supra* note 5, at 188.

[125] *Id.* at 188-89.

[126] *Id.* at 186.

[127] *Id.* at 186, 396 & nn.52-54.

[128] Clarke D. Forsythe, *The Medical Assumption at the Foundation of* Roe v. Wade *and Its Implications for Women's Health*, 71 WASH. & LEE L. REV. 827, 873-892 (2014) (citing international studies in three appendices).

[129] ROE V. DOBBS, *supra* note 5, at 178, 374 nn.30-32, 393 nn.10-11.

[130] *See* Alvaré, *supra* note 74, at 180-81, 184-85, 192-96, 201-05; David Reardon, *The Embrace of the Pro-Abortion Turnaway Study*, 85 LINACRE Q. 204 (2018).

[131] *See, e.g.*, *Dobbs*, 597 U.S. at 232 ("It is time to heed the Constitution and return the issue of abortion to the people's elected representatives."); *id.* at 259 ("[W]e thus return the power to weigh those arguments to the people and their elected representatives."); *id.* at 269 ("[T]he Court usurped the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people."); *id.* at 289 ("Our decision returns the issue of abortion to those legislative bodies."); *id.* at 292 ("*Roe* and *Casey* must be overruled, and the authority to regulate abortion must be returned to the people and their elected representatives.").

the causes of elective abortion, seek to reduce elective abortions, offer effective alternatives to abortion, and help women balance work and family. And, also unlike the Court, different states can try different policies. With time, Americans may have the opportunity to see whether and how women flourish in states with unlimited abortion and states with abortion limits.

VI. PROGRESSIVE JUDGING

Comparing *Roe v. Wade* with *Dobbs v. Jackson Women's Health Organization* reveals fundamental differences over how to interpret the Constitution. *Roe v. Dobbs* confirms that the fundamental interpretive gap between progressives and originalists remains as wide as ever.[132] It also confirms that the originalist critique of *Roe* and its methodology was correct. Methodology makes a difference for liberty, republicanism, and self-government.[133] The scholarly criticism of *Roe* was so vast and so fundamental that it spawned a revival of originalism and a conservative legal movement. Professor Bollinger admits that "*Roe v. Wade* came to symbolize this problem"—the "dilemma of constitutionalism"—but *Roe v. Dobbs* evades a frank answer as to how or why.[134]

Bollinger's position is that "the text [of the Constitution] . . . is extremely brief and general . . . barely providing a guide" to interpretation.[135] According to Bollinger, the "extensive, sometimes labyrinthine, doctrines, analytical formulations, and decisions in concrete cases"—all made by judges—are the foundation for our rights.[136] Bollinger dismisses "fictional notions of 'original intent'" as "frozen in a distant past when our notions of right and wrong" were "embedded in error."[137] He offers a caution that "it is vitally important that the Constitution not serve as a contentless charter for justices to implement their personal or political preferences under the guise of doing 'law.'"[138]

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[132] ROE V. DOBBS, *supra* note 5, at xxi.

[133] *See* Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387 (2006) (reviewing STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005)); Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment On Ronald Dworkin's "Moral Reading" of the Constitution*, 65 FORDHAM L. REV. 1269 (1997).

[134] ROE V. DOBBS, *supra* note 5, at xxii.

[135] *Id.* at xxi.

[136] *Id.*

[137] *Id.* at xxii.

[138] *Id.*

But since no methodology is given that would guard against that danger, the concern seems *pro forma*.

Some contributors retreat from addressing the specifics of abortion to argue that *Dobbs* is a threat to some abstract notion of "matters involving the family."[139] But when judges retreat to such abstractions, they free themselves to update the Constitution without democratic input. As Professor Alvaré has pointed out, "the *Dobbs* dissenters—Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan—would also foreclose the influence of the populace upon abortion lawmaking—women as well as men, and those living in the past as well as today and in the future."[140] A progressive approach to judging replaces self-government with judicial administration.

In "*Dobbs*'s Democratic Deficits," Professors Melissa Murray and Katherine Shaw review abortion politics after *Dobbs* and criticize the Roberts Court's election law decisions, especially *Rucho v. Common Cause*,[141] which left the issue of partisan gerrymandering to the democratic process. Their premise is that legislatures are "often the least representative institutions in state government" as a result of partisan gerrymandering.[142] They argue that though *Dobbs* returned abortion to the political process, the same Court's election decisions have exposed "its profoundly limited conception of democracy."[143] *Dobbs* was wrong, they argue, because of "its own narrow and limited vision of democracy as majoritarian politics" and because "*Dobbs*'s appeal to democracy is shallow, underdeveloped, and profoundly cynical."[144] Beyond these epithets, their chapter does not provide much reason to prefer rule by judges to our imperfect but constitutionally prescribed electoral system. *Dobbs* and *Rucho* are consistent, however, in this critical sense: they agree that if the Constitution is silent on a highly charged political issue, the Court should leave the issue to the people and the democratic process—however imperfect they might be.[145]

VII. WOULD WOMEN HAVE VOTED FOR ABORTION IN 1868?

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[139] *Id.* at 125.

[140] Helen Alvaré, *Denying* Dobbs*, Dodging the Demos*, 60 HOUS. L. REV. 865, 869 (2023).

[141] 588 U.S. 684 (2019).

[142] ROE V. DOBBS, *supra* note 5, at 160.

[143] *Id.* at 159.

[144] *Id.* at 160

[145] *See, e.g.*, Michael W. McConnell, *A Moral Realist Defense of Constitutional Democracy*, 64 CHI.-KENT L. REV. 89 (1988).

The dissenting Justices in *Dobbs* and the contributors to *Roe v. Dobbs* make much of the fact that women didn't vote in 1868, when the Fourteenth Amendment was ratified. They argue that this shows that history at the time of the Fourteenth Amendment should be irrelevant to the question of whether the Fourteenth Amendment protects a right to abortion. This argument is based on the unexpressed assumption that women would have voted for abortion if they could have.

Abundant historical evidence suggests that women would not have supported a right to abortion. But this history has long been ignored. In *Dispelling the Myths of Abortion History*, Dellapenna writes, "historians of the new orthodoxy, particularly those who describe themselves as feminists, tend to project their notions of what women feel and think today onto women of the past, particularly American women of the nineteenth century."[146] As Dellapenna points out, even historian James Mohr "cited a great deal of evidence of a broad social consensus in favor of the criminalization of abortion—including the near unanimous strong condemnation of abortion by nineteenth century feminists."[147] "Susan B. Anthony and Elizabeth Cady Stanton both spoke in terms of child-murder."[148] And contrary to the recent practice—including by some *Roe v. Dobbs* contributors—of conflating abortion and contraception, the "nineteenth century feminists themselves distinguished sharply between the two practices."[149] Paulina Wright Davis, Matilda Gage, Victoria Woodhull, Tennessee Claflin, Sarah Norton, and other leading 19th-century feminists all denounced abortion in strong terms.[150] Dellapenna also surveys the pioneering female physicians of the 19th century who opposed abortion.[151] As he summarizes, "Reading the new orthodoxy of abortion history, one would never guess that the feminists of the nineteenth century were so consistently and so strongly opposed to abortion."[152]

Another recent book reinforces what Dellapenna has said about 19th-century feminists and their views of abortion. In *Pity for Evil: Suffrage, Abortion & Women's Empowerment in Reconstruction America*, the authors examine

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[146] DELLAPENNA, *supra* note 22, at 372.

[147] *Id.*

[148] *Id.* at 375.

[149] *Id.* at 376.

[150] *Id.* at 379. *See also* MONICA KLEM & MADELEINE MCDOWELL, PITY FOR EVIL: SUFFRAGE, ABORTION & WOMEN'S EMPOWERMENT IN RECONSTRUCTION AMERICA PITY FOR EVIL (2023).

[151] DELLAPENNA, *supra* note 22, at 399-406. *See also* KLEM & MCDOWELL, *supra* note 150.

[152] DELLAPENNA, *supra* note 22, at 387.

the feminist newspaper, *The Revolution*, owned by Susan B. Anthony and edited by Elizabeth Cady Stanton and Parker Pillsbury, and plumb the collections of the papers of feminists and female doctors of the Reconstruction era, including doctors Charlotte Denman Lozier, Marie Zakrzewska, Anita Tyng, and Elizabeth Blackwell.[153] Several, if not all, of these women educated against abortion because of its negative impact on women.[154] The historical record suggests that American women in the 1860s might have supported the restrictive abortion laws proposed in the states at that time; at the very least, it undermines the notion that they universally opposed them.

VIII. THE LIMITS OF *DOBBS*

Several contributors argue that *Dobbs* threatens many other constitutional rights. Professor Strauss, for example, raises the concern that *Dobbs* "will lead to the rejection of other currently established unenumerated rights—in particular, the right to obtain contraceptives and the right to same-sex marriage."[155] Professor Martha Minow of Harvard Law School also attempts to show how *Dobbs* will "unravel" other liberties.[156]

This is answered in at least five ways. (1) The *Dobbs* majority made repeated statements limiting its holding to abortion, which Justice Clarence Thomas—whose concurring opinion has been cited as evidence that the Court will use the reasoning of *Dobbs* to curtail other rights—joined and affirmed. (2) *Roe* itself, which *Dobbs* overturned, had a limited holding which created a "right to terminate a pregnancy."[157] (3) *Dobbs* expressly distinguished other precedents that do not deal with abortion.[158] (4) *Dobbs* emphasized that abortion is a unique act,[159] relying on the same distinction that Justice Blackmun raised in *Roe* and that was reiterated in *Casey*.[160] (5) By the

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[153] KLEM & MCDOWELL, *supra* note 150. *See also* ERIKA BACHIOCHI, THE RIGHTS OF WOMEN: RECLAIMING A LOST VISION (2021).

[154] KLEM & MCDOWELL, *supra* note 150, at 2, 17, 24, 51, 72-73 (Tyng), 82-83, 196, 202, 207.

[155] ROE V. DOBBS, *supra* note 5, at 15.

[156] *Id.* at 318-38.

[157] *Roe*, 410 U.S. at 153 (The "right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."); *see also id.* at 140. *See infra* note 176 (citing decisions defining right to abortion).

[158] *Dobbs*, 597 U.S. at 290 ("Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.").

[159] *Id.* at 257, 290.

[160] *Id.* at 157 ("What sharply distinguishes the abortion right from the rights recognized in the cases on which *Roe* and *Casey* rely is something that both those decisions acknowledged: Abortion destroys what those decisions call "potential life" and what the law at issue in this case regards as the

requirements of *stare decisis et quieta non movere*, a single Justice questioning a precedent—here, Justice Thomas noting in a sole concurrence that precedents like *Eisenstadt* and *Obergefell* rest on shaky legal foundations just as *Roe* did—does not unsettle it.

Jonathan Mitchell, one of the two conservative contributors to *Roe v. Dobbs*, points out that the *Dobbs* Court distinguished *Loving*, *Griswold*, *Eisenstadt*, and other precedents because they didn't involve the taking of human life.[161] Contending otherwise ignores the language and limits of *Roe*, *Casey*, and *Dobbs*. Professors Aziz Huq and Rebecca Wexler—in their provocative and speculative chapter on data privacy and the enforcement of abortion laws—describe *Dobbs* as broadly overruling "the right of privacy over the body."[162] This exaggerated description ignores the fact that *Roe* and *Dobbs* specifically addressed the right to terminate a pregnancy. More importantly, hundreds of state and federal laws that protect privacy remain untouched by *Dobbs* and are enforced or enforceable today.[163]

Another distinction between *Roe* on one hand and *Loving*, *Griswold*, and *Eisenstadt* on the other is how they fare under *stare decisis et quieta non movere* analysis: the Court's decisions conferring rights to interracial marriage and contraception are settled. Even if a theoretical case could be made that *Loving*, *Griswold*, and *Eisenstadt* were wrongly decided, it is difficult to imagine how the other stare decisis factors would be met with regard to those cases. There is no significant division in the Court over their holdings (just their rationale), there is no significant dissent from the bar or the academy, they are not unworkable, they have not been challenged by the states, and there is no litigation campaign to challenge them—all traditional evidence of settlement.[164]

IX. INTERNATIONAL PERSPECTIVES

Professor Mark Tushnet, who clerked for Justice Thurgood Marshall at the time *Roe* was decided, argues that pro-life advocates in the U.S. should

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life of an "unborn human being.") (citing *Roe*, 410 U.S. at 159 (abortion is "inherently different"); *Casey*, 505 U.S. at 852 (abortion is "a unique act")).

[161] *Id.* at 273; ROE V. DOBBS, *supra* note 5, at 59.

[162] ROE V. DOBBS, *supra* note 5, at 317.

[163] *See, e.g.*, *U.S. State Comprehensive Privacy Laws: Updated April 2024*, LOCKE LORD LLP, https://www.lockelord.com/-/media/files/privacy-and-cybersecurity-resource-center/april-2024-us-state-privacy-laws-chart.pdf.

[164] *See generally* Forsythe & Maitlen, *supra* note 47.

pursue European social welfare policies to reduce abortion and "promote life as much as possible" (a theme that runs through his chapter).[165] He calls this "the Social and Christian Democratic package of abortion-related policies" or "Western European-style abortion policies."[166] Tushnet's is one of the most interesting, thoughtful, and reasonable chapters in *Roe v. Dobbs*.

There is reason to believe that *Roe*—with its one-size-fits-all policy for our large and diverse country—prevented the development of any European-style compromise because it imposed an unlimited abortion license throughout pregnancy that doesn't exist in any Western European country. *Dobbs*, by contrast, would allow such a compromise to develop. Moderate policies that don't endorse the position of partisans on either side—a better concept than the oft-confused use of "compromise"—are more achievable under *Dobbs* than they were under *Roe*. Tushnet argues that "a juridified culture demanding rational consistency" makes moderate policies ("compromises," in his words) "extremely difficult to arrive at."[167] This is a reasonable argument, and it supports the proposition that *Dobbs* is better than *Roe*.

Professor Tom Ginsburg employs the theme of "American exceptionalism" ironically, arguing that the U.S. stands out among the nations for its vices. He characterizes the abortion issue in the U.S. as "five decades of polarized politics of the fetus."[168] Ginsburg is devoted to "proportionality analysis"—the very interest-balancing that failed under *Roe* and *Casey*.[169] It's not clear whether he proposes that judges or the people should do the balancing, but since he scorns politicians because they "have become addicted to the issue" of abortion, it seems that elected representatives would be excluded.[170] Ginsburg appeals to a decision-making process that "delivers on policies supported by a majority of citizens" and proposes that we "find[] ways to bring ordinary Americans together to understand that their views are not as divided as their politics."[171] But if "the complex moral questions around abortion are too important to be left to the politicians," what alternative process is superior

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[165] ROE V. DOBBS, *supra* note 5, at 243. Professor Mary Ann Glendon, a colleague of Tushnet's at Harvard, offered a similar proposal in her 1988 book, ABORTION AND DIVORCE IN WESTERN LAW: AMERICAN FAILURES, EUROPEAN CHALLENGES.

[166] ROE V. DOBBS, *supra* note 5, at 244.

[167] *Id.* at 254.

[168] *Id.* at 277.

[169] *Id. See Dobbs*, 597 U.S. at 280-86.

[170] ROE V. DOBBS, *supra* note 5, at 277.

[171] *Id.*

to representatives who are accountable to the people at regularly scheduled elections?

Despite Ginsburg's disdain for American constitutionalism and representative government, his international survey is thought-provoking and worth a critical review. It shows that different countries have taken an array of positions on abortion through many different processes.[172] Few have granted a practically unlimited right to abortion by judicial decision—as the United States did under *Roe*—compared to legislation or other processes. Perhaps this means *Dobbs* put an end to American abortion exceptionalism.

X. IMPLICATIONS FOR THE FUTURE

Professor Glenn Cohen, an influential academic and creative and stimulating thinker, has published numerous articles on bioethics from a progressive perspective and is the director of the Petrie-Flom Center for Bioethics at Harvard. He addresses "Reproductive Technologies and Embryo Destruction After *Dobbs*."[173] It is a useful survey of legal limits on reproductive technology in the U.S. and abroad. He focuses on the question of whether *Dobbs* allows state prohibition on human embryo destruction. In fact, the *Dobbs* decision does not change constitutional law that preexisted it,[174] as Cohen seems to agree,[175] and its holding is limited, as *Roe*'s was, to "the right to terminate pregnancy."[176] Furthermore, prohibitions of "embryo destruction," as Professor Cohen frames it,[177] have been addressed for more than a century by prenatal injury, wrongful death, and fetal homicide law.[178] Long before *Dobbs* was decided, and long before modern reproductive technologies came on the market, these areas of law developed in favor of protecting

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[172] *Id.* at 261-76.

[173] *Id.* at 281.

[174] *See, e.g.*, Clarke D. Forsythe, *Human Cloning and the Constitution*, 32 VAL. U. L. REV. 469 (1998).

[175] ROE V. DOBBS, *supra* note 5, at 283-84 n.16.

[176] *See, e.g.*, Stenberg v. Carhart, 530 U.S. 914, 921 (2000) ("to terminate her pregnancy") (quoting *Casey*, 505 U.S. at 833, 846, 850, 852–53, 859, 869, 870, 876, 887 ("terminate her pregnancy")); *Akron*, 462 U.S. at 420 n.1 ("terminate her pregnancy"); Harris v. McRae, 448 U.S. 298, 316 (1980) ("the freedom of a woman to decide whether to terminate her pregnancy"); Maher v. Roe, 432 U.S. 464, 474 (1977) ("her freedom to decide whether to terminate her pregnancy"); *Roe*, 410 U.S. at 153 ("a woman's decision whether or not to terminate her pregnancy").

[177] ROE V. DOBBS, *supra* note 5, at 281.

[178] *See generally* Linton, *supra* note 95.

the developing human being from injuries and lethal assaults, whether intentional or negligent.

Cohen argues that "attempts to restrict embryo destruction require resolution of deep and difficult questions of when personhood begins and why."[179] But one's view on whether and when a fetus attains the status of "personhood" need not be definitive for one's view of abortion or reproductive technology. "Personhood" is an ontological and metaphysical concept. In contrast, homicide law, stretching back more than 800 years, is focused on protecting human beings. The human being is a biological and anthropological entity, and protecting human beings has never required resolving difficult metaphysical questions.

What is left out of much analysis of reproductive technology—and virtually all of the discussion of the Alabama Supreme Court's 2024 decision in *LePage v. Center for Reproductive Medicine*[180]—is that women usually get the short end of the stick when it comes to disputes over the custody of embryos.[181] When couples with joint custody of human embryos created through in vitro fertilization divorce or dissolve and courts consider the matter, courts almost always reason that the embryos are property, and they therefore side with the man who wants to destroy them over the woman who wants to preserve or implant them.[182] If embryos were treated as children, and courts applied the best interests of the child standard that is common in custody law, the woman who wants to preserve or implant them—and it is usually the woman who takes that position in such cases—might prevail.

XI. CONCLUSION

Roe v. Dobbs is essential reading for anyone who wants to understand public arguments about abortion after *Dobbs*. The arguments in this book, strong or weak, are and will continue to be very influential in the media, in legislative hearings, and in courts. These are the post-*Dobbs* arguments for abortion, as well as the arguments for overturning *Dobbs* if the Supreme Court's composition changes in the future.

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[179] ROE V. DOBBS, *supra* note 5, at 295.

[180] LePage v. Ctr. for Reprod. Med., P.C., No. SC-2022-0515, 2024 WL 656591 (Ala. Feb. 16, 2024).

[181] *See generally* Benjamin C. Carpenter, *Sperm Is Still Cheap: Reconsidering the Law's Male-Centric Approach to Embryo Disputes after Thirty Years of Jurisprudence*, 34 YALE J.L. & FEMINISM 1 (2023).

[182] *Id.*

But if a first-year law student picked up *Roe v. Dobbs*, she would understand nothing about the backstory to *Roe*, the weaknesses of the *Roe* decision, congressional responses from 1973-83, or nearly fifty years' worth of criticisms by judges and scholars.[183] She would assume that *Dobbs* came out of nowhere to overturn—abruptly and without explanation—a fifty-year-old decision that was universally admired and relied on by judges, scholars, political leaders, and the American people. She would never learn of the pre-*Roe* increase in state and federal laws, supported by public opinion, to create equal rights for women, nor that women's economic and professional progress began before *Roe*. She would not learn about the long history between the Fourteenth Amendment and *Roe* that elevated women's rights without enshrining a right to abortion.[184]

Virtually all of the arguments in *Roe v. Dobbs* have been presented to the Supreme Court in amicus briefs filed between *Roe* and *Dobbs*. Many are policy arguments which may now be presented to lawmakers in all fifty states. Many others are claims about the impact of limiting abortion. These claims will be proven true or false as states pass a variety of policies and collect data on outcomes. States that want to defend their abortion laws—permissive or restrictive—will need to develop a sound understanding of public health data and publish it for public evaluation.

The seeming heft of this 450-page book is undermined by the contributors' refusal to engage the historical scholarship of Joseph Dellapenna or that of contemporary feminist legal scholars who have dissented from the proposition that women need abortion for equal opportunity in American society, such as Mary Ann Glendon, Helen Alvaré, and Erika Bachiochi.

Will *Dobbs* become settled and abortion remain an issue for the people and their elected representatives to decide? Or will a future Court take control of the abortion issue once again and return itself to the role of national abortion monitor? "The people and their elected representatives"—through presidential and U.S. Senate elections—will largely determine that.

Dobbs will be settled—if at all—by the same legal and democratic actions that settled *Brown v. Board of Education*: judicial, political, and public acceptance, the latter ultimately demonstrated through democratic actions

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[183] *See* Clarke D. Forsythe, *A Survey of Judicial & Scholarly Criticism of* Roe v. Wade *Since 1973: Legal Criticism & Unsettled Precedent*, AMS. UNITED FOR LIFE (Jan. 2022), https://aul.org/wp-content/uploads/2022/01/A-Survey-of-Judicial-and-Scholarly-Criticism-of-Roe-v.-Wade-Since-1973.pdf.

[184] *See* Alvaré, *supra* note 74; Bachiochi, *supra* note 115.

including state legislation and electoral acceptance. *Dobbs* returned the abortion issue to "the people and their elected representatives." "Public sentiment," in Abraham Lincoln's words, will govern these issues for the foreseeable future.

Other Views:

- ROE V. DOBBS: THE PAST, PRESENT, AND FUTURE OF A CONSTITUTIONAL RIGHT TO ABORTION (Lee Bollinger & Geoffrey Stone eds. 2024), *available at* https://global.oup.com/academic/product/roe-v-dobbs-9780197760352?cc=us&lang=en&.
- Reva B. Siegel, *The History of History and Tradition: The Roots of* Dobbs*'s Method (and Originalism) in the Defense of Segregation*, 133 YALE L.J. F. 99 (2023), *available at* https://www.yalelawjournal.org/forum/the-history-of-history-and-tradition-the-roots-of-dobbss-method-and-originalism-in-the-defense-of-segregation.
- Aaron Tang, *Lessons from* Lawrence*: How "History" Gave Us* Dobbs*—And How History Can Help Overrule It*, 133 YALE L.J. F. 65 (2023), *available at* https://www.yalelawjournal.org/forum/lessons-from-lawrence-how-history-gave-us-dobbsand-how-history-can-help-overrule-it.
- Aliza Forman-Rabinovici & Olatunde C.A. Johnson, *Political Equality, Gender, and Democratic Legitimation in* Dobbs, 46 HARV. J.L. & GENDER 81 (2023), *available at* https://scholarship.law.columbia.edu/faculty_scholarship/3920/.
- Michele Goodwin, *Opportunistic Originalism:* Dobbs v. Jackson Women's Health Organization, 2022 SUP. CT. REV. 111, *available at* https://chicagounbound.uchicago.edu/supremecourtrev/vol2022/iss1/5/.