# FEDERALIST SOCIETY REVIEW

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# FEDERALIST SOCIETY REVIEW

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# Federalist Society Review

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# A CORD OF THREE STRANDS: HOW *KENNEDY V. BREMERTON SCHOOL DISTRICT* CHANGED FREE EXERCISE, ESTABLISHMENT, AND FREE SPEECH CLAUSE DOCTRINE*

KAYLA A. TONEY & STEPHANIE N. TAUB**

In 2015, Bremerton High School football coach Joseph Kennedy lost his job for kneeling at the fifty-yard-line after football games to say a brief prayer of thanksgiving.[1] Coach Kennedy sued the school district.[2] On June 27, 2022, the United States Supreme Court held that Coach Kennedy's brief, quiet, personal postgame prayer was protected by the Free Exercise and Free Speech Clauses of the First Amendment to the United States Constitution.[3] The Court also held that the Establishment Clause posed no obstacle and concluded that the *Lemon* test is no longer good law.

*Kennedy v. Bremerton School District* profoundly alters Free Exercise, Establishment, and Free Speech Clause doctrine. A significant contribution of the *Kennedy* opinion lies in the principle that the three clauses work together to provide robust protection for religious speech. Writing for the 6-3 majority, Justice Neil Gorsuch explained that the clauses of the First Amendment "work in tandem. Where the Free Exercise Clause protects religious exercises, whether communicative or not, the Free Speech Clause provides overlapping protection for expressive religious activities."[4] The result, which the framers

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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* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2418-19 (2022).

[2] *Id.* at 2419.

[3] *Id.*

[4] *Id.* at 2421.

intended because of their "distrust of government attempts to regulate religion and suppress dissent," is that the First Amendment "doubly protects religious speech."[5] Here, the Court rebuked the tendency of courts and commentators to set the Establishment and Free Exercise Clauses against one another.[6] This article will explore the changes in the law, open questions, and the proper framework moving forward under each of the three clauses.

Common criticisms of the *Kennedy* opinion include 1) that it does not change existing law, 2) that it is confusing and fails to provide guidance, and 3) that it is limited in scope. This article demonstrates that the Court's opinion advanced First Amendment jurisprudence in several ways. Although there certainly still are open questions, lower courts are already citing the case for its clear guidance, especially on the Free Exercise Clause, the final demise of the *Lemon* test, and the contours of government speech.

One important measure of a Supreme Court opinion's impact is the frequency and depth with which subsequent courts and judges cite it. As one empirical analysis argued, "Citations are a facially clear measure of the importance of opinions, at least within the law itself. They are commonly used in research and offer an available measure for quantitative analysis."[7] Because "measures of case importance correspond to perceptions of case importance,"[8] albeit imperfectly, the way cases are cited during the first several months after they are decided is especially relevant in gauging the impact they will have on jurisprudence going forward. In its first nine months on the books, *Kennedy* has already been cited 69 times, and nearly all of these are substantive citations on the merits rather than minor procedural points.[9] Nor are its citations limited to similar factual scenarios or issue areas.

Two citations, both in the Ninth Circuit, demonstrate the significant impact of *Kennedy*'s theme: the clauses of the First Amendment work in harmony, and they do not conflict. In *Green v. Miss United States of America*, the Ninth Circuit upheld a national beauty pageant's practice of limiting its contestants to biological women.[10] While the opinion focused on expressive association rather than free exercise, it cited *Kennedy*'s explanation of the

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[5] *Id.*

[6] *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 587 (1992) (interpreting Establishment Clause to prohibit prayer at graduation ceremony, in opposition to Free Exercise Clause).

[7] *See, e.g.*, Frank B. Cross & James F. Spriggs II, *The Most Important (and Best) Supreme Court Opinions and Justices*, 60 EMORY L.J. 407, 411 (2010).

[8] *Id.*

[9] This count and all other citation counts are accurate as of March 6, 2023.

[10] No. 21-35228, 2022 WL 16628387 (9th Cir. Nov. 2, 2022).

"significant parity in the operations of the Free Speech and Free Exercise Clauses," and its argument that the "Clauses work in tandem" and "provide[] overlapping protection" for religious speech.[11] The court even acknowledged that the Supreme Court "rebuked our court for treating these Clauses as hermetically sealed, 'separate units.'"[12] The court also pointed out that *Kennedy* applied strict scrutiny regardless of "[w]hether one views the case through the lens of the Free Exercise or Free Speech Clause," as the result was the same under "the First Amendment's double protection."[13] While the beauty pageant at issue in *Green* was not a religious event, *Kennedy*'s reasoning mattered because it showed that "even a purportedly minor modification of the Pageant's message" could significantly change the overall message and violate the First Amendment's protection of free expression.[14]

In another case that relied heavily on *Kennedy*, *Waln v. Dysart School District*, a Native American student asked to wear an eagle feather on her graduation cap, and the school district refused, while making exceptions for many other students who wanted secular messages on their caps.[15] The court cited *Kennedy* throughout its opinion, emphasizing that "the First Amendment doubly protects religious speech" because the "Clauses work in tandem."[16] The district's policy was not neutral or generally applicable because it allowed secular exceptions while excluding the plaintiff's religious expression.[17] And the district's selective enforcement triggered strict scrutiny under the Free Speech Clause, shifting the burden to the district "[w]hether one views the case through the lens of the Free Exercise or Free Speech Clause."[18] Thus, regardless of the factual context or type of First Amendment claim asserted, *Kennedy* is significant for its cohesive reading of the Constitution, and early citations already show lower courts adopting this approach.

Most other citations to *Kennedy* focus on one of the three First Amendment clauses in particular. *Kennedy* is most commonly cited as a free exercise case that restates and strengthens the governing legal framework. In Establishment Clause cases, courts most commonly cite it for holding that the *Lemon* test is officially dead and has been replaced by analysis of historical

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[11] *Id.* at *11 n.14.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] Waln v. Dysart Sch. Dist., No. 21-15737, 2022 WL 17544355 (9th Cir. Dec. 9, 2022).
[16] *Id.* at *4.
[17] *Id.*
[18] *Id.* at *8.

practices and understandings. (Only two post-*Kennedy* cases have toyed with applying *Lemon*.) In free speech cases, courts cite *Kennedy* most commonly for the proposition that when evaluating the speech of government employees, courts must make a threshold inquiry of whether the particular speech at issue was public or private before determining how the First Amendment applies.

## I. *KENNEDY*'S IMPACT ON THE FREE EXERCISE CLAUSE

As a free exercise case, *Kennedy* is most important because of how it synthesized the past two decades of Free Exercise Clause jurisprudence. Lower courts are commonly citing it as a helpful summary of the many ways that religious claimants can bring and prevail on free exercise claims. And perhaps most significantly, footnote 1 makes clear that under *Masterpiece Cakeshop*, government hostility toward religious beliefs is an automatic free exercise violation. Such claims are not subject to any balancing test—not even strict scrutiny.

### *A.* Kennedy*'s Free Exercise Holding*

*Kennedy* held that the Free Exercise Clause provides robust protection not only for "the right to harbor religious beliefs inwardly and secretly," but also for "the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through 'the performance of (or abstention from) 'physical acts.'"[19] In clear, concise analysis, the Court spelled out Coach Kennedy's sincerely motivated religious exercise, which "no one questions," of "giving 'thanks through prayer' briefly and by himself 'on the playing field' at the conclusion of each game he coaches."[20] Coach Kennedy did not seek to lead any prayer involving students and had stopped leading locker-room prayers and postgame religious talks. The District disciplined him only for his brief, quiet, personal prayer, and that violated his right to free exercise of religion.[21]

The Court's free exercise reasoning is clear and simple in part because the District never questioned Coach Kennedy's sincerity or that its actions

[19] *Kennedy*, 142 S. Ct. at 2421.
[20] *Id.* at 2422.
[21] *Id.*

burdened his religious practice.[22] Nor did it try to squeeze its repeated targeting of his religious practice into the mold of "neutral or generally applicable rules" from *Employment Division v. Smith.* On the contrary, the District "conced[ed] that its policies were 'not neutral' toward religion" when it took the extreme stance that Coach Kennedy could not take "any overt actions" that appeared to endorse any voluntary prayer.[23] Nor did the District attempt to show its actions were generally applicable; it invented a "bespoke requirement specifically addressed to Mr. Kennedy's religious exercise," allowing other staff to take personal phone calls or visit with friends, yet opining that Coach Kennedy needed to spend every postgame moment supervising his players.[24] Thus, the District's actions triggered strict scrutiny.

While the Court's free exercise analysis is brief, it is significant for several reasons. First, it helpfully summarizes current free exercise jurisprudence, which has changed significantly in the last several years. It cites *Employment Division v. Smith* only in conjunction with *Church of Lukumi Babalu Aye v. Hialeah* and *Fulton v. City of Philadelphia.* The Court makes clear that there is more than one way to win a free exercise case: "a plaintiff may carry the burden of proving a free exercise violation *in various ways, including* by showing that a government entity has burdened his sincere religious practice pursuant to a policy that is not 'neutral' or 'generally applicable.'"[25] Next, the Court explained that even the *Smith* framework has expanded in four significant ways: government action may violate the Free Exercise Clause if it (1) expresses hostility toward religion (*Masterpiece Cakeshop*); (2) targets or discriminates against religion (*Lukumi*); (3) "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way" (*Fulton*); or (4) if it provides "a mechanism for individualized exemptions" (*Fulton*).[26] Each of these circumstances triggers at least strict scrutiny; the first triggers an automatic free exercise violation.

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[22] Indeed, the District would have been hard pressed to find any reason for questioning Coach Kennedy's beliefs or practices. *See, e.g.*, Thomas v. Review Bd. of Ind. Emp. Div., 450 U.S. 707, 714 (1981).

[23] *Id.* at 2422-23.

[24] *Kennedy,* 142 S. Ct. at 2423. Even if the school district had had a neutral policy regarding postgame staff activities, which it did not, its unequal enforcement against Coach Kennedy would still have triggered strict scrutiny under the Free Exercise Clause.

[25] *Id.* at 2422 (citing Employment Division v. Smith, 494 U.S 872, 879-81 (1990)) (emphasis added).

[26] *Id.* (citing Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1877 (2021)).

In footnote 1, the Court clarified that some free exercise violations are so blatant that they do not require strict scrutiny analysis or the *Smith* framework: "[a] plaintiff may also prove a free exercise violation by showing that 'official expressions of hostility' to religion accompany laws or policies burdening religious exercise."[27] While strict scrutiny is the most difficult test for the government to meet, it still involves balancing, and religious claimants do not always prevail. Yet when government actors have showed clear hostility and animus toward religion in formulating or implementing their policies, such behavior violates the Free Exercise Clause on its face, and courts can comfortably "'set aside' such policies without further inquiry."[28] This rule will serve as a warning to governments and a balm to religious claimants who have borne the brunt of government hostility.

Given the shift away from unitary application of *Smith* in free exercise jurisprudence, lower courts have found helpful *Kennedy*'s succinct summary of the current framework.[29] Notably, the Court still cited *Smith*, despite the facts that it has been heavily criticized and that five Justices signaled dissatisfaction with it in *Fulton*.[30] This is not surprising, however, because whether to overrule *Smith* was not squarely presented in this case. Furthermore, the Court overruled *Lemon*, and the Court would be unlikely to overrule two landmark Religion Clause precedents (however heavily criticized) in the same case. But the fact that *Smith* is only cited along with *Lukumi* and *Fulton*—which qualify it—shows that free exercise claimants are not limited to the unfavorable *Smith* framework when they seek redress for violations of their constitutional rights. The Court's acknowledgement of the multiple ways to analyze free exercise claims demonstrates its gradual shift away from *Smith* as "one test to rule them all."[31] Indeed, such an approach may make *Smith* increasingly irrelevant, because many factual scenarios fall outside its ambit or fit more effectively in the *Lukumi* framework for religious targeting, the

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[27] *Kennedy*, 142 S. Ct. at 2422 n.1 (quoting Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719, 1732 (2018)).

[28] *Id.*

[29] *See infra* at I.B.

[30] John O. McGinnis, *The* Fulton *Opinion and the Originalist Future of Religious Freedom*, LAW & LIBERTY (June 24, 2021), https://lawliberty.org/the-emfulton-em-opinion-and-the-originalist-future-of-religious-freedom/ ("While the majority's opinion did not overrule *Smith*, two concurrences joined by five justices suggest that *Smith* is on life support.").

[31] *See generally Fulton*, 141 S. Ct. at 1915-22 (Alito, J., concurring); *see also* Br. of Becket Fund for Religious Liberty as Amicus Curiae, Carson v. Makin, 142 S. Ct. 1987 (2022).

*Fulton* framework for individualized exemptions, or the *Hosanna-Tabor* framework for religious autonomy, to name a few.[32]

*B. Lower Court Citations to* Kennedy *on Free Exercise*

At least three circuit courts of appeal have already cited *Kennedy* for its free exercise framework. In *M.A. v. Rockland County Department of Health*, the Second Circuit cited *Kennedy* first—instead of directly relying on *Smith* and *Lukumi*—for the principle that "this Court will find a First Amendment violation unless the government can satisfy 'strict scrutiny' by demonstrating its course was justified by a compelling state interest and was narrowly tailored in pursuit of that interest."[33] The court found that New York's Emergency Declaration during a measles outbreak was not neutral because it required children who were unvaccinated for religious reasons to quarantine, but not children who were unvaccinated for medical reasons. Drawing a comparison to *Kennedy*, the concurrence explained that the Declaration's "object" was to burden the religious plaintiffs "at least in part because of their religious character."[34]

In *Green v. Miss United States of America*, the Ninth Circuit applied the principle from *Kennedy* that the clauses of the First Amendment "work in tandem" to its analysis of the beauty pageant's expressive association claim.[35] And in *Maisonet v. Commissioner, Alabama Department of Corrections,* the Eleventh Circuit cited *Kennedy* for the basic proposition that plaintiffs must show that they "seek[] to engage in a sincerely motivated religious exercise" and that "a government entity has burdened [their] sincere religious practice pursuant to a policy that is not neutral or generally applicable."[36] There, an imam challenged Alabama's practice of excluding clergy from the execution chamber on the basis of his own free exercise rights, and the court dismissed his claim because all other non-state employees were also excluded regardless of their religion. Thus, whether religious claimants prevail or lose, *Kennedy* is a helpful guide to free exercise jurisprudence.

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[32] *See, e.g.*, Hosanna-Tabor Evangelical Lutheran Ch. & Sch. v. EEOC, 565 U.S. 171, 190 (2012) (declining to apply *Smith* in ministerial exception case because it "involved government regulation of only outward physical acts").

[33] M.A. v. Rockland Cnty. Dep't of Health, No. 21-551, 2022 WL 16826545, at *4 (2d Cir. Nov. 9, 2022) (quoting *Kennedy*, 142 S. Ct. at 2422).

[34] *Id.* at *8 (Park, J., concurring) (citing *Kennedy*, 142 S. Ct. at 2422).

[35] *Green*, 2022 WL 16628387, at *11 n.14.

[36] Maisonet v. Comm'r, Alabama Dep't of Corr., No. 22-10023, 2022 WL 4283560, at *3-*4 (11th Cir. Sept. 16, 2022) (citing *Kennedy*, 142 S. Ct. at 2422).

Lower courts are citing *Kennedy* in a wide range of factual scenarios relating to free exercise. For example, in *James v. Kootenai County*, the District of Idaho found that a coroner violated a Native American family's free exercise rights by performing an autopsy of their daughter instead of allowing for timely burial rituals.[37] The court called *Kennedy* a "Free Exercise case[]" and cited it for the holding that "[a] plaintiff may demonstrate the infringement of his rights under the Free Exercise clause in numerous ways, 'including by showing that a government entity has burdened his sincere religious practice pursuant to a policy that is not 'neutral' or 'generally applicable.'"[38] The court also drew a comparison between the *Kennedy* Court's close scrutiny of the school district's disciplinary actions and its own scrutiny of the coroner's autopsy practices. Rather than permitting government actors to rely on general laws that empower them with discretion, the opinion explained that courts must evaluate their policies as applied to particular religious plaintiffs—and in both *James* and *Kennedy*, that tailored scrutiny revealed policies "specifically designed to be intolerant of religious beliefs."[39]

Three other cases illustrate the broad applicability of *Kennedy*'s free exercise framework in diverse factual contexts. In *Tatel v. Mt. Lebanon School District*, the Western District of Pennsylvania synthesized *Kennedy*'s framework into this rule:

> A government policy will not qualify as "neutral" if it: (1) is specifically directed at religious practice; (2) discriminates on its face; or (3) has as its object a religious exercise. *Id.* (citations omitted). A government policy will not be "generally applicable" if it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way, or if it provides a mechanism for individualized exemptions."[40]

The court applied this rule in a free exercise case brought by religious parents against a public school. The parents asserted that they had "sincerely held religious beliefs about sexual or gender identity and the desire to inculcate those beliefs in their children," and that their children's first-grade teacher

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[37] James v. Kootenai Cnty., No. 2:19-CV-00460-BLW, 2022 WL 4585858, at *4 (D. Idaho Sept. 29, 2022).

[38] *Id.*

[39] *Id.* at *5.

[40] Tatel v. Mt. Lebanon Sch. Dist., No. CV 22-837, 2022 WL 15523185, at *26 (W.D. Pa. Oct. 27, 2022) (citing *Kennedy*, 142 S. Ct. at 2421-22).

was advocating her own agenda which conflicted with their beliefs.[41] While the "District provide[d] notice and opt out rights for numerous other, non-religious topics," it would not allow the parents to opt their children out of lessons on the religiously significant topic of gender identity, and that triggered strict scrutiny under the Free Exercise Clause.[42]

The North Carolina Court of Appeals applied the same rule to find that the state could not exclude religious schools from its voucher program, because then the program would cease to be neutral under the Free Exercise Clause.[43] The court cited Justice Gorsuch's observation in *Kennedy* that "[t]he Constitution and the best of our traditions counsel mutual respect and tolerance, not censorship and suppression, for religious and nonreligious views alike."[44] The Southern District of New York cited *Kennedy* to demonstrate that the Free Exercise Clause protects both those "who harbor religious beliefs inwardly and secretly" and those who "live out their faiths in daily life," allowing members of an Orthodox Jewish family to amend their complaint where they challenged the maximum occupancy limit on affordable housing.[45]

The free exercise context where *Kennedy* may have the most immediate impact is in cases involving religious objections to COVID-19 vaccine mandates, which continue to percolate in multiple jurisdictions. Several cases upholding free exercise challenges to vaccine mandates have cited *Kennedy*'s articulation of the free exercise framework.[46] In the military context, the District of Nebraska quoted *Kennedy*'s observation that the Free Exercise Clause "does perhaps its most important work by protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life."[47]

Even courts that ultimately reject free exercise claims cite *Kennedy* as the latest touchstone of free exercise jurisprudence, recognizing that the case

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[41] *Id.*

[42] *Id.*

[43] Kelly v. State, 2022-NCCOA-675, 2022 WL 10218654, at *7 n.3 (App. N.C. 2022).

[44] *Id.* (citing *Kennedy*, 142 S. Ct. at 2416).

[45] Katz v. New York City Hous. Pres. & Dev., No. 21 CIV. 2933 (JPC), 2022 WL 3156178, at *4 (S.D.N.Y. Aug. 8, 2022).

[46] *See, e.g.*, UnifySCC v. Cody, No. 22-CV-01019-BLF, 2022 WL 2357068, at *7-*8 (N.D. Cal. June 30, 2022) (finding that portion of vaccine mandate which prioritized high-risk employees with secular exemptions over religious objectors likely violated the Free Exercise Clause); Roth v. Austin, No. 8:22CV3038, 2022 WL 3593373, at *2 (D. Neb. Aug. 5, 2022) (upholding facial challenges but not as-applied challenges to military COVID-19 vaccine mandate).

[47] *Roth*, 2022 WL 3593373, at *8 (citing *Kennedy*, 142 S. Ct. at 2421-22).

states the proper framework for the free exercise analysis. For example, several cases rejecting free exercise challenges to vaccine mandates also cite *Kennedy* for its explanation of the neutral and generally applicable framework as modified by cases since *Smith*.[48] In *Tingley v. Ferguson*, the Ninth Circuit rejected a Christian therapist's challenge to a state ban on conversion therapy, finding that it was neutral and generally applicable and not designed to target religious healthcare providers.[49] This was "unlike the situation in *Kennedy*, in which the school district admitted that it 'sought to restrict [the coach's] actions at least in part because of their religious character.'"[50] And in the *Matter of A.C.*, an Indiana state court rejected parents' free exercise claim when their transgender child was removed from their home, finding that the removal decision was based on mental health concerns rather than targeting the parents' beliefs as such. Yet again, the court cited *Kennedy* for its strict scrutiny framework and its recognition that the First Amendment protects "the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through the performance of (or abstention from) physical acts."[51] Thus, courts are citing *Kennedy* as the Supreme Court's latest word on how the Free Exercise Clause functions in myriad factual scenarios.

### *C.* Kennedy*'s Protection of Government Employees' Free Exercise*

*Kennedy*'s free exercise analysis reinforced the important principle that coaches, teachers, and other school employees—like students—do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[52] This rule applies when school employees are not acting in their official capacities to speak on behalf of the government. In *Kennedy*, the Court held that Coach Kennedy was not acting in his official capacity when

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[48] *See, e.g.*, Does 1-2 v. Hochul, No. 21CV5067AMDTAM, 2022 WL 4637843, at *8 (E.D.N.Y. Sept. 30, 2022) (rejecting free exercise challenge to New York healthcare workers' vaccine mandate because it was neutral and generally applicable); Brock v. City of New York, No. 21CIV11094ATSDA, 2022 WL 3445732, at *2 (S.D.N.Y. Aug. 17, 2022) (rejecting free exercise challenge to NYC's vaccine requirement for workers); George v. Grossmont Cuyamaca Cmty. Coll. Dist. Bd. of Governors, No. 22-CV-0424-BAS-DDL, 2022 WL 16722357, at *14 (S.D. Cal. Nov. 4, 2022) (finding vaccine mandates neutral and generally applicable because they allowed employees to apply for religious exemptions).

[49] Tingley v. Ferguson, 47 F.4th 1055, 1084–85 (9th Cir. 2022) (citing *Kennedy*, 142 S. Ct. at 2422).

[50] *Id.* (citing *Kennedy*, 142 S. Ct. at 2422).

[51] Matter of A.C., No. 22A-JC-49, 2022 WL 12166236, at *8 (Ind. Ct. App. Oct. 21, 2022) (citing *Kennedy*, 142 S. Ct. at 2421).

[52] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969).

he said a brief, quiet, personal prayer "during a period when school employees were free to speak with a friend, call for a reservation at a restaurant, check email, or attend to other personal matters."[53]

The Court also expressed strong disagreement with the lower court's decision that "treat[s] everything [school employees] say in the workplace as government speech subject to government control."[54] The Court reasoned that such an interpretation would allow "a school [to] fire a Muslim teacher for wearing a headscarf in the classroom or prohibit a Christian aide from praying quietly over her lunch in the cafeteria."[55] Under the Free Exercise Clause, school employees may engage in non-disruptive religious expression unrelated to the scope of their official duties and professional capacity and generally not coercive to students, such as wearing religious attire or jewelry.[56]

When teachers or coaches are acting in their official capacity, such as during instructional time, they must remain "neutral" toward religion. The Supreme Court distinguished Coach Kennedy's postgame prayers in his personal capacity, which are constitutionally protected by the Free Exercise Clause, from prayers that could be "attributable to the State," which may violate the Establishment Clause.[57] State neutrality toward religion does not require the absence of religion from public spaces. Indeed, to expel faith from the school environment, as if there was something harmful about students encountering the sincere religious beliefs of their role models and peers, when they are exposed to every other type of opinion and viewpoint, sends a message of hostility—not neutrality—to religious employees and students alike. Government guidance has recognized many ways that school employees are free to practice their own faith. For example, they "may take part in religious activities where the overall context makes clear that they are not participating in their official capacities."[58] Teachers may "take part in religious activities such as prayer even during their workday at a time when it is permissible to engage in . . . private conduct," "meet with other teachers for prayer or bible study" at a time that would be equally appropriate to engage in other nonreligious conversation such as "before school or during lunch," or "participate

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[53] *Kennedy*, 142 S. Ct. at 2425.

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.* at 2422; Lee v. Weisman, 505 U.S. 577, 587-88 (1992).

[58] U.S. Dep't of Educ., *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*, *available at* https://www2.ed.gov/policy/gen/guid/religion-andschools/prayer_guidance.html (last updated Jan. 16, 2020).

in their personal capacities in privately sponsored baccalaureate ceremonies or similar events."[59] And religion is not a taboo topic in the classroom: "school district employees can discuss the historical and cultural role of religion as part of a secular program of education."[60] These principles are far from extreme or new; they merely acknowledge the longstanding reality that many school employees are people of faith who do not forfeit their religious exercise when they sign an employment contract, and that students will be exposed to different religious beliefs during the course of their lives in a pluralistic society. Because pluralism begins in the school context and extends into the workplace and beyond, for a public school to prevent students from any contact with religious beliefs besides their own is to do them a disservice in preparation for successful relationships in adult society.

Most importantly for the school context, the Court makes clear that public schools and other government actors can no longer hide behind hypothetical Establishment Clause concerns to justify real free exercise violations.[61] On the contrary, "there is no conflict between the constitutional commands [of the Establishment Clause and the Free Exercise Clause.] . . . And in no world may a government entity's concerns about phantom constitutional violations justify actual violations of an individual's First Amendment rights."[62] This decisive holding points out the error of public school officials who for decades have ousted religion entirely from the school environment for fear of violating the Establishment Clause.

Overall, *Kennedy*'s impact in the free exercise context is two-fold: it synthesizes existing free exercise jurisprudence in a way that is clear and helpful for lower courts to follow, and it clarifies that under *Masterpiece Cakeshop*, official expressions of religious hostility constitute a per se free exercise violation even apart from strict scrutiny analysis.

## II. *KENNEDY*'S IMPACT ON THE ESTABLISHMENT CLAUSE

### *A. Replacing* Lemon *With Historical Analysis*

*Kennedy*'s most significant contribution to Establishment Clause jurisprudence, and to First Amendment law overall, is its clear recognition that the long-criticized *Lemon* test from *Lemon v. Kurtzman* is overruled. While the

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[59] *Id.*
[60] *Id.*
[61] *Kennedy*, 142 S. Ct. at 2432.
[62] *Id.*

exact time of death remains uncertain, the test that "stalk[ed] our Establishment Clause jurisprudence" "[l]ike some ghoul in a late-night horror movie" is finally dead and buried.[63] Writing for the 6-3 majority, Justice Gorsuch explained that "this Court long ago abandoned *Lemon* and its endorsement test offshoot."[64] Here, the Court unequivocally rejected the *Lemon* test and its "reasonable observer" standard for two main reasons. First, the "reasonable observer" standard created a "modified heckler's veto, in which . . . religious activity can be proscribed" based on "'perceptions'" or "'discomfort.'"[65] Second, the *Lemon* test "invited chaos" in lower courts and created a "minefield" for legislators because of its subjective, unpredictable, and often contradictory outcomes.[66]

While this holding marks a significant milestone in Establishment Clause jurisprudence, it follows directly from the Court's 2019 holding in *American Legion v. American Humanist Association.* There, in a 7-2 ruling, the Court upheld a memorial in the shape of a cross that had commemorated World War I veterans for nearly 100 years. Five Justices said that *Lemon* should be overruled, but they did so in splintered opinions. These Justices gave four detailed reasons why the test failed to provide consistent or constitutional results, and the Court did not use the *Lemon* test at all but focused on "historical practices and understandings" instead. The Court had also analyzed historical practices instead of applying *Lemon* in *Town of Greece* five years earlier.[67] *Kennedy* built on this foundation. The majority cited both *American Legion* and *Town of Greece* in finding that the Court had "long ago abandoned *Lemon*."[68] Thus, while the official time of death was likely 2019's *American Legion*, *Kennedy* clarifies that lower courts may no longer resurrect *Lemon* to support their decisions.[69]

Justice Sonia Sotomayor's dissent argues that the Court in *Kennedy* "goes much further" than it did in *American Legion* by "overruling *Lemon* entirely

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[63] Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring).

[64] *Kennedy,* 142 S. Ct. at 2427 (citing American Legion v. American Humanist Association, 139 S. Ct. 2067, 2079-81 (2019); Town of Greece v. Galloway, 572 U.S. 565, 575-77 (2014)).

[65] *Kennedy,* 142 S. Ct. at 2427 (citing Good News Club v. Milford Central School, 533 U.S. 98, 119 (2001)).

[66] *Id.* at 2427 (citing Cap. Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 768-69 (1995)).

[67] *American Legion*, 139 S. Ct. at 2101-02 (Gorsuch, J., concurring) (citing *Town of Greece*, 572 U.S. at 576).

[68] *Kennedy,* 142 S. Ct. at 2427.

[69] *Id.* (faulting the school district and the Ninth Circuit for "overlook[ing]" the fact that "this Court long ago abandoned *Lemon* and its endorsement test offshoot").

and in all contexts."[70] The dissent's reading of *American Legion* is that it declined to apply *Lemon* in the monument context and rejected its "grand unified theory of the Establishment Clause," but it says *Lemon* was not actually overruled until *Kennedy*.[71] Even if this interpretation is correct, both the majority and the dissent make clear that *Lemon* is now overruled.

Now that *Lemon* is no longer good law, what framework should replace it? *Kennedy* answered that question too, drawing from *Town of Greece* and *American Legion*: "the Establishment Clause must be interpreted by 'reference to historical practices and understandings.'"[72] Courts should focus on "original meaning and history" in the first instance.[73] This approach is faithful to the Founders' understanding, and it also respects the complementarity of the clauses of the First Amendment. Here, the Bremerton School District viewed the Establishment Clause as a trump card which defeated Coach Kennedy's free exercise and free speech rights. But the Court recognized that the Religion and Free Speech Clauses of the First Amendment work together with "'complementary' purposes, not warring ones where one Clause is always sure to prevail over the others."[74] Focusing on historical practices and understandings will ensure that the clauses are interpreted together, rather than in opposition in a way that allows a hostile government to choose "its preferred way out of its self-imposed trap."[75]

### *B. Lower Court Citations to* Kennedy *on the Establishment Clause*

In the months immediately following *Kennedy*, the Second, Fifth, Ninth, and Eleventh Circuits all cited it for the proposition that the *Lemon* test is dead and replaced by analysis of historical practices and understandings. For instance, in *Jusino v. Federation of Catholic Teachers, Inc.*, the Second Circuit held that the *Lemon* test was no longer good law, regardless of whether *Lemon* was abandoned "long ago," as the majority said in *Kennedy*, or in *Kennedy* itself, as the dissent concluded.[76] In *Rojas v. City of Ocala, Florida*, the Eleventh Circuit remanded with instructions to apply *Kennedy*'s historical test to an Establishment Clause challenge to a mayor's prayer vigil, recognizing that

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[70] *Id.* at 2429 (Sotomayor, J., dissenting).

[71] *Id.*

[72] *Id.* at 2428 (internal citations omitted).

[73] *Id.*

[74] *Id.* at 2426.

[75] *Id.* at 2427.

[76] Jusino v. Fed'n of Catholic Teachers, Inc., No. 21-2081, 2022 WL 17170533, at *5 (2d Cir. Nov. 23, 2022).

"the Supreme Court drove a stake through the heart of the ghoul and told us that the *Lemon* test is gone, buried for good, never again to sit up in its grave."[77] When analyzing a Justice of the Peace's practice of opening court sessions with prayer, the Fifth Circuit looked to "historical evidence" rather than the *Lemon* test, recognizing that "[i]ts long Night of the Living Dead . . . is now over," and that it was "too easily manipulated to shed light on history's relevance."[78] And the Ninth Circuit recognized that "the Supreme Court's recent decision in *Kennedy* . . . has called into doubt much of our Establishment Clause case law" and "marks a shift in the Court's Establishment Clause jurisprudence."[79] Post-*Kennedy*, "[i]nstead of relying on the *Lemon* test, lower courts must now interpret the Establishment Clause by 'reference to historical practices and understandings.'"[80]

District courts have followed suit in the months since the *Kennedy* decision. In *Napper v. Hankison*, the Western District of Kansas found that "the Supreme Court recently rejected *Lemon*'s inquiry into whether a particular display offends the observer or amounts to an 'endorsement' of religion."[81] In *Kane v. De Blasio*, the Southern District of New York cited *Kennedy* for the rule "that the Establishment Clause must be interpreted by reference to historical practices and understandings."[82] In *JLF v. Tennessee State Board of Education*, the Middle District of Tennessee had already applied historical analysis instead of the *Lemon* test to a challenge to the national motto "In God We Trust," and it cited *Kennedy* as further reason to abandon the *Lemon* test in Establishment Clause cases.[83]

Only two district courts, as of the date of this writing, have toyed with applying *Lemon* now that *Kennedy* has overruled it. In *Ervins v. Sun Prairie*

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[77] Rojas v. City of Ocala, Fla., 40 F.4th 1347, 1351–52 (11th Cir. 2022).

[78] Freedom From Religion Found., Inc. v. Mack, 49 F.4th 941, 951, 954 n.20 (5th Cir. 2022) (citing *Kennedy*, 142 S. Ct. at 2427).

[79] Sabra v. Maricopa Cnty. Cmty. Coll. Dist., 44 F.4th 867, 887-88 (9th Cir. 2022) (citing *Kennedy*, 142 S. Ct. at 2427-28) (finding that Muslim plaintiff's Establishment Clause claim against module on "Islamic terrorism" was barred by qualified immunity).

[80] *Id.*

[81] No. 3:20-CV-764-BJB, 2022 WL 3008809, at *15 n.2 (W.D. Ky. July 28, 2022) (rejecting Establishment Clause challenge to Bible verse in firearms training for police officer).

[82] No. 21 CIV. 7863 (NRB), 2022 WL 3701183, at *10 (S.D.N.Y. Aug. 26, 2022) (rejecting Establishment Clause challenge to vaccine mandate).

[83] No. 3:21-CV-00621, 2022 WL 16541177, at *2 (M.D. Tenn. Oct. 27, 2022) (rejecting atheist plaintiff's attempt to relitigate her case against the national motto "In God We Trust" by arguing that *Kennedy* changed intervening law, because the previous court did not rely on *Lemon* test to address her claim).

*Area School District*, the Western District of Wisconsin rejected parent plaintiffs' Establishment Clause claim based on a history lesson about the Code of Hammurabi.[84] The court acknowledged that after *Kennedy*, "the continuing validity of the *Lemon* endorsement test is doubtful," but "even if *Lemon* applied," the Establishment Clause claim would fail because the challenged practice was not religious in nature.[85] Thus, the claim "cannot be squared with *Lemon* or any other Establishment Clause standard."[86] In *Abiding Place Ministries v. Newsom*, the Southern District of California opined that *Kennedy* "criticiz[ed] the Ninth Circuit's use of the *Lemon* test," yet it seemed to consider the prongs of *Lemon* anyway when analyzing a COVID-19 lockdown order.[87] These outlier cases are best interpreted as applying a belt and suspenders approach to the Establishment Clause. Even so, this equivocal approach is odd because of how decisively *Kennedy* spoke of *Lemon*'s overruling.

### *C. Open Questions About the New Establishment Clause Test*

Thanks to the Court's decisive holding in *Kennedy*, lower courts no longer need to quibble over whether or how to apply the *Lemon* test. Yet questions remain about the proper framework for Establishment Clause analysis. The exact contours of the "historical practices and understandings" approach are still being explored, especially because these inquiries are often context-specific. Two other open questions are whether coercion still has a role in Establishment Clause analysis, and whether offended observer standing is still valid after *Kennedy*.

#### 1. History and Tradition Analysis

The Court in *Kennedy* did not define the exact contours of the history and tradition analysis that should replace *Lemon*. Justice Sotomayor's dissent characterizes this as a major weakness of the opinion with dire consequences in the public school context, arguing that "the Court's history-and-tradition test offers essentially no guidance for school administrators. If even judges and Justices, with full adversarial briefing and argument tailored to precise legal issues, regularly disagree (and err) in their amateur efforts at history, how are school administrators, faculty, and staff supposed to adapt?"[88] Although

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[84] Ervins v. Sun Prairie Area Sch. Dist., No. 21-CV-366-JDP, 2022 WL 2390180, at *9 (W.D. Wis. July 1, 2022).

[85] *Id.*

[86] *Id.*

[87] No.: 3:21-cv-00518-RBM-DDL, 2023 WL 2001125, at *8 (S.D. Cal. Feb. 14, 2023)..

[88] *Kennedy*, 142 S. Ct. at 2450 (Sotomayor, J., dissenting).

it may not always be simple to apply a historical analysis, Justice Sotomayor's concern may be overstated in light of existing case law.

Several Supreme Court cases offer guidance in applying a historical approach to Establishment Clause questions: *Marsh v. Chambers*, *Town of Greece*, *American Legion*, and *Kennedy*. These cases, as well as Justice Gorsuch's concurrence in *Shurtleff v. City of Boston*, rely heavily on scholarship by Professor Michael McConnell, whose detailed investigation of founding-era religious establishments provides helpful context for evaluating more recent Establishment Clause claims.[89] The *Kennedy* decision incorporates this scholarship by reference, citing both the *Shurtleff* concurrence and McConnell's scholarship in footnote 5.[90] As Justice Gorsuch recognized in *Shurtleff*, citing McConnell, six features of an establishment that the framers of the First Amendment sought to forbid included:

1. Government control over doctrine and personnel of established churches;
2. Government-mandated attendance of the established church;
3. Punishment of dissenting churches and individuals;
4. Restrictions on dissenters' political participation;
5. Government financial support for established churches; and
6. Government use of established churches to carry out civil functions.[91]

Based on these six criteria, courts—and school administrators—may be able to tell whether an Establishment Clause issue they face is analogous to founding-era establishments. In many cases, "[t]hese historical hallmarks . . . [will] provide helpful guidance for those faced with future disputes."[92] In short, courts and government actors are now directed to look to the original meaning of the Constitution, and judges can breathe a sigh of relief that they no longer need to count snowmen and reindeer to determine whether a holiday display is somehow too religious. In the founding era, such displays were not typically a concern since they merely acknowledged the cultural influence of

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[89] *See* Michael McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2110–2112, 2131 (2003); *see also* Daniel Chen, Kennedy v. Bremerton School District*: The Final Demise of* Lemon *and the Future of the Establishment Clause*, 21 Harv. J.L. & Pub. Pol'y Per Curiam (Aug. 8, 2022) (drawing connection between Justice Gorsuch's *Shurtleff* concurrence, Michael McConnell's scholarship, and *Kennedy*'s historical approach framework).

[90] *Kennedy*, 142 S. Ct. at 2429 n.5.

[91] Shurtleff v. City of Boston, Massachusetts, 142 S. Ct. 1583, 1609–10 (2022) (Gorsuch, J., concurring) (citing McConnell, *supra* note 89, at 2131).

[92] *Shurtleff*, 142 S. Ct. at 1610 (Gorsuch, J., concurring).

religion.[93] However, judges will need to take a closer look at government efforts to control who is preaching or what they are preaching, since those situations raise concerns under both the Establishment Clause and the Free Exercise Clause.

Thus, while analyzing historical practices and understandings is not a one-size-fits-all approach, or a "grand unified theory" of the Establishment Clause as the *Lemon* test purported to be,[94] it does provide a clearer framework for courts to follow than *Lemon*. It may take some time for courts and litigants to adapt to a new approach, and to determine how it applies in different contexts. But it is far better for the law to grapple with historical realities than the amorphous, subjective standards that plagued application of the *Lemon* and endorsement tests. On the whole, a historical approach should lead to results more aligned with the original meaning of the First Amendment and less dictated by the policy preferences of judges.

2. Coercion Analysis

In *Kennedy*, the Court focused on coercion as a major touchstone of its analysis, but its use of the term "coercion" is notably different from how it was used in cases such as *Lee v. Weisman* and *Santa Fe Independent School District v. Doe*. Because the *Kennedy* Court overturned *Lemon* and its "reasonable observer" endorsement test offshoot, the Court now views coercion through the lens of the original meaning of the Establishment Clause rather than through the perspective of a hypothetical reasonable observer. The six elements of a founding-era establishment that McConnell and Gorsuch highlight all "reflect forms of 'coerc[ion]' regarding 'religion or its exercise.'"[95] The *Kennedy* opinion made this clear: "coercion along these lines was among the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment."[96] While Coach Kennedy's brief, private prayer "did not come close to crossing any line," the line the Court seems concerned about here is actual religious coercion by the state, such as where a school district employee intends to influence students' behavior and students actually change their behavior as a result. This is a far cry from the "phantom constitutional violations" that *Lemon*'s reasonable observer seemed

[93] *Id.* ("'No one at the time of the founding is recorded as arguing that the use of religious symbols in public contexts was a form of religious establishment.' . . . it appears that, until *Lemon*, this Court had never held the display of a religious symbol to constitute an establishment of religion.").

[94] *Kennedy*, 142 S. Ct. at 2427 (citing *American Legion*, 139 S. Ct. at 2021).

[95] *Shurtleff*, 142 S. Ct. at 1609 (Gorsuch, J., concurring) (citing *Lee*, 505 U.S. at 587).

[96] *Kennedy*, 142 S. Ct. at 2429.

to create.[97] The Sixth Circuit has already cited *Kennedy* for the principle that "[g]overnment 'justification[s]' for interfering with First Amendment rights 'must be genuine, not hypothesized or invented post hoc in response to litigation.'"[98] Thus, coercion will continue to be a touchstone as courts analyze Establishment Clause claims going forward, but in order to prevail, claimants will need concrete, non-speculative evidence that coercion was intended and that it occurred.

3. Offended Observer Standing

As at least one lower court has recognized, the *Kennedy* opinion did not conclusively decide whether "offended-observer standing" is obsolete for Establishment Clause cases.[99] But it may be the next to fall now that the *Lemon* test is overruled. As Justice Gorsuch's concurrence in *American Legion* pointed out, "[l]ower courts invented offended observer standing for Establishment Clause cases in the 1970s in response to . . . *Lemon.*"[100] The offended observer standing doctrine was not at issue in *Kennedy* because it was Coach Kennedy who sued the school district over its actions against him, not parents or students who sued because they were offended by the alleged religious establishment.

Future cases will likely either set aside this standing doctrine or severely limit its scope. As Justice Gorsuch said in a 2019 concurrence, "With *Lemon* now shelved, little excuse will remain for the anomaly of offended observer standing, and the gaping hole it tore in standing doctrine in the courts of appeals should now begin to close."[101] Perhaps the Court will not feel the need to explicitly denounce offended observer standing, but instead claimants will realize that they need evidence of actual coercion in order to prevail on Establishment Clause claims, and that will deter suits based merely on offense.

## III. *KENNEDY*'S IMPACT ON THE FREE SPEECH CLAUSE

The *Kennedy* Court's Free Speech Clause holding offers useful guidance for analyzing the free speech claims of government employees. The opinion

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[97] *Id.* at 2432.

[98] Doster v. Kendall, Nos. 22-3497/3702, 2022 WL 17261374, *28 (citing *Kennedy*, 142 S. Ct. at 2432 n.8).

[99] *Napper*, 2022 WL 3008809, at *15 n.12.

[100] *Am. Legion*, 139 S. Ct. at 2101 (Gorsuch, J., concurring in the judgment).

[101] *Id.* at 2102.

will be particularly useful for evaluating when government employee speech should be considered private speech, rather than official speech. When a government employee's private speech is also religious, six Justices agreed that the Free Speech Clause and Free Exercise Clause work in tandem to provide an extra layer of protection. However, the different opinions of the Justices reflected disagreement about the proper analysis for free speech claims of government employees, particularly when those speech claims involve religious speech, leaving open questions for future cases.

### *A.* Kennedy*'s Free Speech Holding*

#### 1. The Free Speech and Free Exercise Clauses Doubly Protect Religious Speech

The Court's free speech analysis in *Kennedy* began by affirming that the First Amendment's Free Speech and Free Exercise Clauses "work in tandem" and "provide[] overlapping protection for expressive religious activities."[102] This statement that "the First Amendment doubly protects religious speech" did not break new ground.[103] Many Supreme Court cases address protected religious expression. The *Kennedy* Court noted that "government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince."[104] Even the dissent agreed that the majority opinion of "[t]he Court is correct that certain expressive religious activities may fall within the ambit of both the Free Speech Clause and the Free Exercise Clause."[105]

#### 2. Public Employee Speech: Private Speech or Government Speech?

The Court continued its Free Speech analysis by repeating *Tinker*'s promise that the "First Amendment's protections extend to 'teachers and students,' neither of whom 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'"[106] It would be improper for schools to treat "everything teachers and coaches say in the workplace as government speech subject to government control."[107] Still, teachers are government employees who may be called upon to speak the government's message.

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[102] *Kennedy*, 142 S. Ct. at 2421 (citing Widmar v. Vincent, 454 U.S. 263, 269, n.6 (1981); Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 841 (1995)).

[103] *Id.*

[104] *Id.* at 2421 (quoting *Pinette*, 515 U.S. at 760).

[105] *Id.* at 2446 (Sotomayor, J., dissenting).

[106] *Id.* at 2423 (citing *Tinker*, 393 U.S. at 506).

[107] *Id.* at 2425.

The Court then explained that its past cases used the *Pickering* test to address the free speech claims of government employees. The court first announced the test in *Pickering v. Board of Education* in 1968,[108] and later applied it with qualifiers in *Garcetti v. Ceballos* in 2006.[109] Under this test, courts first ask whether the speech at issue is government speech (such as speech spoken by the employee as an agent of the government) or private speech (such as speech spoken by the employee as a citizen on a matter of public concern). If it is government speech, the government may control it. On the other hand, if it is private speech, it may be constitutionally protected.

When private speech is involved, courts are to "balance" the interests of a government employee "as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[110] This is sometimes referred to as *Pickering* balancing. *Garcetti* explained that, if a government employee is disciplined for speaking on a matter of public concern, courts analyze "whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public."[111]

The *Kennedy* Court was careful to explain that it applied *Pickering* because both sides asked the Court to use that test. The opinion left room for future argument that *Pickering* may not be the correct approach for all government employee speech cases. The opinion specifically flagged two possible exceptions. First, academic freedom questions, most commonly encountered at the university level, may proceed under a different analysis.[112] Second, "[b]ecause our analysis and the parties' concessions lead to the conclusion that Mr. Kennedy's prayer constituted private speech on a matter of public concern, we do not decide whether the Free Exercise Clause may sometimes demand a

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[108] Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will Cnty., Illinois, 391 U.S. 563 (1968).

[109] Garcetti v. Ceballos, 547 U.S. 410 (2006).

[110] *Pickering*, 391 U.S. at 568.

[111] *Garcetti*, 547 U.S. at 418.

[112] In *Garcetti*, the Court specifically carved out academic freedom questions from the normal public employee speech test. Two circuits have thus concluded that professors engaged in scholarship or teaching deserve full First Amendment protection: Demers v. Austin, 746 F.3d 402 (9th Cir. 2014); Adams v. Trustees of the University of N.C.-Wilmington, 640 F.3d 550 (4th Cir. 2011). For a discussion of the academic freedom exception, see Nick Cordova, *An Academic Freedom Exception to Government Control of Employee Speech*, 22 FEDERALIST SOC'Y REV. 284 (2019), *available at* https://fedsoc.org/commentary/publications/an-academic-freedom-exception-to-government-control-of-employee-speech.

different analysis at the first step of the *Pickering–Garcetti* framework."[113] Religious speech may be entitled to heightened protections whether or not it is on a matter of public concern.

Applying the *Pickering* test to the facts in *Kennedy*, the Court held that Kennedy's speech was private speech rather than government speech:

> When Mr. Kennedy uttered the three prayers that resulted in his suspension, he was not engaged in speech "ordinarily within the scope" of his duties as a coach. He did not speak pursuant to government policy. He was not seeking to convey a government-created message. He was not instructing players, discussing strategy, encouraging better on-field performance, or engaged in any other speech the District paid him to produce as a coach. . . . Simply put: Mr. Kennedy's prayers did not "ow[e their] existence" to Mr. Kennedy's responsibilities as a public employee. [114]

The Court recited a few additional facts about the timing and circumstances of Kennedy's prayers that bolster the argument that his speech was private speech. For instance, he prayed separately from his team during the post-game period, when "coaches were free to attend briefly to personal matters—everything from checking sports scores on their phones to greeting friends and family in the stands."[115] That others could engage in comparable private speech during that time made it less likely that the job's requirements included use of that time for official purposes.[116] Overall, the Court concluded that the totality of the circumstances reflected that Kennedy was not acting within the scope of his government duties as a coach.

The dissent did not take a firm position on whether Kennedy's speech should be considered government speech or private speech. The dissent stated that "the District has a strong argument that Kennedy's speech, formally integrated into the center of a District event, was speech in his official capacity as an employee that is not entitled to First Amendment protections at all."[117] But it focused its argument on its analysis of the school district's burden in light of the Establishment Clause and, thus, considered resolution of this threshold free speech issue to be unnecessary.[118]

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[113] *Kennedy*, 142 S. Ct. at 2425 n.2.
[114] *Id.* at 2424 (citations omitted).
[115] *Id.* at 2425.
[116] *Id.* at 2424–25.
[117] *Id.* at 2445 (Sotomayor, J., dissenting) (quoting *Garcetti*, 547 U.S. at 418).
[118] *Id.* at 2426 n.3.

*B. Lower Court Citations to* Kennedy *on the Free Speech Issue*

In the months since the opinion's release, it has often been cited by courts evaluating whether a government employee's speech should be considered private speech. For example, one district court case, *Beathard v. Lyons*, gave this summary of *Kennedy*'s holding:

> Kennedy makes it clear that when a high school football coach engages in prayer after a high school football game, he is not engaged in speech that falls within his ordinary job duties. . . . Just because a student or other staff members can see one exercising their freedom of speech does not transform private speech into government speech. . . . During the football game, the coach's "prayers did not 'ow[e their] existence' to Mr. Kennedy's responsibilities as a public employee." . . . The Court explained that while not everything a coach says in the workplace is considered government speech, one must evaluate the substance of the speech as well as the circumstances around the speech to determine whether or not the speech was within one's job duties.[119]

This court applied the same standard when evaluating a state university football coach's replacement of a Black Lives Matter poster with a sign stating that "All Lives Matter to our Lord & Savior Jesus Christ." The court concluded that the coach's actions were not taken in furtherance of his official job duties:

> In putting up the replacement poster, Plaintiff was expressing his personal views, which in no way "owed their existence" to his responsibilities as a public employee. . . . Plaintiff was not paid by the University to decorate his door or to use it [sic] to promote a particular viewpoint, he was employed to coach football.[120]

In another case, *DeMarco v. Borough of Saint Clair*, the magistrate judge quoted *Kennedy* at length on the legal standard for deciding whether government employee speech is private or official.[121] The court applied the standard to hold that because there was no evidence that a part-time police chief was required "to partner with local business owners and engage in fundraising" or

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[119] Beathard v. Lyons, No. 121CV01352JESJEH, 2022 WL 3327753, at *3 (C.D. Ill. Aug. 11, 2022).

[120] *Id.*

[121] DiMarco v. Borough of Saint Clair, No. 3:20-CV-1335, 2022 WL 6685296, at *10 (M.D. Pa. July 19, 2022), *report and recommendation adopted*, No. 3:20-CV-01335, 2022 WL 6685263 (M.D. Pa. Sept. 27, 2022).

that fundraising was a part of his duties, the part-time police chief's fundraising activities should be considered private—not government—speech.[122]

In *Kingman v. Frederickson*, the Seventh Circuit recited *Kennedy*'s standard to grapple with the question of whether a government employee was fired in retaliation for protected speech at city council meeting. Ultimately, the court resolved the case on different grounds without resolving the question of whether the speech at issue should be considered private—and thus fully protected—speech.[123]

Another Seventh Circuit decision, *Cage v. Harper*, found that a university's chief legal officer was acting in furtherance of his job responsibilities "when he raised concerns about the potential conflict of interest flowing from [a board member] simultaneously serving on the University's Board and seeking to become the institution's next president."[124] Because he was speaking pursuant to his official duties, his speech lacked protection under the Free Speech Clause.

### *C. Open Questions*

The different opinions in *Kennedy* left open some questions about the proper framework for evaluating government employees' free speech claims related to religious speech. In particular, questions remain about the government's burden and which level of scrutiny applies.

The majority opinion, by stating that it was applying *Pickering* only because both parties asked it to, left room for future argument that *Pickering* may not be the correct approach for all government employee speech cases. Justice Alito's concurrence explained that he was joining the majority opinion on the understanding that the Court is leaving open the question of which standard applies. This suggests he may be in favor of a heightened standard of review, at least where there is a break in official activity.[125]

Justice Thomas's concurrence suggested that when government employees' private speech is also religious speech, the government might have a higher burden. He wrote, "the Court has never before applied *Pickering* balancing to a claim brought under the Free Exercise Clause. A government

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[122] *Id.*

[123] Kingman v. Frederickson, 40 F.4th 597, 602 (7th Cir. 2022).

[124] Cage v. Harper, 42 F.4th 734, 742 (7th Cir. 2022).

[125] *Kennedy*, 142 S. Ct. at 2433–34 (Alito, J., concurring).

employer's burden therefore might differ depending on which First Amendment guarantee a public employee invokes."[126]

Justice Kavanaugh's position is the least clear. He did not join the first portion of the free speech analysis, Part III-B. But because Justice Kavanaugh did not write a separate concurrence, we do not know why he did not join the majority's opinion in full. It is therefore unclear whether he disagreed with the majority's approach (applying *Pickering* to a claim involving religious speech), disagreed with the outcome of the *Pickering* test as applied here (finding Kennedy's speech was private speech), or deemed it unnecessary to decide in light of the Court's free exercise holding. Kavanaugh did join Part IV, which held that the government failed to meet its burden under any of the possible standards (*Pickering*, intermediate scrutiny, or strict scrutiny). Thus, it is unlikely that Kavanaugh would hold that Kennedy's speech should be considered government speech. It therefore seems most likely that he does not want to address the threshold free speech issue unless a case requires it.

On the other hand, one scholar notes that Justice Kavanaugh, while he was serving on the D.C. Circuit, joined a panel opinion that took a broad view of government speech in the government employee context.[127] The opinion in *LeFande v. District of Columbia* held that a police officer's emails criticizing his superiors "enjoy no First Amendment protection because his interest in sending them is outweighed by the police department's interest in promoting office harmony and efficiency."[128]

Overall, the different *Kennedy* opinions tee up the issue for future litigants to argue that burdens on the religious speech of government employees should be subject to a higher level of scrutiny than the default *Pickering* test—a judicial test created in the context of whistleblower speech—would require. Religious private speech implicates different concerns as well as a combination of rights under the First Amendment.

## IV. CONCLUSION

*Kennedy* is likely to have a lasting impact on the jurisprudence of the first three clauses of the First Amendment. In the Free Exercise Clause context, it synthesized decades of post-*Smith* cases. In the Establishment Clause context,

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[126] *Id.* at 2433 (Thomas, J., concurring).

[127] Timothy Zick, *Judge Kavanaugh and freedom of expression*, SCOTUSblog (Aug. 7, 2018, 3:49 PM), https://www.scotusblog.com/2018/08/judge-kavanaugh-and-freedom-of-expression/.

[128] LeFande v. D.C., 841 F.3d 485, 488 (D.C. Cir. 2016).

it replaced the unsuccessful *Lemon* test with a test grounded in history and tradition. In the Free Speech Clause context, it paved the way for increased protection for government employees' private speech, particularly at the intersection of free speech and religious expression.

Other Views:

- Ira C. Lupu & Robert W. Tuttle, Kennedy v. Bremerton School District – *A Sledgehammer to the Bedrock of Nonestablishment*, GEO. WASH. L. REV. ON THE DOCKET (2022), https://www.gwlr.org/kennedy-v-bremerton-school-district-a-sledgehammer-to-the-bedrock-of-nonestablishment/.
- Ian Millhiser, *The Supreme Court hands the religious right a big victory by lying about the facts of a case*, VOX (June 27, 2022), https://www.vox.com/2022/6/27/23184848/supreme-court-kennedy-bremerton-school-football-coach-prayer-neil-gorsuch.
- Brief for Respondent, Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022), *available at* https://www.au.org/wp-content/uploads/2022/03/Kennedy-v.-Bremerton-School-District-SCOTUS-Respondents-Brief-3.25.22.pdf.

# REMEDYING CRIMINAL TRIAL ERRORS: RETRIAL OR ACQUITTAL IN *SMITH V. UNITED STATES*?*

PAUL J. LARKIN & CHARLES D. STIMSON**

The best-known rule of criminal procedure is that the government may not deprive someone of his life, liberty, or property unless and until it has proved his guilt of a crime beyond a reasonable doubt at trial.[1] The question of a party's guilt or innocence is the most fundamental issue in every American criminal trial. Indeed, the entire purpose of a criminal trial is to decide whether the accused is guilty of the charges levelled against him.[2]

If a jury finds the accused guilty, the trial judge may impose whatever punishment is authorized by law.[3] If a jury returns a verdict of "Not Guilty,"

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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.*, Victor v. Nebraska, 511 U.S. 1, 5 (1994); MCCORMICK ON EVIDENCE § 341 (8th ed. Robert P. Mosteller gen'l ed., & July 2022 update). Ironically, the common law adopted the reasonable doubt standard to make it *easier* for juries to convict the accused by lifting from them the fear that a mistaken judgment would lead to their eternal damnation. *See* JAMES Q. WHITMAN, THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF THE CRIMINAL TRIAL (2008); Thomas P. Gallanis, *Reasonable Doubt and the History of the Criminal Trial*, 76 U. CHI. L. REV. 941, 953 (2009) ("The reasonable doubt instruction . . . was designed not to protect the accused but rather to make it easier for jurors to reach a verdict of guilt . . . . Jurors needed the reassurance, for they feared divine vengeance if they condemned improperly. In England, the reasonable doubt instruction became established in the 1780s, because by then transportation to the American colonies was no longer available as a noncapital sanction. This raised the punishment stakes sufficiently that jurors needed more coaxing to convict . . . .") (references and punctuation omitted).

[2] *See* United States v. Nobles, 422 U.S. 225, 230 (1975).

[3] *See* Chapman v. United States, 500 U.S. 453, 465 (1991).

the judge must enter a judgment reflecting that verdict and release the accused from any restraints associated with the charges.[4] If an appellate court finds that the evidence was insufficient for the jury reasonably to convict the defendant, the court must order the entry of a judgment of acquittal.[5] In either case, that judgment and the Fifth Amendment's Double Jeopardy Clause protect a party against a second prosecution for the "same offense"[6] even if the acquittal is "based upon an egregiously erroneous foundation."[7]

Few trials, however, come off perfectly. When a trial or appellate court decides that the defendant was prejudiced[8] by an error that occurred before the case was submitted to the jury or during its deliberations, what is the proper remedy? Should the court merely order a new trial? Or should the court enter a judgment of acquittal (or, in what amounts to essentially the same relief, order a dismissal of the indictment with prejudice) on the theory that the government should be allowed only one chance to convict someone of a crime?[9] That is the remedy awarded when the case should not have been submitted to the jury at all because the government's proof of guilt was

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[4] *See* Fed. R. Crim. P. 32(k)(1).

[5] *See* Burks v. United States, 437 U.S. 1 (1978).

[6] U.S. CONST. amend. V.

[7] Fong Foo v. United States, 369 U.S. 141, 143 (1962); *see also*, *e.g.*, Evans v. Michigan, 568 U.S. 313, 318-30 (2013); Arizona v. Rumsey, 467 U.S. 203, 211 (1984).

[8] Not every error is prejudicial or requires a drastic remedy. The Harmless Error Doctrine requires a federal court to disregard an error that did not affect the "substantial rights" of the accused. See 28 U.S.C. 2111 (2018) ("On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."); Fed. R. Crim. P. 52(a) ("Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."); United States v. Mechanik, 475 U.S. 66, 69-73 (1986) (finding that allowing two witnesses to testify jointly before the grand jury, in violation of Rule 6(d) of the Federal Rules of Criminal Procedure, does not require reversal of an otherwise valid judgment of conviction); Hobby v. United States, 468 U.S. 339, 343-50 (1984) (holding discrimination in the selection of a grand jury foreperson does not require setting aside an otherwise valid conviction); Kotteakos v. United States, 328 U.S. 750, 764-65 (1946). Most errors, even ones that violate the Constitution, are subject to harmless error analysis. *See*, *e.g.*, United States v. Marcus, 560 U.S. 258, 262-65 (2010) (ruling that a jury instruction allowing a defendant to be convicted for conduct predating enactment of the relevant statute can be harmless); Arizona v. Fulminante, 499 U.S. 279, 282, 303, 288-89, 295, 302 (1991) (holding that the admission of a coerced confession can be a harmless error); *id.* at 307 (collecting examples of potentially harmless constitutional errors).

[9] United States v. Strain, 407 F.3d 379, 379 (5th Cir. 2005); United States v. Greene, 995 F.2d 793 (8th Cir. 1993).

inadequate.[10] The Supreme Court will answer that question this Term in *Smith v. United States*.[11]

The facts of the *Smith* case illustrate a truly modern type of crime.[12] Smith is a software engineer and fisherman. Using his computer and the Internet, Smith accessed information about the location of attractive artificial fishing reefs in the Gulf of Mexico possessed by a Florida business named Strike-Lines. StrikeLines is a private company that offers detailed GPS-enabled high resolution fishing charts on a subscription basis. The government charged Smith with (among other things) the theft of trade secrets,[13] and the trial was held in the Northern District of Florida. Smith objected to that venue, arguing that the locus delicti—or place where an offense was committed—was elsewhere. The case should have been tried, he argued, either in the Middle District of Florida, where StrikeLines' servers were located, or the Southern District of Alabama, where he was at all times relevant to the case. Trial in the Northern District of Florida, he maintained, violated the venue requirements of Article III of the Constitution, the Sixth Amendment's Jury Trial Clause, and Rule 18 of the Federal Rules of Criminal Procedure.[14]

The district court rejected Smith's argument,[15] but the U.S. Court of Appeals for the Eleventh Circuit agreed with him. To remedy that error, the circuit court awarded Smith a new trial on the trade-secret theft count.[16]

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[10] *See* Burks v. United States, 437 U.S. 1, 16-17 (1978) ("The prevailing rule has long been that a district judge is to submit a case to the jury if the evidence and inferences therefrom most favorable to the prosecution would warrant the jury's finding the defendant guilty beyond a reasonable doubt. . . . Obviously a federal appellate court applies no higher a standard; rather, it must sustain the verdict if there is substantial evidence, viewed in the light most favorable to the Government, to uphold the jury's decision.") (citations omitted).

[11] 2022 WL 17586971 (No. 21-1576) (cert. granted Dec. 13, 2022) (No. 21-1576).

[12] *See* United States v. Smith, 22 F.4th 1236, 1238-40 (11th Cir. 2022).

[13] *See* 18 U.S.C. § 1832(a)(1) (2018). Smith was also charged with extortion, in violation of 18 U.S.C. § 875(d) (2018). Smith was convicted of that count, his conviction was upheld on appeal, and that aspect of the case is not before the Supreme Court.

[14] *See* U.S. CONST. art. III, § 2, cl. 3 ("The Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed."); *id*. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."); Fed. R. Crim. P. 18 ("[T]he government must prosecute an offense in a district where the offense was committed."). The locus delicti is determined from the nature of the crime alleged, the conduct constituting the offense, and the location of the act or acts constituting it. *See*, *e.g.*, United States v. Rodriguez-Moreno, 526 U.S. 275, 279 (1999); United States v. Cabrales, 524 U.S. 1, 6–7 (1998).

[15] United States v. Smith, 469 F. Supp. 1249, 1255-57 (N.D. Fla. 2020), *aff'd in part and rev'd in part*, 22 F.4th at 1238-40, *cert. granted*, 2022 WL 17586971 (Dec. 13, 2022) (No. 21-1576).

[16] *Smith*, 22 F.4th at 1242-45.

Relying on circuit court precedent, the court of appeals rejected Smith's argument that the proper remedy was entry of a judgment of acquittal.[17]

Smith petitioned the Supreme Court to decide which of those remedies—retrial or acquittal—is the appropriate relief when a defendant is tried in the wrong court.[18] His argument is two-fold. First, venue is an element of a federal offense, he says, which the federal government cannot try to prove more than once. Second, retrial is not a constitutionally adequate remedy for being tried in the wrong district, he argues, because it cannot rectify the burdens the defendant suffered by the first trial.[19]

In our view, a mistaken choice of trial venue does not require an offender to go scot-free; a new trial is an adequate remedy. That argument will unfold as follows: Part I will discuss the law governing appropriate remedies for cases in which, after a jury's guilty verdict, a trial or appellate court finds that an error prejudiced the offender's ability to defend himself at trial. Part II will explain why the Sixth Amendment's Jury Trial Clause does not create an exception to the rule that a retrial is the appropriate remedy for a trial that went awry. That part will also address the relevance of an 1861 Supreme Court decision, *United States v. Jackalow*, on which Smith relies.[20] Part III explains why the Due Process Clause also does not require the entry of a judgment of acquittal as the remedy for initially trying a defendant in the wrong forum. Indeed, the Supreme Court has quite clearly rejected Smith's argument when it was made in connection with the Fifth Amendment's Double Jeopardy Clause. It fares no better under the alternative theories discussed below.

## I. POST-VERDICT REMEDIES IN CRIMINAL CASES

The Anglo-American common law does not provide much assistance in answering the question in *Smith*. English courts could not grant a convicted offender a new trial until the end of the 17th century.[21] Even then, the court could award a new trial only during the term of court in which the judge entered his judgment or enter a reprieve so that the offender could seek royal

[17] *Id*. at 1244-45.

[18] The question presented in *Smith* is "[w]hether the proper remedy for the government's failure to prove venue is an acquittal barring re-prosecution of the offense, as the U.S. Courts of Appeals for the 5th and 8th Circuits have held, or whether instead the government may re-try the defendant for the same offense in a different venue, as the U.S. Courts of Appeals for the 6th, 9th, 10th and 11th Circuits have held." Cert. Pet. i.

[19] Cert. Pet. 5-9, 22-34.

[20] 66 U.S. (1 Black) 484 (1861).

[21] *See* Herrera v. Collins, 506 U.S. 390, 408 (1993).

clemency.[22] There also was no right to appeal a judgment of conviction or sentence at common law.[23] True, habeas corpus was an available remedy to challenge an unlawful pretrial detention, but it did not serve as a basis for seeking relief from a judgment of conviction, however error-filled the trial might have been.[24] A judgment entered by a court with jurisdiction over an offense was a conclusive answer to a claim of illegal detention.[25] In sum, at common law, clemency was the only recourse available to a convicted offender.[26]

The Framers followed that approach.[27] Article III created one Supreme Court of the United States and contemplated that Congress would create lower courts; it gave Congress the freedom to decide whether and how to create a federal judicial system,[28] as well as what authority lower courts should have, including over the adjudication of criminal cases.[29] The First Congress passed two laws creating the original federal judicial system and the criminal code—the Judiciary Act of 1789[30] and the Crimes Act of 1790[31]—but

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[22] *See id*.; United States v. Mayer, 235 U.S. 55, 67 (1914); Paul J. Larkin, Jr., *Guiding Presidential Clemency Decision Making*, 18 GEO. J.L. & PUB. POL'Y 451, 476 & n.142 (2021).

[23] *See* McKane v. Durston, 153 U.S. 684, 687 (1894).

[24] *See* Paul J. Larkin, *The Reasonableness of the "Reasonableness" Standard of Habeas Corpus Review Under the Antiterrorism and Effective Death Penalty Act of 1996*, 72 CASE W. RES. L. REV. 669, 724-27 (2022) (discussing the role of habeas corpus at common law).

[25] *See, e.g.*, Ex parte Watkins, 28 U.S. (3 Pet.) 193 (1830); Ex parte Kearney, 20 U.S. (7 Wheat.) 38 (1822); Larkin, *Reasonableness*, *supra* note 24, at 726-27.

[26] *See, e.g.*, DANIEL DEFOE, A HISTORY OF THE CLEMENCY OF OUR ENGLISH MONARCHS, FROM THE REFORMATION, DOWN TO THE PRESENT TIME (London, N. Mist 1717); Stanley Grupp, *Some Historical Aspects of the Pardon in England*, 7 AM. J. LEGAL HIST. 51 (1963); Larkin, *Clemency*, *supra* note 22, at 476-77 & nn.133, 138 & 142.

[27] Larkin, *Reasonableness*, *supra* note 24, at 731-32.

[28] U.S. CONST. art. III, § 1 ("The Judicial Power of the United States, shall be vested in one supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish.").

[29] For instance, Article III defines the Supreme Court's original jurisdiction, U.S. CONST. art. III, § 2, cl. 2 ("In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, 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."), which Congress cannot enlarge, *see* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). Yet, that jurisdiction does not include "the "Trial of . . . Crimes," U.S. CONST. art. III, § 2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.").

[30] Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.

[31] Act of Apr. 30, 1790, ch. 9, 1 Stat. 112.

neither one gave a defendant the right to appeal a judgment of conviction.[32] In fact, it was not until 1889 that Congress granted convicted offenders a right of appeal, and then only in capital cases.[33] Convicted offenders with lesser punishments had to wait until 1891 for that right.[34] Only then did a convicted offender have an opportunity to seek relief from a judgment of conviction and sentence from a federal court rather than the President.[35]

The new ability of defendants to appeal their convictions posed the question as to the proper relief that an appellate court should award. The Supreme Court answered that question in 1891 in *United States v. Ball*.[36] *Ball* was a murder case. Three defendants were tried; two were convicted, one was acquitted. On the appeal of the convicted defendants, the Supreme Court reversed the trial court's judgment on the ground that the indictment was defective for omitting a statement as to the time and place of the victim's death.[37] Afterwards, the government retried and convicted all three defendants.[38] On its second review of the prosecution, the Court held that the acquitted defendant should not have been retried even under a valid indictment.[39] In his case, "[t]he verdict of acquittal was final, and could not be reviewed, on error or otherwise, without putting him twice in jeopardy, and thereby violating the constitution," the Court reasoned.[40] "However it may be in England, in this country a verdict of acquittal, although not followed

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[32] *See, e.g.*, *Watkins*, 28 U.S. at 201, 202-03 ("A judgment, in its nature, concludes the subject on which it is rendered, and pronounces the law of the case. The judgment of a court of record whose jurisdiction is final, is as conclusive on all the world as the judgment of this court would be. It is as conclusive on this court as it is on other courts. It puts an end to inquiry concerning the fact, by deciding it."); *Kearney*, 20 U.S. at 42; Ex parte Bollman, 8 U.S. (4 Cranch) 75, 93-94 (1807); United States v. More, 7 U.S. (3 Cranch) 159, 172–74 (1805); United States v. La Vengeance, 3 U.S. (3 Dall.) 297, 299 (1796) ("[I]n all criminal causes, whether the trial is by a jury, or otherwise, the judgment of the District Court is final.").

[33] Act of Feb. 6, 1889, ch. 113, § 6, 25 Stat. 655.

[34] Act of Mar. 3, 1891, ch. 517, § 5, 26 Stat. 827.

[35] *See, e.g.*, Larkin, *Reasonableness*, *supra* note 24, at 476-77 & nn.133, 138 & 142 (2021). Moreover, the Supreme Court also held that the Fourteenth Amendment Due Process Clause does not grant a convicted offender the right to appeal his conviction, *see* McKane v. Durston, 153 U.S. 684, 687 (1894), even in a capital case, *see* Andrews v. Swartz, 156 U.S. 272 (1895). In fact, despite the revolution in constitutional criminal procedure that took place in the 1960s and 1970s, the Supreme Court has repeatedly said that there is no constitutional right to appeal a judgment of conviction. *See, e.g.*, Goeke v. Branch, 514 U.S. 115 (1995); Kohl v. Lehlback, 160 U.S. 293, 297 (1895).

[36] 163 U.S. 662 (1896) (*Ball II*).

[37] Ball v. United States, 140 U.S. 118 (1891) (*Ball I*).

[38] *Ball II*, 163 U.S. at 663-66.

[39] *Id*. at 666-71.

[40] *Id*. at 671.

by any judgment, is a bar to a subsequent prosecution for the same offense."[41] By contrast, the Court held that the two defendants who had been convicted under a defective indictment could be re-prosecuted under the new one.[42] They could not rely on the Double Jeopardy Clause as a bar to their retrial because they had sought judicial relief from the original judgment:

> How far, if they had taken no steps to set aside the proceedings in the former case, the verdict and sentence therein could have been held to bar a new indictment against them, need not be considered, because it is quite clear that a defendant who procures a judgment against him upon an indictment to be set aside may be tried anew upon the same indictment, or upon another indictment, for the same offense of which he had been convicted.[43]

The Court later summarized the teaching of *Ball* in *United States v. Scott*.[44] As then-Associate Justice William Rehnquist explained, *Ball* established "two venerable principles of double jeopardy jurisprudence."[45] One is that "[t]he successful appeal of a judgment of conviction, on any ground other than the insufficiency of the evidence to support the verdict . . . poses no bar to further prosecution on the same charge."[46] By contrast, "[a] judgment of acquittal, whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict, may not be appealed and terminates the prosecution when a second trial would be necessitated by a reversal."[47] The Supreme Court has consistently applied the distinction it first drew in *Ball* between acquittals and reversals on other grounds.[48]

The Supreme Court has made the same point in connection with a Sixth Amendment provision parallel to the one at issue in the *Smith* case: The Counsel Clause. In *United States v. Morrison*, two federal agents interviewed an indicted offender in the absence of her attorney, in violation of the

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[41] *Id.*

[42] *Id.* at 671-74.

[43] *Id.* at 672.

[44] 437 U.S. 82 (1978).

[45] *Id.* at 90.

[46] *Id.* at 90-91.

[47] *Id. Scott* and another case decided shortly beforehand, *Burks*, 437 U.S. 1, also make clear that there is no difference in the preclusive effect to be given to a jury's verdict of acquittal, a district court's decision to dismiss a case because of evidentiary sufficiency without submitting it to a jury, and an appellate court's decision that the government's proof was insufficient to convict. *See Scott*, 437 U.S. at 90-91; *Burks*, 437 U.S. at 16–17.

[48] *See*, *e.g.*, Evans v. Michigan, 568 U.S. 313, 318 (2013); *Rumsey*, 467 U.S. at 211; *Burks*, 437 U.S. 1 (1978); United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977); *Fong Foo*, 369 U.S. at 143; Kepner v. United States, 195 U.S. 100, 133 (1904).

clause.[49] The defendant challenged the interview as violating her rights under the Counsel Clause, and the court of appeals agreed. The court of appeals also ruled that the appropriate remedy was dismissal of the indictment. The Supreme Court unanimously reversed.[50]

The Court started from the premise that "the fundamental importance of the right to counsel in criminal cases" was not the only relevant consideration.[51] Also relevant is "the necessity for preserving society's interest in the administration of criminal justice."[52] To protect both interests, the Court said that "[c]ases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests."[53] In earlier cases involving a violation of the Counsel Clause, the Court had consistently remedied the violation only by excluding improperly obtained evidence without ordering dismissal of the indictment.[54] The correct approach is "to identify and then neutralize the taint" from a constitutional error, by tailoring relief "appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial."[55] Absent a prejudicial "effect" on the trial, however, "there is no basis for imposing a remedy in that proceeding," let alone one of dismissal.[56] The deliberate nature of the error was irrelevant, the Court decided, absent a prejudicial effect on the proceedings. Citing its precedents discussing the Fourth Amendment and the Fifth Amendment Self-Incrimination Clause, the Court explained that "[t]he remedy in the criminal proceeding is limited to denying the prosecution the fruits of its transgression."[57] Dismissal of the charges, the Court ruled, is an

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[49] 449 U.S. 361, 362 (1981); *see* Massiah v. United States, 377 U.S. 201 (1964) (barring the government from interviewing a charged defendant in the absence of counsel).

[50] *Morrison*, 449 U.S. at 364-67.

[51] *Id*. at 364.

[52] *Id*.

[53] *Id*.

[54] *Id*. (discussing Moore v. Illinois, 434 U.S. 220 (1977); Geders v. United States, 425 U.S. 80 (1976); Herring v. New York, 422 U.S. 853 (1975); Gilbert v. California, 388 U.S. 263 (1967); United States v. Wade, 388 U.S. 318 (1967); O'Brien v. United States, 386 U.S. 345 (1967); Black v. United States, 385 U.S. 26 (1966); Gideon v. Wainwright, 373 U.S. 335 (1963); *Massiah*, 377 U.S. 201; and Powell v. Alabama, 287 U.S. 45 (1932)).

[55] *Id*. at 365.

[56] *Id.* 365.

[57] *Id*. at 366; *accord* United States v. Blue, 384 U.S. 251, 255 (1966) ("Even if we assume that the Government did acquire incriminating evidence in violation of the Fifth Amendment [Self-Incrimination Clause], Blue would at most be entitled to suppress the evidence and its fruits if they were sought to be used against him at trial. . . . Our numerous precedents ordering the exclusion of

unwarranted remedy. "[A]bsent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation may have been deliberate."[58] Having shown no prejudice in her case, Morrison was not entitled to have the indictment dismissed.[59]

In sum, the Supreme Court's historic remedy for a trial error that prejudiced the accused is a retrial, not entry of a judgment of acquittal (or, what is the same thing, dismissal of the indictment with prejudice). The government may retry an offender who persuades an appellate court that a prejudicial error before or at trial materially affected the integrity of a judgment of conviction. There is but one exception. Whether before or after the jury returns a guilty verdict, if the trial judge or an appellate court decides that the evidence was insufficient to allow a reasonable jury to convict, then a judgment of acquittal is the only appropriate remedy.[60] Put conversely, if the trial judge should have dismissed the charges for insufficient proof without even submitting the case to the jury, the defendant is entitled to have a judgment of acquittal entered in his favor.[61] Entry of such a judgment engages the protections of the Fifth Amendment Double Jeopardy Clause, barring a retrial for the "same offense." Otherwise, the government may begin the prosecution anew.

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such illegally obtained evidence assume implicitly that the remedy does not extend to barring the prosecution altogether. So drastic a step might advance marginally some of the ends served by exclusionary rules, but it would also increase to an intolerable degree interference with the public interest in having the guilty brought to book.") (footnotes omitted)..

[58] *Morrison*, 449 U.S. at 366.

[59] *Id*. at 366-67.

[60] "The prevailing rule has long been that a district judge is to submit a case to the jury if the evidence and inferences therefrom most favorable to the prosecution would warrant the jury's finding the defendant guilty beyond a reasonable doubt. . . . Obviously a federal appellate court applies no higher a standard; rather, it must sustain the verdict if there is substantial evidence, viewed in the light most favorable to the Government, to uphold the jury's decision." *Burks*, 437 U.S. at 16–17 (citations omitted). The clause bars a retrial even if an acquittal was based on "an egregiously erroneous foundation." *Fong Foo*, 369 U.S. at 143; *see also*, *e.g.*, *Evans*, 568 U.S. at 315; *Rumsey*, 467 U.S. at 211.

[61] *See*, *e.g.*, *id*. at 17-18 ("[W]e hold today that the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient, the only 'just' remedy available for that court is the direction of a judgment of acquittal.") (quoting 28 U.S.C. § 2106 (2018) ("The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.")); *see also Evans*, 568 U.S. at 318 ("[O]ur cases have defined an acquittal to encompass any ruling that the prosecution's proof is insufficient to establish criminal liability for an offense."); *Scott*, 437 U.S. at 90-91.

## II. THE SIXTH AMENDMENT JURY TRIAL CLAUSE

Smith maintains that he is entitled to a judgment of acquittal for being forced to stand trial in the wrong district.[62] Pointing to the venue provisions of Article III and the Sixth Amendment, Smith argues that, because the Constitution effectively makes proof of venue an element of every federal offense and because of the importance of trying a defendant in the proper court, the government's failure to try him in the correct district is tantamount to a failure of proof of his guilt, entitling him to an acquittal. That argument is unpersuasive.

Smith is correct that the venue requirement is an important one; indeed, it is expressly granted *twice* in the Constitution. But Smith is mistaken in the role that venue plays in a federal prosecution. Proper venue is but one of several guarantees that the Framers and the First Congress adopted to ensure that no one would be convicted without receiving the type of trial that, even by late 18th-century standards, was deemed necessary for that proceeding to be fundamentally fair. But all of those guarantees are procedural in nature, not substantive. With the one exception of the crime of treason, the Constitution is silent on what conduct should be made a crime and what the elements of that offense should be. Here, the offense for which Smith was convicted does not make venue an element of the actual offense, so requiring him to stand in the dock in the wrong court cannot be deemed a failure of proof that he committed the offense charged against him.

Start with the text of the Constitution. Article III provides in part that "[t]he Trial of all crimes . . . shall be by jury . . . in the State where the said Crimes shall have been committed."[63] The Sixth Amendment contains a similar provision, which states that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."[64] Technically speaking, Article III and the Jury Trial Clause could be said to establish two different requirements.[65] The former, which could be denominated a *venue* requirement, demands that a trial be held "in the State where the said

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[62] *See* Br. for Pet. 19-47. Several amici support Smith. Like Smith, each one argues that the Article III and Sixth Amendment venue provisions are so important that the government ought not to be allowed to bring a defendant to trial more than once. *See*, *e.g.*, Br. Amici Curiae of Profs. Drew L. Kershen & Brian C. Kalt 3-22.

[63] U.S. CONST. art. III, § 2, cl. 3.

[64] U.S. CONST. amend. VI.

[65] *See* Drew L. Kershen, *Vicinage*, 29 OKLA. L. REV. 801, 803 (1976).

Crime shall have been committed." The latter, which could be seen as a *vicinage* requirement, guarantees the accused "an impartial jury of the State and district wherein the crime shall have been committed." Think of the location of the trial versus the location of the jurors.

The critical point, however, is that Article III and the Sixth Amendment fix only the *location* for a trial brought to decide the accused's guilt or innocence of an offense created and defined elsewhere in the law. That was no accidental oversight. The colonists and Framers were familiar with the difference between the substantive law of crimes and the rules of procedure. Murder and robbery were offenses at common law, and the states had criminal codes incorporating those crimes.[66] In fact, the text of the Treason Clause, a companion provision to the Article III Jury Trial requirement, illustrates the difference between the two bodies of law. The Treason Clause is the only constitutional provision defining a crime.[67] Other clauses, such as the Commerce, Coinage, Counterfeiting, Piracy, and Military Regulation Clauses, also illustrate the divide between substance and procedure. They expressly or impliedly authorize Congress to create federal offenses without regulating where those cases may be tried.[68] Accordingly, the text of the Constitution undermines Smith's argument.

The history of the Article III and Sixth Amendment Jury Trial Clauses also does not help Smith. The Framers focused on trial geography in those clauses because of events preceding the Revolutionary War. Colonial juries were known for acquitting colonists charged with criminal violations of the Crown's laws and for convicting of assault Crown officials who arrested local offenders.[69] In response, Parliament authorized a trial for treason to be held

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[66] *See*, *e.g.*, DOUGLAS GREENBERG, CRIME AND LAW ENFORCEMENT IN THE COLONY OF NEW YORK, 1691-1776 (1974); HUGH RANKIN, CRIMINAL TRIAL PROCEEDINGS IN THE GENERAL COURT OF COLONIAL VIRGINIA (1965).

[67] U.S. CONST. art. III, § 3 ("Treason against the United States consists only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort."). The Framers went out of their way to define that offense in the constitutional text because they did not trust Congress to protect political dissent. *See*, *e.g.*, Cramer v. United States, 325 U.S. 1, 8–15 (1945); Willard Hurst, *Treason in the United States*, 58 HARV. L. REV. 395 (1945); Charles Warren, *What Is Giving Aid and Comfort to the Enemy*, 27 YALE L.J. 331 (1918).

[68] *See* U.S. CONST. art. I, § 8, cls. 3, 5-6, 10 & 14 (the Commerce, Coinage, Counterfeiting, Piracy, and Military Regulation Clauses); Paul J. Larkin, Jr. & GianCarlo Canaparo, *Are Criminals Bad or Mad? Premeditated Murder, Mental Illness, and* Kahler v. Kansas, 43 HARV. J.L. & PUB. POL'Y 85, 97-99 (2020).

[69] Kershen, *supra* note 65, at 805-06; *see* JACK P. GREENE, THE CONSTITUTIONAL ORIGINS OF THE AMERICAN REVOLUTION 69-77 (2011); EDMUND S. MORGAN, THE BIRTH OF THE REPUBLIC, 1763-89, at 14-15 (4th ed. 2013).

wherever the Crown saw fit to designate as the proper forum.[70] The colonists were outraged by the prospect that they could be tried in England for offenses occurring in America. In fact, one of the grievances listed in the Declaration of Independence was that England had "depriv[ed] us in many cases, of the benefits of Trial by Jury" and had "transport[ed] us beyond Seas to be tried for pretended offenses."[71] Article III and the Jury Trial Clause sought to prevent a reoccurrence of those outrages in the new nation by ensuring that trials were held locally.[72]

In his petition, Smith relied heavily on the Supreme Court's 1861 decision in *United States v. Jackalow*.[73] *Jackalow* was an unusual case, in several respects. The government charged a pirate who used the alias "Jackalow" with a capital offense for violating the federal piracy statute[74] because he boarded an American vessel on the high seas, assaulted its owner, and robbed him of merchandise and gold.[75] The evidence indicated that the piracy occurred in Long Island Sound near New York, but the government arrested Jackalow in New Jersey and brought him to trial in that district, as both Article III and

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[70] Kershen, *supra* note 65, at 805-06.

[71] Decl. of Indep. arts. 20-21 (July 4, 1776).

[72] Kershen, *supra* note 65, at 808-09 ("Limitation of venue was considered to be necessary to insure a fair trial for persons accused of crime. By limiting venue, the colonists and constitutional draftsmen apparently intended to insure that an accused would usually be prosecuted for criminal conduct at his place of residence. Hence, the accused would receive the benefit of being known by those who prosecuted and tried him, the benefit of having friends and relatives close at hand to provide legal and moral support, and the benefit of knowing the jurors and thereby being able to challenge jurors intelligently. Additionally, the accused would be better able to produce witnesses, especially character witnesses, and evidence for his defense. Moreover, if the accused were tried at his place of residence, he would know the local attorneys, possibly even have a local attorney who had represented him previously, and thereby be able to have effective counsel in whom he could have confidence.") (footnotes omitted).

[73] 66 U.S. (1 Black) 484 (1861). Interestingly, Smith does not even cite the *Jackalow* decision in his merits brief.

[74] Act of May 15, 1820, ch. 113, 16 Stat. 600, 600 (1820). Section 3 of that act provided as follows:

> *And be it further enacted,* That, if any person shall, upon the high seas, or in any open roadstead, or in any haven, basin, or bay, or in any river where the sea ebbs and flows, commit the crime of robbery, in or upon any ship or vessel, or upon any of the ship's company of any ship or vessel, or the lading thereof, such person shall be adjudged to be a pirate: and, being thereof convicted before the circuit court of the United States for the district into which he shall be brought, or in which he shall be found, shall suffer death.

[75] *Jackalow*, 66 U.S. (1 Black) at 485.

the piracy statute seemed to permit.[76] The jury convicted Jackalow of having committed piracy, but then uncertainty arose as to precisely where the crime occurred. The issue of venue had not been submitted to the jury at the guilt stage of the case. After the jury returned its guilty verdict, the court held a post-trial arrest-of-judgment hearing to determine the jurisdictional issue, and a special jury verdict indicated that the crime did not occur in the District of New Jersey.[77] The Supreme Court concluded that it was a mistake to try Jackalow in New Jersey.[78] Given Article III and the piracy statute, the Court reasoned, "the indictment and trial must be in a district of the State in which the offence was committed."[79] Because the jury had not been properly instructed on the venue issue, the Court concluded, the judgment could not stand.[80] The Court therefore ordered that Jackalow be retried.[81]

The Supreme Court's opinion in *Jackalow* is both short and (to be honest) opaque.[82] The Court mentioned but did not delve into the relationship

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[76] Article III states that "when [the offense is] not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed," U.S. CONST. art. III, § 2, cl. 3, and the piracy act provided that "on conviction thereof before the circuit court of the United States for the district into which he shall be brought, or in which he shall be found," 16 Stat. at 600 (quoted *supra* note 74).

[77] *Jackalow*, 66 U.S. (1 Black) at 484-85. The question of venue had not initially been submitted to the jury. Instead, the Circuit Court hearing the case decided to try the case to a verdict, and then held a post-trial arrest-of-judgment hearing to determine if the Circuit Court had proper jurisdiction. *The Jackalow Trial*, N.Y. TIMES, Jan. 30, 1861, https://www.nytimes.com/1861/01/30/archives/the-jackalow-trial.html.

[78] *Jackalow*, 66 U.S. (1 Black) at 488 ("We do not think the special verdict in this case furnishes ground for the court to determine whether or not the offence was committed out of the jurisdiction of a State, and shall direct that it be certified to the Circuit Court, to set aside the special verdict, and grant a new trial."). Jackalow did not appeal the case to the Supreme Court. There was no such right of appeal, even in a capital case, until 1891. *See supra* text accompanying notes 29-35. The Supreme Court could review a federal criminal case only if there was a split opinion on a question of law in the circuit court and only if the circuit court, not the offender, issued a certificate of division. Act of Apr. 29, 1802, ch. 31, § 6, 2 Stat. 156, 159; *Scott*, 437 U.S. at 88. The two circuit court judges split on the correct answer to the proper district for trial. *Jackalow*, 66 U.S. (1 Black) at 485 ("This case comes before us on a division of opinion of the judges of the Circuit Court of the United States for the district of New Jersey.").

[79] *Jackalow*, 66 U.S. (1 Black) at 487.

[80] *Id*. at 487-88.

[81] *Id*. at 488.

[82] The Court's entire discussion was the following: "We have not referred to this boundary of New York for the purpose of determining it, or even expressing an opinion upon it, but for the purpose of saying that the boundary of a State, when a material fact in the determination of the extent of the jurisdiction of a court, is not a simple question of law. The description of a boundary may be a matter of construction, which belongs to the court; but the application of the evidence in the ascertainment of it as thus described and interpreted, with a view to its location and settlement,

between the trial judge's authority to decide issues of law and the jury's authority to decide pure questions of fact and mixed questions of fact and law. The Court also conflated issues of jurisdiction, venue, and substantive criminal law in the course of its brief treatment of the issue. The Court did not fully explicate the respective duties of trial judges and juries for several more decades. It was not until 1895, when the Court decided *Sparf v. United States*, that the Court clearly distinguished between a court's responsibility to decide questions of law and a jury's responsibility to decide questions of fact.[83] And it was not until 1995, when the Court decided *United States v. Gaudin*, that it made clear that juries must decide mixed questions of fact and law in accordance with the trial court's jury instructions.[84] Unlike *Jackalow*, *Sparf* and *Gaudin* justified in detail the separate responsibilities of the trial judge and petit jury. The latter two decisions state the contemporary law; *Jackalow* does not. In short, *Jackalow* did not survive the Court's later rulings in *Sparf* and *Gaudin*. Whatever the precise holding of *Jackalow* might be, it is not the law today that a jury must decide a venue issue along with the factual elements of a charged substantive offense.[85]

There is one aspect of the *Jackalow* opinion, however, that is quite clear. The remedy for trying a defendant found guilty in the wrong court is a new

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belongs to the jury. All the testimony bearing upon this question, whether of maps, surveys, practical location, and the like, should be submitted to them under proper instructions to find the fact." *Id.* at 487-88. One reason why the *Jackalow* opinion is somewhat inscrutable might be that no attorney appeared for Jackalow in the Supreme Court. *Id.* at 485.

[83] 156 U.S. 51, 59-103 (1895). That is why Smith reliance on some of the Supreme Court's and lower federal courts' pre-1895 decisions is mistaken. *See* Br. for Pet. 31-36. *Sparf* made clear that questions of law, like venue, are the for court to resolve, not the jury. Pre-*Sparf* case law is irrelevant.

[84] 515 U.S. 506, 501-15 (1995).

[85] The federal courts of appeals have held that venue is not an element of an offense like the actus reus or mens rea elements. *See*, *e.g.*, United States v. Lanoue, 137 F.3d 656, 661 (1st Cir. 1998); United States v. Rommy, 506 F.3d 108, 119 (2d Cir. 2007); United States v. Perez, 280 F.3d 318, 330 (3d Cir. 2002); United States v. Lee, 966 F.3d 310, 320 n.2 (5th Cir. 2020) (stating that venue is not "an element of the offense or an issue that goes to guilt"); United States v. Griley, 814 F.2d 967, 973 (4th Cir. 1987); United States v. Muhammad, 502 F.3d 646, 652 (7th Cir. 2007); United States v. Kaytso, 868 F.2d 1020, 1021 (9th Cir. 1989); United States v. Stickle, 454 F.3d 1265, 1271-1272 (11th Cir. 2006). Those courts have also concluded that the government need not prove venue beyond a reasonable doubt. *See*, *e.g.*, United States v. Salinas, 373 F.3d 161, 163 (1st Cir. 2004); *Rommy*, 506 F.3d at 119; *Perez*, 280 F.3d at 330; United States v. Robinson, 275 F.3d 371, 378 (4th Cir. 2001); United States v. Lee, 966 F.3d 310, 320 & n.2 (5th Cir. 2020); United States v. Crozier, 259 F.3d 503, 519 (6th Cir. 2001); *Muhammad*, 502 F.3d at 652; United States v. Johnson, 462 F.3d 815, 819 (8th Cir. 2006); United States v. Pace, 314 F.3d 344, 349 (9th Cir. 2002); United States v. Cryar, 232 F.3d 1318, 1323 (10th Cir. 2000); United States v. Little, 864 F.3d 1283, 1287 (11th Cir. 2017); United States v. Morgan, 393 F.3d 192, 195 (D.C. Cir. 2004).

trial, not an acquittal. The last line of the Court's opinion directed the circuit court on receipt of the Court's opinion "to set aside the special verdict, and grant a new trial."[86] On that point, at least, the Court's opinion is pellucid. Jackalow was not entitled to be set free just because he was tried in New Jersey, rather than another district. At the end of the day, therefore, *Jackalow* denies Smith the relief that he seeks.

*Jackalow* is also but one decision. The Supreme Court has discussed the venue guarantee in a host of additional cases, and none of them requires entry of a judgment of acquittal for a trial initially held in the wrong court.[87]

Venue, Justice Felix Frankfurter wrote, "touch[es] closely the fair administration of criminal justice and public confidence in it, on which it ultimately rests."[88] Those factors are "important" ones "in any consideration of the effective enforcement of the criminal law" raising "deep issues of public policy," rather than "merely matters of formal legal procedure."[89] Nonetheless, when the Supreme Court concluded that a defendant had been charged in the wrong district, the Court did not direct the district court to enter a judgment of acquittal, dismiss the charges with prejudice, or otherwise treat a defendant as if he had been acquitted of the charged offense. The Court merely ordered that the offender be retried.[90]

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[86] *Jackalow*, 66 U.S. (1 Black) at 488.

[87] *See*, *e.g.*, United States v. Rodriguez-Moreno, 526 U.S. 275 (1999); United States v. Cabrales, 524 U.S. 1 (1998); Platt v. Minnesota Min. & Mfg. Co., 376 U.S. 240 (1964); Travis v. United States, 364 U.S. 631 (1961); United States v. Cores, 356 U.S. 405 (1958); Johnston v. United States, 351 U.S. 215 (1956); United States v. Anderson, 328 U.S. 699 (1946); United States v. Johnson, 323 U.S. 273 (1944); United States v. Midstate Horticultural Co., 306 U.S. 161 (1939); United States v. Lombardo, 241 U.S. 73 (1916); Brown v. Elliott, 225 U.S. 392 (1912); Hyde v. United States, 225 U.S. 347 (1912); Haas v. Henkel, 216 U.S. 462 (1910); Armour Packing Co. v. United States, 209 U.S. 56 (1908); Burton v. United States, 202 U.S. 344 (1906); Hyde v. Shine, 199 U.S. 62 (1905); Benson v. Henkel, 198 U.S. 1 (1905); Horner v. United States, 143 U.S. 207 (1892); Palliser v. United States, 136 U.S. 257 (1890).

[88] *Johnson*, 323 U.S. at 276.

[89] *Id.*

[90] *See*, *e.g.*, *Travis*, 364 U.S. at 637 (saying, "since our holding in the main case is that venue was improperly laid in Colorado, the judgment of conviction must be set aside," but without ordering the indictment dismissed with prejudice); *Johnston*, 351 U.S. at 220-23 (affirming one district court order dismissing an indictment and reversing another judgment rejecting a venue challenge without ordering the indictments dismissed with prejudice in either case); *Johnson*, 323 U.S. at 278 (upholding a district court order granting a demurrer that the charges were brought in the wrong jurisdiction); *Midstate Horticultural Co.*, 306 U.S. at 165-67 (same); *Lombardo*, 241 U.S. at 77-79 (upholding district court's grant of defendant's demurrer without ordering the indictment dismissed with prejudice. A demurrer admits the alleged facts but argues that they do not state a claim for relief. As such, the demurrers granted in *Midstate Horticultural Co*. and *Johnson* did not resolve an element of the factual elements of the charges in the defendant's favor, *see* BLACK'S LAW

The same is true when we consider the Supreme Court's other jury trial decisions. The Jury Trial Clauses protect against governmental oppression by interposing a jury of one's peers between the prosecution and a defendant.[91] Nonetheless, the Court has never held that a violation of the jury trial right can be remedied only by entry of a judgment of acquittal or dismissal of the charges rather than awarding the offender a new trial. The Court has not ordered an acquittal or dismissal when the government unconstitutionally excluded potential grand or petit jurors because of their race or sex;[92] when the jury panel contained too few members (viz., five) to qualify as a "jury";[93] when a six-person jury was not unanimous;[94] when adverse publicity, before or during trial, prejudiced the jury's consideration of guilt or innocence;[95] or

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DICTIONARY 498 (9th ed. Bryan A. Garner, Editor-in-Chief, 2009), which is necessary for those orders to have been tantamount to an acquittal, *see*, *e.g.*, *Evans*, 568 U.S. at 318; *Martin Linen Supply Co.*, 430 U.S. at 571.

[91] *See*, *e.g.*, Singer v. United States, 380- U.S. 24, 31 (1965) ("The clause was clearly intended to protect the accused from oppression by the Government . . . ."); 3 MAX FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 101 (2018) (1911) (James Wilson); *id*. at 221-222 (Luther Martin).

[92] *See*, *e.g.*, Taylor v. Louisiana, 419 U.S. 522, 526-38 (1975) (ruling that a state cannot require only women to file an affidavit stating a desire to be subject to jury service ); Hernandez v. Texas, 347 U.S. 475, 477-82 (1954) (reversing conviction for discrimination in the selections of grand and petit jurors); Ballard v. United States, 329 U.S. 187, 189-96 (1946) (exercising its supervisory power to set a aside a judgment of conviction where women had been intentionally and systematically excluded from jury service in the defendant's case); Pierre v. Louisiana, 306 U.S. 354 (1939) (reversing conviction for discrimination in the selections of grand and petit jurors); Norris v. Alabama, 294 U.S. 587, 589 (1935) (same); Martin v. Texas, 200 U.S. 319 (1906); Bush v. Kentucky, 107 U.S. 110, 117 (1883); Neal v. Delaware, 103 U.S. 370, 386-98 (1880); Strauder v. West Virginia, 100 U.S. 303, 305 (1879) (setting aside a judgment of conviction when state law disallowed blacks to sit as petit jurors; "There was error, therefore, in proceeding to the trial of the indictment against him after his petition was filed, as also in overruling his challenge to the array of the jury, and in refusing to quash the panel."). The Court also has not ordered dismissal with prejudice of an indictment returned by an illegally constituted grand jury. *See*, *e.g.*, Castaneda v. Partida, 430 U.S. 482, 492-501 (1977) (collecting cases); *Hernandez*, 347 U.S. at 477-82; Hill v. Texas, 316 U.S. 400, 405-06 (1942); Smith v. Texas, 311 U.S. 128, 130-32 (1940); Pierre v. Louisiana, 306 U.S. 354 (1939); *Norris*, 294 U.S. at 589; Carter v. Texas, 177 U.S. 442, 447-49 (1900); Gibson v. Missouri, 162 U.S. 555 (18); Neal v. Delaware, 103 U.S. 370, 397 (18); Strauder v. West Virginia, 100 U.S. 303 (1879).

[93] *See* Ballew v. Georgia, 435 U.S. 223 (1978) (holding that a five-member jury is insufficient to qualify as the "jury" required by the Jury Trial Clause).

[94] *See* Burch v. Louisiana, 441 U.S. 130 (1979) (holding that a conviction by a nonunanimous six-member jury violates the Jury Trial Clause).

[95] *See*, *e.g.*, *Pena-Rodriguez*, 580 U.S. 206, 223-30 (2017) (ruling that a defendant was entitled to prove that racial discrimination infected the jury's deliberations in his case); Groppi v. Wisconsin, 400 U.S. 505 (1971) (holding unconstitutional a state law forbidding change of venue in misdemeanor cases as potentially violating the Jury Clause guarantee of an "impartial" jury); Sheppard v.

when a defendant was mistakenly denied the right to any jury trial at all.[96] The Court has not ordered a trial court to enter a judgment of acquittal, or dismissal with prejudice of an indictment, where there was a constitution-based error in the selection of petit jurors, whether that error was based on the Jury Trial Clause or the Equal Protection Clause.[97] In each case, the Court's opinion contemplates that there will be a new trial on the offender's guilt or innocence.

Two cases stand out in that regard. One is *Hill v. Texas*.[98] After being convicted of rape, Hill challenged the indictment against him on the ground that African Americans had been systematically excluded from the pool of potential grand jurors. After reviewing the evidence, the Supreme Court agreed with him.[99] The Court made clear, however, that its ruling in Hill's favor did not bar a re-prosecution. As Chief Justice Harlan Fisk Stone wrote, "A prisoner whose conviction is reversed by this Court need not go free if he is in fact guilty, for Texas may indict and try him again by the procedure which conforms to constitutional requirements."[100] The rationale in *Hill* is fully consistent with the one that the Court offered in *Ball* for allowing a retrial when an offender persuades a court that he was prejudiced by a pre-verdict error in his case. The second case is a federal criminal prosecution, *Ballard v. United States*.[101] There, the Court exercised its supervisory power to set aside a judgment of conviction where women had been intentionally and systematically excluded from jury service in the defendant's case. The majority also ordered the indictment to be dismissed because it was returned by a grand jury that suffered from the same infirmity.[102] Nonetheless, the Court again made it clear that the government could seek a new indictment and re-prosecute the defendants for fraud.[103] *Hill* and *Ballard* prove that

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Maxwell, 384 U.S. 333 (1966) (finding that the defendant had been denied a fair trial due to adverse pretrial publicity); Rideau v. Louisiana, 373 U.S. 723, 727 (1963) (when a defendant's confession was videotaped and played on television for the local community, ruling that a change of venue was necessary to ensure that the defendant received a fair trial).

[96] *See*, *e.g.*, Duncan v. Louisiana, 391 U.S. 145 (1968) (ruling that the defendant was entitled to a jury trial for the charge of simple assault).

[97] *See*, *e.g.*, *Taylor*, 419 U.S. at 537-38.

[98] 316 U.S. 400.

[99] *Id*. at 404-05.

[100] *Id*. at 406.

[101] 329 U.S. 187 (1946).

[102] *Id*. at 195-96.

[103] *Id*. at 196 ("In disposing of the case on this ground we do not reach all the issues urged and it is suggested that in so limiting our opinion we prolong an already lengthy proceeding. We are told

errors in the selection of the parties who will decide whether someone should be charged with or convicted of a crime do not immunize a defendant against a second trial.

Relying on the Supreme Court's decision in *Strunk v. United States*,[104] Smith argues that the Supreme Court should adopt the same remedy for venue errors that it has already endorsed for speedy trial shortcomings: dismissal of the indictment.[105] *Strunk* was a short opinion decided before the Court came to focus on the remedial aspects of a ruling in the defendant's favor.[106] *Strunk* concluded that the proper remedy for a Speedy Trial Clause violation is dismissal of the indictment because no remedy other than dismissal can cure the flaw in the trial process.[107] But the Court in *Strunk* expressly distinguished Speedy Trial Clause violations from all others, such as the "failure to afford a public trial, an impartial jury, notice of charges, or compulsory service," all of which can be remedied by a new trial, the Court wrote.[108] *Strunk* therefore does not assist Smith. If trying the accused before a *secret or biased* jury can be remedied by a new trial, surely trying a defendant before the *wrong* jury can be remedied in the same way.

Moreover, it is not clear that the Supreme Court would decide that dismissal is the only available remedy if the issue in *Strunk* were to arise today. The Speedy Trial Clause protects three interests: (1) freedom from unduly prolonged pretrial detention, (2) freedom from the trials and tribulations of a pending criminal charge, and (3) freedom from the potentially prejudicial effect that delay could have on the accused's ability to defend himself at

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that these petitioners will again be before us for the determination of questions now left undecided. But we cannot know that this is so, and to assume it would be speculative. The United States may or may not present new charges framed within the limits of our earlier opinion. A properly constituted grand jury may or may not return new indictments. Petitioners may or may not be convicted a second time.").

[104] 412 U.S. 434 (1973).

[105] It is unclear whether the judgment in Strunk requires dismissal of an indictment *with prejudice*. *Strunk* did not order the indictment dismissed with prejudice, only that it be dismissed. *Id*. at 439 ("Given the unchallenged determination that petitioner was denied a speedy trial, the District Court judgment of conviction must be set aside; the judgment is therefore reversed and the case remanded to the Court of Appeals to direct the District Court to set aside its judgment, vacate the sentence, and dismiss the indictment.") (footnote omitted). If the statute of limitations had not expired, the government could have retried Strunk under a new indictment consistent with the Supreme Court's judgment in *Strunk*.

[106] That began with the Court's 1981 decision in *United States v. Morrison*, discussed *supra* at notes 49-59.

[107] *Strunk*, 412 U.S. at 438-39.

[108] *Id*. at 439.

trial.[109] The Court did not consider in *Strunk* whether other forms of relief would rectify the harms from an unduly delayed trial. The only alternative that the Court considered in *Strunk* was crediting the offender's federal term of imprisonment against the state period of incarceration that he was then serving.[110] Discounting one sentence against another, however, would remedy none of the three harms caused by an unduly delayed trial.

Finally, the Court's statement in *Strunk* that "dismissal must remain 'the only possible remedy'"[111] is implausible. As Stanford Law School Professor Anthony Amsterdam explained:

> On its face, this proposition is incredible. Anglo-American law has long provided remedies for denial of a speedy trial other than dismissal of the prosecution with prejudice. State and lower federal courts enforcing subconstitutional speedy-trial guarantees have frequently found other remedies appropriate; and both lower courts and the Supreme Court have enforced the sixth amendment by other means. Surely, the primary form of judicial relief against denial of a speedy trial should be to expedite the trial, not to abort it. Where expedition is impracticable for some reason, the Supreme Court's repeated recognition of the several distinct interests protected by a right to speedy trial suggests the propriety of fashioning various remedies responsive to the particular interest invaded in any particular case. If the sole wrong done by delay is undue and oppressive incarceration prior to trial, the remedy ought to be release from pretrial confinement; if prolongation of the 'anxiety' and other vicissitudes 'accompanying public accusation' is sufficiently extensive, the remedy ought to be dismissal of the accusation without prejudice; and it is only when delay gives rise to 'possibilities [of impairment of] . . . the ability of an accused to defend himself,' or when a powerful sanction is needed to compel prosecutorial obedience to norms of speedy trial which judges cannot otherwise enforce, that dismissal of a prosecution with prejudice is warranted.[112]

The Court's later decision in *United States v. Montalvo-Murillo* illustrates why dismissal is not the only available remedy.[113] *Montalvo-Murillo* involved a parallel type of issue. The Bail Reform Act of 1984 requires a court to hold a hearing on whether a person should be detained pending trial "immediately

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[109] *See*, *e.g.*, Klopfer v. North Carolina, 386 U.S. 213, 222 (1967); Anthony G. Amsterdam, *Speedy Criminal Trial: Rights and Remedies*, 27 STAN. L. REV. 525, 532-33 (1975).

[110] That was the remedy chosen by the federal circuit court. *See* United States v. Strunk, 467 F.2d 969, 972 (7th Cir. 1972), *rev'd*, 412 U.S. 434 (1973).

[111] *Strunk*, 412 U.S. at 440 (quoting Barker v. Wingo, 407 U.S. 514, 522 (1972)).

[112] Amsterdam, *supra* note 109, at 534-35 (footnotes omitted).

[113] 495 U.S. 711 (1990).

upon the person's first appearance before" a judicial officer.[114] In that case, the release hearing was held later, and both the district court and federal court of appeals held that the delay required the offender's release.[115] The Supreme Court reversed, ruling that "a failure to comply with the first appearance requirement does not defeat the government's authority to seek detention of the person charged.[116] "Although the duty" to hold a release hearing at an offender's first appearance is "mandatory," the failure to do so should not deprive the government "of all later powers to act";[117] a more "realistic and practical" approach was preferable[118] given the hustle-bustle that can occur during the pretrial stage of a case.[119] Moreover, a dismissal of the charges "has neither causal nor proportional relation to any harm caused by the delay in holding the hearing" because "a defendant subject to detention already will have suffered whatever inconvenience and uncertainty a timely hearing would have spared him," harms that an order of release cannot remedy.[120] A prompt hearing on the motion of the defendant or government is an adequate remedy.[121] The same rationale would apply to a Speedy Trial Clause claim. The proper remedy is for the defendant (or government) to demand a trial, not to wait until one is held and then seek dismissal of the charges. In sum, post-*Strunk* decisions like *Montalvo-Murillo* illustrate not only that the Court's remedy in *Strunk* was overbroad, but also that the Court would not likely endorse it today.[122]

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[114] 18 U.S.C. § 3142(f) (2018).

[115] United States v. Montalvo-Murillo, 713 F. Supp. 1407 (D.N.M. 1989), *aff'd*, 876 F.2d 826 (10th Cir. 1989).

[116] *Montalvo-Murillo*, 495 U.S. at 717.

[117] *Id*. at 718.

[118] *Id*. at 719, 720.

[119] *Id*. at 710.

[120] *Id*. at 721; Amsterdam, *supra* note 109, at 536 ("Denials of the right to a speedy trial—or, at least those denials which occur (as in *Strunk*) during the court phase of a criminal prosecution—are judicially controllable by other methods than dismissing the prosecution; and it seems intolerable that '[t]he criminal is to go free because [a judge, or the court system] . . . has blundered,' if there are any other satisfactory methods of controlling the blunderers.") (quoting People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926) (Cardozo, J.); footnote omitted).

[121] *Montalvo-Murillo*, 495 U.S. at 722.

[122] Several other post-*Strunk* decisions are also relevant. *Morrison*, 449 U.S. 361 (1981), and *United States v. Mechanik*, 475 U.S. 66 (1986), held that, because remedies in criminal cases should be tailored to the injury a defendant suffers, dismissal of an indictment is inappropriate when an error has no prejudicial effect on the trial. Other cases are *California v. Trombetta*, 467 U.S. 479 (1984), and *Arizona v. Youngblood*, 488 U.S. 51 (1988). *Trombetta* and *Youngblood* held that the government's destruction of potentially exculpatory evidence does not violate the Due Process Clause absent evidence that the government acted in bad faith, which effectively serves as a proxy

Finally, there is no good reason to construe Article III or the Sixth Amendment to require the government to prove venue as an element of every federal offense. Any such rule would be irreconcilable with the Supreme Court's decision in *Jackson v. Virginia*.[123] *Jackson* interpreted the Due Process Clause to forbid a conviction if "no rational trier of fact could have found proof beyond a reasonable doubt" from "the record evidence adduced at the trial."[124] In response to the concern that this standard would "invite intrusions upon the power of the States to define criminal offenses," the Court responded that any such fear was unfounded because "the standard must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law."[125] Perhaps, some criminal statutes require proof that a particular offense occurred at a site certain, and those statutes might raise a different issue. But that is not generally the case. Criminal laws are generally concerned with *what* a person did, not *where* he did it. By focusing on the *what* elements of a criminal offense, the clear implication of *Jackson* is that venue is not a necessary element of every criminal offense.

## III. THE FIFTH AMENDMENT DUE PROCESS CLAUSE

The final question is whether the Due Process Clause should play a role in this case atop the one played by the Jury Trial Clause.[126] The Supreme Court has occasionally used that clause as an all-purpose backstop forbidding fundamentally unfair pretrial and trial procedures that do not violate a specific constitutional guarantee, but that the Court finds constitutionally unacceptable. The cases in which the Court has followed that approach are ones in which a state deprived a defendant of any semblance of a fair trial or deeply corrupted the fact-finding process. For example, in *Frank v. Mangum*, the Court held that a mob-dominated proceeding was, in effect, a slow-motion lynching rather than the "trial" that due process requires.[127] Similarly, in

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for proof that the evidence would have been exculpatory. *See Youngblood*, 488 U.S. at 57-59. Those cases hold that dismissal of an indictment would be an inappropriate remedy for a Due Process Clause violation that does not prejudice the accused's ability to defend himself. That rationale applies here too.

[123] 443 U.S. 307 (1979).

[124] *Id*. at 324 (footnote omitted).

[125] *Id*. at 324 n.16.

[126] U.S. CONST. amend. XIV, § 1 ("No State . . . shall deprive any person of life, liberty, or property, without due process of law . . . .").

[127] 237 U.S. 309, 335 (1915) ("We of course agree that if a trial is in fact dominated by a mob, so that the jury is intimidated and the trial judge yields, and so that there is an actual interference

*Tumey v. Ohio*, the Court ruled that paying a trial judge by the number of convictions obtained in his court is impermissible because it is inherently likely to bias a judge in the government's favor.[128] Since *Frank* and *Tumey*, the Court has condemned a host of other state practices that effectively denied a defendant a fair trial. Those now-forbidden practices include using perjured testimony or a coerced confession to establish a defendant's guilt;[129] trying a defendant who, because of a mental disease or defect, is incapable of understanding what a trial is (or that he is on trial) or from consulting with defense counsel;[130] and trying a defendant under circumstances that, due to adverse pretrial publicity or in-court media coverage, corrupt the integrity of the proceedings.[131] The question that the Court decided to review in *Smith* is not limited to the Jury Trial Clause, so the Justices could address the relevance of the Due Process Clause.[132] If they do, the issue would be whether that clause should bar a retrial of an offender when neither the Double

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with the course of justice, there is, in that court, a departure from due process of law in the proper sense of that term. And if the State, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the State deprives the accused of his life or liberty without due process of law."); *see also*, *e.g.*, Moore v. Dempsey, 261 U.S. 86, 88-90 (2013) (ruling that the defendant was entitled to a hearing on his claim that he was the victim of a mob-dominated trial).

[128] 273 U.S. 510, 531 (1927) (holding unconstitutional a state law basing a judge's salary on the penalties imposed following a conviction); *cf.* Connally v. Georgia, 429 U.S. 245 (1977) (same, the number of search warrants that a magistrate issues).

[129] *See*, *e.g.*, Pyle v. Kansas, 317 U.S. 213, 215–16 (1942) (ruling that due process forbids a prosecutor from intentionally using perjured testimony to convict a defendant); Brown v. Mississippi, 297 U.S. 278, 286–87 (1936) (same, using a defendant's coerced confession); Mooney v. Holohan, 294 U.S. 103, 112 (1935) (same, proving a defendant's guilt entirely through perjured testimony); *cf.* Brady v. Maryland, 373 U.S. 83, 86–87 (1963) (ruling that due process forbids the prosecution from not disclosing to the defense exculpatory evidence on the issues of guilt or innocence). That rule includes knowingly allowing perjured testimony to go uncorrected. Napue v. Illinois, 360 U.S. 264, 265, 269–70 (1959) (ruling that due process forbids a prosecutor from knowingly allowing a witness's perjury to go uncorrected at trial).

[130] *See*, *e.g.*, Drope v. Missouri, 420 U.S. 162, 171–72 (1975) (ruling that a defendant has a right not to be tried if he is mentally incompetent and cannot understand the nature of the proceedings or assist in his defense); Pate v. Robinson, 383 U.S. 375, 385–86 (1966) (discussing procedures necessary at a hearing held to determine whether a defendant should be psychiatrically examined for his competency to stand trial); Dusky v. United States, 362 U.S. 402, 402 (1960) (adopting a standard to determine whether a defendant is competent to stand trial)

[131] *See* Estes v. Texas, 381 U.S. 532 (1965) (holding that a defendant was denied a fair trial in that case because of the televised proceedings) (limited by Chandler v. Florida, 449 U.S. 560, 570-74 (1981)); Sheppard, 384 U.S. at 335 (same, due to massive and prejudicial pretrial publicity).

[132] *See supra* note 18.

Jeopardy Clause nor the Jury Trial Clause require such relief. We think not, for three reasons.

The first one is that, in the due process cases just discussed, the Supreme Court did not rule that a judgment of acquittal was the necessary or an appropriate remedy for the errors that occurred. In fact, the Court did not establish a new law of remedies for the due process violations that the Court found in those cases. In each case, the Supreme Court relied on the Due Process Clause only as a means of defining the substantive right that a defendant is entitled to receive as a component of a fundamentally fair trial. The Court did not say, let alone hold, that an acquittal is the only remedy that could both remedy the flaw and prevent a state from repeating its mistake in other cases. Even in cases like *Moore v. Dempsey*,[133] where the integrity of the proceedings was so despoiled by a mob's demand for the defendant's blood that "the whole proceeding" was but "a mask" for a lynching,[134] the Court did not order the charges to be dismissed, only that, if the trial happened as the habeas petitioners averred, they would have been denied a fair trial. The Court's 1966 decision in *Sheppard v. Maxwell* makes that point well.[135] There, the Court determined that the defendant was denied a fair trial due to adverse pretrial and in-trial publicity,[136] along with disruptive courtroom influences.[137] The Court only ordered the defendant to be released from custody

[133] 261 U.S. 86 (1923).

[134] *Id*. at 91.

[135] 384 U.S. 333 (1966).

[136] "For months the virulent publicity about Sheppard and the murder had made the case notorious. Charges and countercharges were aired in the news media besides those for which Sheppard was called to trial. In addition, only three months before trial, Sheppard was examined for more than five hours without counsel during a three-day inquest which ended in a public brawl." *Id*. at 354-55 (footnote omitted).

[137] "The fact is that bedlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom, hounding most of the participants in the trial, especially Sheppard. At a temporary table within a few feet of the jury box and counsel table sat some 20 reporters staring at Sheppard and taking notes. The erection of a press table for reporters inside the bar is unprecedented. The bar of the court is reserved for counsel, providing them a safe place in which to keep papers and exhibits, and to confer privately with client and co-counsel. It is designed to protect the witness and the jury from any distractions, intrusions or influences, and to permit bench discussions of the judge's rulings away from the hearing of the public and the jury. Having assigned almost all of the available seats in the courtroom to the news media the judge lost his ability to supervise that environment. The movement of the reporters in and out of the courtroom caused frequent confusion and disruption of the trial. And the record reveals constant commotion within the bar. Moreover, the judge gave the throng of newsmen gathered in the corridors of the courthouse absolute free rein. Participants in the trial, including the jury, were forced to run a gantlet of reporters and photographers each time they entered or left the courtroom. The total lack of consideration for the

"unless the State puts him to its charges again within a reasonable time."[138] *Sheppard* therefore expressly contemplated that the denial of a fair trial did not require the accused to be acquitted of the crime. Accordingly, the Court's due process decisions cited above cannot justify disregarding the rule stated in *Ball*, *Scott*, and *Morrison* that an adequate remedy for a flawed trial is a new trial.

The second reason is that the Supreme Court has twice held that, in connection with the violation of parallel Bill of Rights provisions, dismissal of the indictment is an overbroad remedy. In *United States v. Blue*[139] and *United States v. Morrison*,[140] the Court ruled that violations of the Fifth Amendment Self-Incrimination Clause and Sixth Amendment Counsel Clause, respectively, do not justify dismissal of an indictment merely because an error occurred.[141] Those decisions are directly relevant here because the remedy that Smith seeks—entry of a judgment of acquittal—is not materially different from the relief that the Court found inappropriate in those cases. To be sure, the Court did not expressly discuss the option of entering a judgment of acquittal as an alternative to dismissal of an indictment in either *Blue* or *Morrison*. But the Court's Double Jeopardy Clause decisions in the *Ball* and *Scott* cases make clear that a judgment of acquittal is appropriate only when a court finds the evidence insufficient to convict.[142] It makes no sense to assume that the Court was ignorant of its Double Jeopardy Clause precedent when it decided *Blue* and *Morrison*.

The third reason is that there is no justification for creating an entirely new acquittal right beyond what the Double Jeopardy Clause already provides. That is the lesson from the Supreme Court's decision in *Graham v. Connor*.[143] The question there was whether the police had used excessive force when arresting Graham. Traditionally, the lower federal courts had treated that claim as a matter of substantive due process.[144] The Supreme Court found that approach misconceived. As the Court explained:

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privacy of the jury was demonstrated by the assignment to a broadcasting station of space next to the jury room on the floor above the courtroom, as well as the fact that jurors were allowed to make telephone calls during their five-day deliberation." *Id*. at 355.

[138] *Id*. at 362.

[139] 384 U.S. 251 (1966).

[140] 449 U.S. 361 (1981).

[141] *See supra* text accompanying notes 51-59 (discussing *Blue* and *Morrison*).

[142] *See supra* text accompanying notes 36-48 (discussing *Ball* and *Scott*).

[143] 490 U.S. 386 (1989).

[144] *Id*. at 392-95; *see*, *e.g.*, Johnson v. Glick, 481 F.2d 1028 (2d Cir. 1973).

> Where, as here, the excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right "to be secure in their persons . . . against unreasonable . . . seizures" of the person. . . . Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims.[145]

That approach makes sense here, too. The only difference is that here the Double Jeopardy Clause—rather than the Fourth Amendment—supplies "the explicit textual source of constitutional protection" against the conduct that Smith challenges: a retrial. But that clause, as explained above, allows Smith to be retried. As the Supreme Court made clear in *Ball*, *Scott*, and other cases, the Double Jeopardy Clause balances the competing interests and clearly defines different consequences for the two materially different judgments that (1) the jury should never have been allowed to deliberate on the charges because the proof of guilt was deficient, and (2) a prejudicial error occurred at the trial of an otherwise guilty defendant. The former is tantamount to an acquittal and must be treated as such, thereby raising a shield against a second prosecution on the indictment. The latter means that an evidentiary or procedural mistake was made that requires correction before we can be confident that only a guilty person was convicted. There is no room left for the Due Process Clause to ensure that no innocent person is convicted and punished. Indeed, some trial errors—the denial of a public trial, for example—might not raise any concern that an innocent person was found guilty. Nonetheless, the criminal justice system's systemic interest in guaranteeing public trials is sufficiently weighty to overcome our general reluctance to treat every trial error as fatal and requires that the defendant be afforded a new trial even if he is indisputably as guilty as sin.[146] Unless every trial error requires an appellate court to enter a judgment of acquittal, there is no good reason why errors like the one in *Smith* case should receive a favored status, leading to acquittal whenever they occur.

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[145] *Graham*, 490 U.S. at 394-95 (footnote omitted).

[146] *See* Waller v. Georgia, 467 U.S. 39, 49 n.9 (1984) (stating that the denial of the right to a public trial cannot be harmless).

## IV. CONCLUSION

The *Smith* case is proof that not every case that the Supreme Court reviews poses a difficult issue of constitutional law. More than a century ago, the Supreme Court held in *Ball* that, if an appellate court finds that the defendant was prejudiced by an error that occurred at his trial, the court must set aside a judgment of conviction and order a retrial. That proposition governs this case. The circuit court of appeals held that Smith was tried in the wrong federal district court and awarded him a new trial. The only exception to that rule exists when an appellate court concludes that the evidence was insufficient to support the jury's verdict. In that event, the court must not only set aside the conviction but also order the entry of a judgment of acquittal, which bars a retrial. Unfortunately for Smith, his case does not fit into that exception. Whether considered as a matter of law or logic, trying a defendant in the wrong zip code is not tantamount to failing to prove his guilt of a crime. Smith is entitled to receive the new trial that the court of appeals awarded him, but he is not entitled to go scot-free, at least not yet.

Other Views:

- Brief for Petitioner, Smith v. United States, 2022 WL 17586971 (No. 21-1576), *available at* https://www.supremecourt.gov/DocketPDF/21/21-1576/253367/20230127165939742_2023-01-27%20No.%2021-1576%20-%20Smith%20Merits%20Brief.pdf.
- Brief of Professor Drew L. Kershen & Professor Brian C. Kalt as Amici Curiae in Support of Petitioner, *Smith* (No. 21-1576), *available at* https://www.supremecourt.gov/DocketPDF/21/21-1576/253972/20230203145310122_Smith%20v.%20US--Amicus%20Brief.pdf.
- Brief for the Rutherford Institute, the Cato Institute, & the National Association for Public Defense as Amici Curiae in Support of Petitioner, *Smith* (No. 21-1576), *available at* https://www.supremecourt.gov/DocketPDF/21/21-1576/253969/20230203144740733_Smith%20v.%20United%20States%20--%20Merits-Stage%20Amicus%20Brief.pdf.
- Brief of the National Association of Criminal Defense Lawyers as Amicus Curiae in Support of Petitioner, *Smith* (No. 21-1576), *available at* https://www.supremecourt.gov/DocketPDF/21/21-1576/253998/20230203155838040_NACDL%20Smith%20Amicus%20Brief%20AS_FILED.pdf.

# TEXT-AND-HISTORY OR MEANS-END SCRUTINY IN SECOND AMENDMENT CASES? A RESPONSE TO PROFESSOR NELSON LUND'S CRITIQUE OF *BRUEN*[*]

STEPHEN P. HALBROOK[**]

Professor Nelson Lund's "*Bruen*'s Preliminary Preservation of the Second Amendment," recently published in the *Federalist Society Review*, critiques the Supreme Court's decision in *New York State Rifle & Pistol Association v. Bruen*.[1] *Bruen* held that New York's restrictive handgun licensing scheme violated the Second Amendment.[2] As Lund notes, "*Bruen* was an easy case, which the Court resolved correctly."[3] After all, the text of the Amendment prohibits infringement of "the right of the people" to "bear arms."[4] Moreover, "the Court was justified in repudiating the interpretive

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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] Nelson Lund, Bruen*'s Preliminary Preservation of the Second Amendment*, 23 FEDERALIST SOC'Y REV. 279 (2022), *available at* https://fedsoc.org/commentary/publications/bruen-s-preliminary-preservation-of-the-second-amendment (hereinafter "Lund").

[2] New York State Rifle & Pistol Association, Inc. v. Bruen, 142 S. Ct. 2111 (2022).

[3] Lund 280.

[4] "A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed." U.S. CONST., amend. II.

approach adopted by a consensus of the circuit courts after *Heller*."[5] That consensus was a two-part interest-balancing test, under which the circuit courts had largely balanced the fundamental right away.

Nevertheless, Professor Lund devotes a major discussion to what he argues are "some serious difficulties that will arise in applying the new approach that *Bruen* adopts."[6] While any ground-breaking decision may entail perceived difficulties, I wish to take issue with some of his arguments.

Lund begins by taking aim at *Bruen*'s foundation: *Heller*'s holding that the Second Amendment's text and history protect an individual right to keep and bear firearms. Professor Lund's criticisms of *Heller*'s historical reasoning are unpersuasive. Justice Antonin Scalia's conclusions in *Heller* that the Second Amendment protects a preexisting right to keep and bear arms, and that this right extends to modern handguns, are based on sound historical evidence and legal reasoning.

Lund's criticisms of *Bruen* fare no better than his criticisms of *Heller*. He takes issue with *Bruen*'s articulation and adoption of a text-and-history standard—or, perhaps more accurately, a "text-first-then-history-second" test—for Second Amendment cases, which is to replace the means-ends scrutiny that had prevailed in the lower courts in the interim between *Heller* and *Bruen*, arguing that a standard based purely on text and history is unsound and that *Bruen* is inconsistent in applying it. Neither charge is correct. *Bruen*'s adoption of this text-and-history standard is based on sound constitutional analysis and comports with the doctrine that applies in the context of many other constitutional rights—including, contra Lund but consistent with *Bruen*, many First Amendment cases. And while Lund argues that portions of *Bruen* gesture towards a continuing form of means-ends scrutiny, his contentions are either misplaced or based on stray remarks from *Bruen* raising issues that the decision does not purport to definitively resolve.

Finally, Lund argues that a pure text-history test is either unworkable or manipulable and that a limited form of means-ends scrutiny should still be applied to Second Amendment challenges. In my view, *Bruen* provides a viable jurisprudence for resolution of Second Amendment cases—one that is far superior to any interest-balancing test or means-ends scrutiny. We know from the post-*Heller* experience what to expect from a Second Amendment jurisprudence based on means-end scrutiny: naked value

[5] Lund 280. *See* District of Columbia v. Heller, 554 U.S. 570, 592 (2008).

[6] *See* Lund 280, 289.

judgments imposed by federal judges who are hostile to the right to keep and bear arms. By contrast, *Bruen*'s text-and-history approach makes it far more difficult for judges to base their decisions in Second Amendment cases on their own policy preferences and moral judgments.

The issues raised below are primarily methodological. Professor Lund and I might not disagree on what the end result should be in resolving Second Amendment cases. In *Bruen*, the Supreme Court adopted the text-history approach and rejected means-ends scrutiny. Lund argues that approach will be unworkable without application of limited means-ends scrutiny. My argument is that *Bruen*'s test is in fact workable and is less susceptible to manipulation by inferior courts than is means-ends scrutiny.

## I. PROFESSOR LUND'S CRITICISMS OF *HELLER* ARE UNPERSUASIVE

### *A.* Heller*'s Holding that "Arms" Includes Handguns*

For Lund, the Supreme Court's errors in its modern Second Amendment jurisprudence started with *District of Columbia v. Heller*, which held the Amendment to protect individual rights and invalidated the District's ban on mere possession of handguns.[7] He states: "Justice Scalia's majority opinion is an exquisite tapestry of sound textual and historical arguments interspersed with fallacious lapses, ambiguous and inconsistent obiter dicta, self-confident ipse dixits, and mischaracterizations of precedent."[8] Without going into all of the details he articulated in a prior article, Lund faults *Heller* by saying:

> But when explaining why D.C.'s law was unconstitutional, the Court did not rely on the absence of historical precedents. Instead, it held that there is a specific constitutional right to possess handguns, even if the challenged law allows one to keep other guns for self-defense. *Heller* justified that specific holding by pointing to the popularity of handguns in the 21st century.[9]

But *Heller* found handguns to be protected for several reasons. Most obviously, the plain text protects "arms": "Before addressing the verbs 'keep' and 'bear,' we interpret their object: 'Arms.' The 18th-century meaning is

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[7] *Heller*, 554 U.S. 570.

[8] Lund 283 (citing Nelson Lund, *The Second Amendment,* Heller*, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343 (2009); Heller *and Second Amendment Precedent*, 13 LEWIS & CLARK L. REV. 335 (2009)).

[9] Lund 284.

no different from the meaning today. The 1773 edition of Samuel Johnson's dictionary defined 'arms' as 'weapons of offence, or armour of defence.'"[10] *Heller* continues, "The handgun ban amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for that lawful purpose."[11] Again, the argument is based squarely on the plain text of the Second Amendment.

*Heller* rejected the argument "that it is permissible to ban the possession of handguns so long as the possession of other firearms (i.e., long guns) is allowed," because "the American people have considered the handgun to be the quintessential self-defense weapon."[12] The Amendment protects "arms 'in common use at the time' for lawful purposes like self-defense."[13] To be in common use "at the time" refers to the types of arms in common use in 1791 as well as those in common use today. Isn't it inherent in the term "the *right* of the *people*" that the people get to choose what "arms" they keep and bear, in the same manner that they can choose what speech to utter under the First Amendment? As just noted, it is what "the American people have considered" to be the self-defense weapons of choice.[14]

Finally, contra Lund, *Heller did* "rely on the absence of historical precedents." It rejected D.C.'s analogy to Boston's 1783 ban on loaded firearms in buildings because that was a fire protection measure, not an arms control law.[15] It relied on colonial and founding-era practices for the proposition that "the sorts of weapons protected were those 'in common use at the time,'"[16] which incorporated "the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'"[17] And it cited antebellum cases holding that prohibitions on concealed carry are constitutional only if open carry is allowed for the proposition that "Few laws in the history of our Nation have come close to the severe restriction of the District's handgun ban."[18]

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[10] *Heller*, 554 U.S. at 581 (quoting 1 DICTIONARY OF THE ENGLISH LANGUAGE 106 (4th ed.)).

[11] *Id.* at 628.

[12] *Id.* at 629.

[13] *Id.* at 624.

[14] *Id.* at 629.

[15] *Id.* at 631.

[16] *Id.* at 625, 627 (citing United States v. Miller, 307 U.S. 174, 179 (1939)).

[17] *Id.* at 627.

[18] *Id.* at 629.

In short, *Heller*'s holding that the Second Amendment protects handguns was based on text and history, and not simply, as Lund suggests, on "the popularity of handguns in the 21st century." Moreover, modern popularity is relevant because of text and history. *Heller*'s text and history analysis led it to conclude that the Second Amendment protects arms that are in common use by law-abiding citizens. And common use by law-abiding citizens is known by looking at current usage, inasmuch as "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding."[19]

*B.* Heller *Was Based on Sound Historical Evidence*

Lund argues that *Heller* found a right to have a handgun without conducting any historical analysis, which in turn raises a problem for *Bruen*, which requires such analysis in Second Amendment cases.[20] But *Heller* did conduct a historical analysis. First, as noted above, it rejected as an outlier Boston's restriction on loaded firearms in buildings, and it rejected gunpowder storage rules as not analogous to a handgun ban.[21] Second, it pointed to antebellum state cases that affirmed the right to carry a handgun openly.[22]

The scarcity of restrictions on weapons at the founding, Lund suggests, might be attributable to the lack of any need for restrictions in the perception of legislatures, and does not necessarily imply lack of the power to impose them.[23] How is it to be determined whether restrictions that were not adopted would have been considered unconstitutional?[24] *Bruen* states that lack of a historical tradition of restrictions "is merely 'relevant evidence' of their unconstitutionality," but, Lund continues, it "does not say what additional evidence might be required" to decide either way.[25]

Without a specific modern restriction at issue, the evidence required cannot be particularized. But *Bruen* sets forth three types of evidence suggesting when a modern restriction may be unconstitutional: (i) the restriction addresses a problem that existed in the 18th century, but there were no similar historical restrictions regarding the same problem; (ii) earli-

[19] *Id*. at 582.
[20] Lund 293.
[21] *Heller*, 554 U.S. at 631-32.
[22] *Id.* at 629.
[23] Lund 293-94.
[24] *Id*. at 294.
[25] *Id*.

er generations addressed the same problem by materially different means; and (iii) analogous restrictions were rejected on constitutional grounds.[26] *Bruen* goes on to devote several more paragraphs to a discussion of how to reason by analogy on the subject, noting that "whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are '*central*' considerations when engaging in an analogical inquiry."[27]

Finally, what evidence is required to determine constitutionality is a question that could be asked about the application of any general rule. Rules are applied based on the quantity and quality of the relevant evidence. Text and history clarify the meaning of constitutional provisions, while means-ends scrutiny invariably introduces policy preferences into the analysis. While any test can be abused, the presumption that the text justifies conduct and the exception for historical restrictions are simply less susceptible to manipulation than is means-ends scrutiny with its inherent subjective basis.

### *C. The Right to Bear Arms as a Pre-Existing Right*

Since, as *Bruen* acknowledges, the language of the Second Amendment is "unqualified," Lund states, "Absent evidence to the contrary, one might think the right that was codified in the Second Amendment was the right to be completely free of federal restrictions."[28] In a note, he adds: "*Heller* called this a 'pre-existing right' but offered no evidence except an ipse dixit from a late 19th century judicial opinion."[29]

But *Heller* offered far more than that citation. The context of that term was the Court's statement that "it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right. The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it 'shall not be infringed.'"[30] The English Declaration of Rights of 1689 was part of this history: "That the subjects which are Protestants may have arms for their

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[26] *Bruen*, 142 S. Ct. at 2131.

[27] *Id.* at 2133 (citation omitted and multiple quotation marks deleted).

[28] Lund 293.

[29] *Id.* at 293 n.66 (quoting *Heller*, 554 U.S. at 592 (citing United States v. Cruikshank, 92 U.S. 542, 553 (1876) ("This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed . . . .")).

[30] *Heller*, 554 U.S. at 592.

defense suitable to their conditions and as allowed by law."[31] As Blackstone wrote, this reflected "the natural right of resistance and self-preservation," and "the right of having and using arms for self-preservation and defence."[32] As *Heller* further stated, "By the time of the founding, the right to have arms had become fundamental for English subjects."[33]

Lund makes some of the same points, quoting extensively from Blackstone and other sources to show the nature and existence of the pre-existing right. As Lund further reflects, "The Second Amendment was completely uncontroversial when it was adopted, partly because of a broad consensus about the validity of the political principles articulated in the Declaration of Independence."[34] While *Heller* did not mention the Declaration, it certainly recounted the basic historical sources for characterizing the right to bear arms as a pre-existing right.

## II. *BRUEN*'S REASONS FOR REJECTING MEANS-ENDS SCRUTINY ARE SOUND

Part III of Professor Lund's article, entitled "*Bruen*'s Future," begins by noting that *Bruen* substituted a text-history mode of interpretation for the lower courts' reliance on a two-part interest-balancing test that reified judicial policy preferences.[35] *Bruen* explained:

> [W]e hold that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."[36]

This is commonly known as the "text-and-history" test. Because it focuses initially, and primarily, on the text of the Second Amendment—and

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[31] *Id*. at 593 (quoting 1 W. & M., c. 2, § 7).

[32] *Id*. at 594 (quoting 1 BLACKSTONE, COMMENTARIES **139-40 (1765)).

[33] *Id*. at 593 (citing JOYCE MALCOLM, TO KEEP AND BEAR ARMS 122-34 (1994)).

[34] Lund 301-02.

[35] *Id*. at 289-90.

[36] *Bruen*, 142 S. Ct. at 2126 (quoting Konigsberg v. State Bar of Cal., 366 U.S. 36, 50 n.10 (1961)).

looks to history only secondarily—it would perhaps be more accurate to call it the "text-first-and-history-second" test. Lund lobs a variety of objections at the reasons *Bruen* gave for adopting this test over some form of means-ends scrutiny. But these criticisms miss their mark.

*A. The Second Amendment's "Unqualified Command"*

Lund begins by criticizing *Bruen*'s citation to the First Amendment case *Konigsberg v. State Bar of California* in describing the Second Amendment as an "unqualified command." *Konigsberg* observes that "the commands of the First Amendment are stated in unqualified terms," but as "their origin and the line of their growth" clarify, libel, slander, conspiracy, and the like are excluded from its coverage.[37] However, contrary to the language in *Konigsberg*, Lund states, "[*Bruen*'s] test is quite novel," and "*Konigsberg* endorses the very same two-part test used by the post-*Heller* circuit courts . . . ."[38] But *Bruen* cites *Konigsberg* simply for its observation that the Second Amendment states an "unqualified command," without more. Lund calls this a "strange invocation of authority for the self-evident proposition that the texts of both the First and Second Amendments contain unqualified commands," but the citation is not so strange given that it is limited to that very self-evident proposition.[39]

To be sure, later First Amendment case law ultimately adopted a tiers-of-scrutiny framework to govern Free Speech Clause cases. But that hardly means that such a framework should apply to the Second Amendment; indeed, it is not even clear that that approach should, or will, continue to apply to the First Amendment. It is worth recalling Chief Justice John Roberts' comment in the *Heller* oral argument that "these standards that apply in the First Amendment just kind of developed over the years as sort of baggage that the First Amendment picked up. But I don't know why when we are starting afresh, we would try to articulate a whole standard that would apply in every case."[40] Tiers of scrutiny have been criticized in First Amendment cases,[41] and they may be questioned more (or even revisited) in the future. At oral argument in *Bruen*, Justices showed interest in reconsid-

[37] *Konigsberg*, 366 at 50 n.10.

[38] Lund 290 (citing *Konigsberg*, 366 U.S. at 50).

[39] *Id*.

[40] Transcript of Argument, *Heller*, No. 07-290, at 44 (March 18, 2008).

[41] *See* Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 502 U.S. 105, 124-28 (1991) (Kennedy, J., concurring) (advocating the elimination of tiers of scrutiny for content-based restrictions of speech).

ering the use of tiered scrutiny in the First Amendment context. Justice Brett Kavanaugh said he found Professor Joel Alicea's amicus brief challenging the concept and its pervasive use "very helpful."[42]

*B. The Court's Reliance on History in Interpreting the First Amendment*

Lund next argues that *Bruen* "exaggerates the extent to which the Court's First Amendment jurisprudence has relied on historical evidence rather than interest-balancing under the tiers of scrutiny."[43] He goes on to say "it's doubtful that the test announced in *Bruen* will prove workable, and the Court's First Amendment jurisprudence does not suggest otherwise."[44] Again, even if Lund's characterization of First Amendment jurisprudence were accurate, that would hardly undermine *Bruen*'s interpretation of the Second Amendment, which came to the Court unencumbered by the "baggage" of cases applying the tiers of scrutiny.

In any event, it is Lund who exaggerates the extent to which history *does not* play a role in First Amendment cases. As *Bruen* explains, to survive a First Amendment challenge "the government must generally point to *historical* evidence about the reach of the First Amendment's protections."[45] For that proposition, *Bruen* cites *United States v. Stevens*, which placed the burden on the government to prove that "a type of speech belongs to a 'historic and traditional categor[y]' of constitutionally unprotected speech . . . ."[46] To be sure, many First Amendment cases engage in means-ends scrutiny. But some of the Court's classic First Amendment decisions rely exclusively on a historical analysis with no balancing of governmental interests.[47] So

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[42] *Bruen*, No. 20-843, Tr. of Oral Argument at 53 (referencing Brief for J. Joel Alicea as Amicus Curiae). *See* Joel Alicea and John D. Ohlendorf, *Against the Tiers of Constitutional Scrutiny*, 54 NAT'L AFFAIRS (Fall 2019), *available at* https://www.nationalaffairs.com/publications/detail/against-the-tiers-of-constitutional-scrutiny.

[43] Lund 290.

[44] *Id.*

[45] *Bruen*, 142 S. Ct. at 2130.

[46] *Id.* (quoting United States v. Stevens, 559 U.S. 460, 468–471 (2010)). Rejecting "the Government's highly manipulable balancing test," *Stevens* added, "Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law. But if so, there is no evidence that 'depictions of animal cruelty' is among them." *Stevens*, 559 U.S. at 472.

[47] E.g., Near v. State of Minnesota, 283 U.S. 697, 713 (1931) ("The question is whether a statute authorizing such proceedings in restraint of publication [abatement as a public nuisance] is consistent with the conception of the liberty of the press as historically conceived and guaranteed."); Grosjean v. American Press Co., 297 U.S. 233, 245 (1936) (Whether an onerous tax on owners of newspapers violates the freedom of the press "requires an examination of the history and

while the Court has engaged in interest-balancing in some First Amendment cases, it has relied on historical evidence in others, and *Bruen* was right to point to the latter as providing support for adopting a text-and-history approach.

In sum, while the Court has often relied on means-ends scrutiny in First Amendment cases, *Bruen* correctly notes that it has also exhibited a long-standing reliance on a historical test. That historical test has proven workable, and there is no reason why a similar test would not be workable in Second Amendment cases.

### *C.* Bruen*'s Dictum About Sensitive Places*

Lund also attempts to use *Bruen*' discussion of restrictions on carrying firearms in "sensitive places" to undermine its holding adopting a text and history approach. *Bruen* recalls *Heller*'s dictum about "longstanding" laws forbidding the carrying of firearms in sensitive places like schools and government buildings, adding, "Although the historical record yields relatively few 18th- and 19th-century 'sensitive places' where weapons were altogether prohibited—*e.g.,* legislative assemblies, polling places, and courthouses—we are also aware of no disputes regarding the lawfulness of such prohibitions."[48] The Court cited a law review article by David Kopel and Joseph Greenlee and the amicus brief of the Independent Institute for this statement. *Bruen* thus "assume[d] it settled" that arms carrying could be prohibited in these locations and that courts may use analogies to them to decide if modern regulations are constitutional.[49]

Lund points out that the Kopel and Greenlee article cited by the Court mentions only two pre-Second Amendment prohibitions on carry in such sensitive places. They include Maryland's ban on carrying arms into the legislature from the mid-17th century, and Delaware's 1776 ban on bearing arms at polling places.[50] After the amendment's ratification, no other such bans (at least as mentioned by Kopel and Greenlee) were on the books until after ratification of the Fourteenth Amendment.[51] Lund states, "If that's all

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circumstances which antedated and attended the adoption of the abridgement clause of the First Amendment.").

[48] *Bruen*, 142 S. Ct. at 2133 (citing David B. Kopel & Joseph Greenlee, *The "Sensitive Places" Doctrine*, 13 CHARLESTON L. REV. 205, 229–36, 244–47 (2018); Brief for Independent Institute as Amicus Curiae at 11–17, *Bruen*, 142 S. Ct. 2111).

[49] *Bruen*, 142 S. Ct. at 2133.

[50] Lund 295.

[51] *Id*.

it takes to identify a regulatory tradition that authorizes a gun regulation, it won't be very hard for courts to limit *Bruen* to its facts."[52]

Had the sensitive places issue actually been before the Court, Lund is certainly correct that the cited laws should not suffice to support constitutionality. Far more exhaustive historical research would be warranted in a case where a specific place is at issue. Moreover, one would not expect to find any historically significant restrictions at most public places, such as roads, stores, places of public assembly, and outdoor venues.

But the sources cited by the Court do include further founding-era laws involving sensitive places. For example, the Independent Institute amicus brief quoted Virginia's 1786 enactment that no man shall "come before the Justices of any court, or other of their ministers of justice doing their office, with force and arms," exempting "the Ministers of Justice in executing the precepts of the Courts of Justice, or in executing of their office, and such as be in their company assisting them . . . ."[53] Courthouses fit easily within sensitive places under the historical test.

Regarding schools, in 1828, University of Virginia's Board of Visitors, which included Thomas Jefferson and James Madison, prohibited students from keeping arms on campus.[54] As Lund points out, that did not apply to faculty and staff.[55] For that very reason, depending on other historical evidence, a faculty member today who wishes to carry a firearm on campus might be able to raise a viable Second Amendment claim.

Government buildings, legislative assemblies, and polling places concern government functions overseen by the government. Should an actual case or controversy arise, further historical research would be warranted. As a practical matter, serious issues regarding whether such places should be classified as sensitive may be unlikely to arise. Given the onerous restrictions and sweeping bans in some states—such as New York's ban on carrying firearms in most public places, in response to *Bruen*[56]—there are far bigger fish to fry for Second Amendment litigation.

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[52] *Id*. at 296.

[53] 1786 Va. Acts 33, ch.21 (quoted in Brief for Independent Institute, *supra* note 48, at 12).

[54] Meeting Minutes of University of Virginia Board of Visitors, 4–5 Oct. 1824, *Rotunda* (1824) (cited in Brief for Independent Institute, supra note 48, at 14).

[55] Lund 295.

[56] *See, e.g.*, Antonyuk v. Hochul, 2022 WL 16744700 (N.D.N.Y. 2022), *stay granted*, 2022 WL 18228317 (2d Cir. 2022), *motion to vacate stay denied*, Antonyuk v. Nigrelli, 2023 WL 150425 (U.S. 2023); Hardaway v. Nigrelli, 2022 WL 16646220 (W.D.N.Y. 2022), *appeal filed* (2d Cir., Nov. 15, 2022); Christian v. Nigrelli, 2022 WL 17100631 (W.D.N.Y. 2022) (preliminary in-

Had the Court's dictum about sensitive places actually been a holding, Lund would be correct in saying that the evidence would be flimsy. Dictum remains open to question. *Heller* referred to presumptively lawful restrictions on possession of firearms by felons.[57] But cases applying the text-history method have raised questions as to the application of that dictum to non-violent felons.[58]

"*Bruen*'s endorsements in dicta of shall-issue permitting schemes and gun-free zones in 'sensitive places' suggest that this Court may find a way to uphold (or allow the lower courts to uphold) all but the most outlandish and onerous regulations," Lund argues.[59] But *Bruen* warned against defining sensitive places "too broadly," commenting that "there is no historical basis for New York to effectively declare the island of Manhattan a 'sensitive place' simply because it is crowded and protected generally by the New York City Police Department."[60]

In fact, New York responded to *Bruen* by enacting the broadest restrictions ever on permit holders. So far, the ensuing litigation is not going well for New York, largely because of the text-history approach.[61] While limited means-ends scrutiny arguably could reach the same result, in application the alleged public-safety justification almost always prevails over the constitutional right.

### *D.* Bruen *Eschews Means-End Scrutiny*

Finally, Lund argues that means-end scrutiny is in some sense inevitable.[62] He first contends that this is illustrated by *Bruen*'s discussion of licensing laws, which purportedly engages in such scrutiny by approving restrictions "designed to ensure only that those bearing arms in the jurisdiction are, in fact, 'law-abiding, responsible citizens.'"[63] But *Bruen*'s brief discussion of licensing laws does not suggest that they are constitutional because they are properly tailored to advance an important government

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junction against gun ban on private property without invitation), *appeal filed* (2d Cir., Nov. 15, 2022).

[57] *Heller*, 554 U.S. 626-27 & n.26.

[58] *E.g.*, Kanter v. Barr, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting); Range v. Garland, 53 F.4th 262 (3d Cir. 2022), *reh. en banc granted & vacated*, 56 F.4th 992 (3d Cir. 2023).

[59] Lund 296.

[60] *Bruen*, 142 S. Ct. at 2134.

[61] *Antonyuk*, 2022 WL 16744700; *Hardaway*, 2022 WL 16646220.

[62] Lund 297.

[63] *Id*. (quoting *Bruen*, 142 U.S. at 2138 n.9).

interest; rather, it suggests they are constitutional because they are sufficiently analogous to historically accepted government measures designed to prevent actually violent or dangerous people from bearing arms. Had a shall-issue permitting system been the issue before the Court, the race would have been on to find historical analogues to justify it.

Yes, *Bruen* also suggests that abuses—such as "lengthy wait times" or "exorbitant fees"[64]—could be subject to challenge if, in practice, they "deny ordinary citizens their right to public carry."[65] That is not means-end scrutiny either—it is simply an application of *Bruen*'s core holding that the text and history of the Second Amendment protect the right of ordinary citizens to carry firearms in common use. And Lund is wrong to insist that every time a court compares the burden on the Second Amendment right with its justification, it is engaged in means-end scrutiny.[66] As *Bruen* clearly explained, while an inquiry into the burden and justification of a modern law is part of the process of reasoning by analogy to historical restrictions, it is *not* "means-end scrutiny under the guise of an analogical inquiry," since this analogical reasoning *always* requires a court "to apply faithfully the balance struck by the founding generation to modern circumstances."[67]

Lund also invokes Justice Samuel Alito's suggestion at oral argument in *Bruen* that a sensitive place would be like a courthouse or government building where everyone goes through a magnetometer and security officials are present.[68] But isn't such screening and protection at such official places just a modern adaptation of historical understandings? In older times, for instance, bailiffs in courthouses would have had the power to conduct searches when necessary to protect those present.

How are bans on nuclear weapons and artillery to be justified under the historical test? Lund states that cannons were available to civilians at least until the mid-19th century.[69] Actually, "destructive devices" such as cannons were not federally regulated until added to the National Firearms Act

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[64] *Bruen*, 142 U.S. at 2138 n.9.

[65] *Id*.

[66] Lund 298.

[67] *Bruen*, 142 U.S. at 2133 n.7.

[68] Lund 298-99.

[69] *Id*. at 300 & n.98. The source for this states only that "at least as late as the mid-nineteenth century, an abolitionist newspaperman apparently defended his printing office with a cannon." Nelson Lund, *The Proper Use of History and Tradition in Second Amendment Jurisprudence*, 30 FLA. J.L. & PUB. POL'Y 171, 177-78 (2020) (citing CASSIUS M. CLAY, THE LIFE OF CASSIUS MARCELLUS CLAY: MEMOIRS, WRITINGS, AND SPEECHES 482 (1886)).

in 1968, under which they are required to be taxed and registered.[70] But text comes before history, and the Second Amendment refers to arms that a person can "bear" or carry,[71] which eliminates heavy weapons. Add to that the historical tradition of banning weapons that are dangerous and unusual, which *Heller* formulates as the common-use test,[72] and the parade of horribles vanishes.

That leaves the current bans on modern rifles (pejoratively labeled "assault weapons") and standard ("high") capacity magazines. Lund suggests that "judges could faithfully apply means-end scrutiny by requiring the government to justify every regulation in light of the purpose of the Second Amendment, which is principally to secure the natural or inherent right to self-defense."[73] That's what some judges have pretended to do in upholding such bans on the basis that citizens "need" only inferior firearms with ten-round magazines for self-defense.[74] The historical common-use test, not misused means-ends scrutiny, provides the proper level of protection. And since the Supreme Court has already done the work to find that arms in common use pass the text-first-then-history-second test, further historical enquiry is unnecessary to decide whether arms in common use are protected.

## III. THE TEXT-HISTORY TEST PROVIDES A MORE WORKABLE AND EFFECTIVE MEANS OF PROTECTING SECOND AMENDMENT RIGHTS THAN MEANS-END SCRUTINY

*Bruen* teaches that:

> reliance on history to inform the meaning of constitutional text—especially text meant to codify a *pre-existing* right—is, in our view, more

[70] Pub. L. 90-618, 82 Stat. 1213, 1231, 1234 (1968). *See* 26 U.S.C. § 5845(a)(8), (f) ("destructive device" defined as a weapon that expels a projectile with barrel over .5 inch in diameter), § 5861 (prohibition on unregistered NFA firearms).

[71] "[T]he Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Bruen*, 142 S. Ct. at 2132 (quoting *Heller*, 554 U.S. at 582).

[72] *Heller*, 554 U.S. at 627. Of course, when the plain text covers conduct, the burden is on the government to show that certain weapons are dangerous and unusual. *See Bruen*, 142 S. Ct. at 2129-30; Caetano v. Massachusetts, 577 U.S. 411, 412 (2016).

[73] Lund 300.

[74] E.g., Friedman v. City of Highland Park, Ill., 784 F.3d 406, 411 (7th Cir. 2015) (a non-banned firearm "gives householders adequate means of defense"), *cert. denied*, 136 S. Ct. 447 (2015).

> legitimate, and more administrable, than asking judges to "make difficult empirical judgments" about "the costs and benefits of firearms restrictions," especially given their "lack [of] expertise" in the field.[75]

A historical document, such as a law enacted around 1791, says what it says, and distortion of its language may be easily detected. By contrast, means-ends scrutiny allows judges to make ostensibly empirical findings that are in fact founded on their value judgments, not the rule of law. And it's easy for judges simply to defer to legislatures without conducting the hard work assigned to the judiciary under our system of separation of powers. Requiring lower courts to rest their judgments on text and history may not preclude them from smuggling in policy preferences, but it makes such legislating from the bench more obvious. Means-end scrutiny enables the same abuses to a greater degree by making it easier to hide them.

*A. The Objectivity of Historical Texts*

Lund points out that "Perhaps the most extreme example of hostility to the Second Amendment was the Ninth Circuit's decision in *Young v. Hawaii*."[76] Previously, based primarily on antebellum state cases, the court held that no right to carry *concealed* exists, but refused to opine on whether a right to carry openly exists.[77] Then in *Young*, it struck the coup de grâce by opining that, based on history, no right to carry *openly* exists either. As Lund notes, "It simply eradicated the textually guaranteed right of the people to bear arms on the ground that an unlimited power of the government to deny that right has existed for centuries."[78] *Bruen* makes clear that the Supreme Court will reject such "fake originalism."[79]

But *Young* demonstrates how the original documents of history may readily expose a court as distorting and manipulating those sources. For instance, *Young* claimed that the English Statute of Northampton of 1328 "applied to anyone carrying arms, without specifying whether the arms were carried openly or secretly. In 1350, Parliament specifically banned the carry-

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[75] *Bruen*, 142 S. Ct. at 2130 (citation omitted).

[76] Lund 287 (citing Young v. Hawaii, 992 F.3d 765 (9th Cir. 2021) (en banc)). *See also* Stephen P. Halbrook, *Faux Histoire of the Right to Bear Arms:* Young v. Hawaii *(9th Cir. 2021)*, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3885910.

[77] Peruta, v. County of San Diego, 824 F.3d 919, 933-36, 939 (9th Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 1995 (2017).

[78] Lund 288.

[79] *Id.* at 290.

ing of concealed arms."[80] In support, the court purported to quote the statute as follows: "[I]f percase any Man of this Realm ride armed [covertly] or secretly with Men of Arms against any other . . . it shall be judged . . . Felony or Trespass, according to the Laws of the Land."[81]

But in this quotation, the words omitted at the ellipses constituted the essence of the crime. Those omitted words are included here in italics:

> [I]f percase any Man of this Realm ride armed [covertly] or secretly with Men of Arms against any other, *to slay him, or rob him, or take him, or retain him till he hath made Fine or Ransom for to have his Deliverance* . . . it shall be judged . . . Felony or Trespass, according to the Laws of the Land of old Times used . . . .[82]

The offense thus consisted of gangs riding with concealed arms to murder, rob, or kidnap. It did not prohibit a peaceable person from carrying concealed arms. *Young* overzealously manipulated the statute in an effort to prove what it could not prove. Anyone could look up the reference and see the distortion.

*Young* also relied on another easily detectable misrepresentation of a historical law. An 1836 Massachusetts law provided:

> If any person shall go armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon, without reasonable cause to fear an assault or other injury, or violence to his person, or to his family or property, he may, *on complaint of any person having reasonable cause to fear an injury, or breach of the peace*, be required to find sureties for keeping the peace, for a term not exceeding six months, with the right of appealing as before provided.[83]

Ignoring the requirement that there must first be a "complaint of any person having reasonable cause to fear an injury, or breach of the peace," *Young* averred that public carry was limited to "persons who could demonstrate their need to carry for the protection of themselves, their families, or their property. In effect, the Massachusetts law provided that such weapons could not be carried in public unless the person so armed could show 'reasonable cause.'"[84] *Young* further ignored that, even if found to be a danger, the per-

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[80] *Young*, 992 F.3d at 788.

[81] *Id.* at 788-89 (alterations in original) (partially quoting 25 Edw. 3, 320, st. 5, c. 2, § 13 (1350)).

[82] 25 Edw. 3, 320, st. 5, c. 2, § 13 (1350).

[83] 1836 Mass. Acts 750, ch. 134, § 16 (emphasis added).

[84] *Young*, 992 F.3d at 799.

son subject to a complaint could still carry arms provided that he posted a bond.

In a 2003 Ninth Circuit case, *Silveira v. Lockyer*, Judge Steven Reinhardt wrote that "some of the framers explicitly disparaged the idea of creating an individual right to personal arms."[85] In fact, he went on, "John Adams ridiculed the concept of such a right, asserting that the general availability of arms would 'demolish every constitution, and lay the laws prostrate, so that liberty can be enjoyed by no man—it is a dissolution of the government.'"[86] As the original source shows, Adams said no such thing. Instead, the full quotation and context show he upheld the right of self-defense: "To suppose arms in the hands of citizens, to be used at individual discretion, except *in private self-defense*, . . . is to demolish every constitution, and lay the laws prostrate, so that liberty can be enjoyed by no man—it is a dissolution of the government."[87] Adams had in mind the misuse of arms in the recent Shays' Rebellion, and in no manner disparaged the individual right to personal arms. In fact, he contrasted the misuse of arms with their proper use when he singled out "private self-defense."

In short, as *Bruen* states, "reliance on history to inform the meaning of constitutional text" is "more legitimate, and more administrable" than having judges who lack expertise weigh the costs and benefits of restrictions.[88] These examples demonstrate how courts' misuse of history may be detected simply by looking up the original sources. But when they apply means-ends scrutiny and find that the government interest outweighs a constitutional right, who's to say that they got it wrong?

*B. Means-Ends Scrutiny Imports the Subjective Value Judgments of Judges*

To reiterate, *Bruen* held that the Second Amendment presumptively protects conduct within its plain text, and that the government must demonstrate that a challenged restriction is consistent with this Nation's historical tradition. The Court rejected means-ends scrutiny—under which a court balances the severity of a restriction with the governmental interest—as a way of justifying such restrictions.[89]

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[85] Silveira v. Lockyer, 312 F.3d 1052, 1085, *reh. denied*, 328 F.3d 567 (9th Cir. 2003), *cert. denied*, 540 U.S. 1046 (2003).

[86] *Id.* (citing 3 JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES 475 (1787)).

[87] 3 JOHN ADAMS, A DEFENCE, *supra* note 86, at 475 (emphasis added).

[88] *Bruen*, 142 S. Ct. at 2130 (citation omitted).

[89] *Id*. at 2126.

In contrast to *Bruen*'s text-first-and-history-second test, a means-end analysis requires judges to engage in balancing and consider their own subjective value judgments. It requires them to engage in subjective moral judgments in determining which governmental purposes are sufficiently "important" or "compelling" to justify overriding Second Amendment rights. And it requires them to engage in a subjective balancing process to determine which restrictions are sufficiently tailored to advance the approved purposes, such that the cost they impose on the right to keep and bear arms is not out of proportion to the supposed benefit they achieve in furthering the government's aims.

In *New York State Rifle & Pistol Association v. City of New York*, the Second Circuit upheld the city's ban on taking a handgun out of one's licensed premises other than to a shooting range in the city.[90] A person with a second home could just obtain a second handgun to keep there, and a person who wanted to go to shooting ranges or enter competitions outside the city could rent a gun there, the court imagined without a scintilla of evidence.[91] Since the court found no significant burdens on the right to bear arms, it applied intermediate scrutiny. The declaration of a former police official said that taking a handgun out of one's licensed premises "constitutes a potential threat to public safety," as licensees would be susceptible to stress, road rage, and other disputes that make it dangerous to have a firearm.[92] Concluding that its review required "difficult balancing" of the constitutional right with the governmental interests, the court upheld the ban based on the speculation of a single police officer.[93]

When the Supreme Court granted certiorari in the case, the city—with the support of the state of New York—amended its ordinance in a manner that the Court found to moot the case.[94] Although he concurred in the dismissal, Justice Kavanaugh shared his "concern that some federal and state courts may not be properly applying *Heller* and *McDonald*."[95] Dissenting from the order, Justice Alito said he would have decided the case on the

[90] New York State Rifle & Pistol Association, Inc. v. City of New York, 883 F.3d 45 (2d Cir. 2018).

[91] *Id*. at 57-58, 61.

[92] *Id*. at 63.

[93] *Id*. at 64.

[94] New York State Rifle & Pistol Association, Inc. v. City of New York, 140 S. Ct. 1525 (2020).

[95] *Id*. at 1527 (Kavanaugh, J., concurring).

merits, noting that the assertion about road rage in the police official's declaration "is dubious on its face."[96]

The D.C. Circuit's decision in *Heller II*, which upheld a rifle ban and magazine capacity limit, represents another case of slippery empirical judgments made by judges employing means-ends scrutiny. Under intermediate scrutiny, the court explained, the government must show "a substantial relationship or reasonable 'fit' between, on the one hand, the prohibition on assault weapons and magazines holding more than ten rounds and, on the other, its important interests in protecting police officers and controlling crime."[97] While ideally a court should consider the interest of law-abiding citizens as part of the "reasonable 'fit'" calculus, in practice the governmental interest almost invariably outweighs the citizens' interest.

The majority in *Heller II* upheld the law in part because a lobbyist testified at a hearing that "[p]istol grips on assault rifles . . . allow the shooter to spray-fire from the hip position."[98] That unsworn assertion directly conflicted with the plaintiffs' expert and lay evidence that pistol grips on rifles are designed only for aimed fire from the shoulder.[99] The court upheld the ban on magazines holding over ten rounds because they supposedly "pose a danger to innocent people and particularly to police officers," though the court did not factor the needs of law-abiding persons for private self-defense into the balancing.[100]

As a third example, consider the Ninth Circuit's 2021 en banc decision in *Duncan v. Bonta*, which upheld California's ban on magazines holding more than ten rounds. The court applied intermediate scrutiny to the law and found that the record demonstrated "(a) that the limitation interferes only minimally with the core right of self-defense, as there is no evidence that anyone ever has been unable to defend his or her home and family due to the lack of a large-capacity magazine; and (b) that the limitation saves lives."[101] *Duncan*'s defiance of *Heller* was thinly disguised.[102] A six-judge

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[96] *Id.* at 1542 (Alito, J., dissenting).

[97] *Heller II*, 670 F.3d at 1262.

[98] *Id*. at 1262-63.

[99] *See* Stephen P. Halbrook, *Reality Check: The "Assault Weapon" Fantasy & Second Amendment Jurisprudence*," 14 GEO. J.L. & PUB. POL'Y 47, 60-62 (2016).

[100] *Heller II*, 670 F.3d at 1264.

[101] Duncan v. Bonta, 19 F.4th 1087, 1096 (9th Cir. 2021) (en banc), *cert. granted, vacated, & remanded*, 142 S. Ct. 2895 (2022).

[102] Among other things, when *Heller* held that handguns are in common *use* for self-defense, it did not say anything about how many times shots are fired for that purpose, but emphasized that citizens commonly *possess* handguns for that purpose. *See Heller*, 554 U.S. at 629.

concurrence asserted that "many 'historians, scholars, and judges have . . . express[ed] the view that the [*Heller* Court's] historical account was flawed.'"[103] Dissenting, Judge Patrick Bumatay said bluntly, "In reality, this tiers-of-scrutiny approach functions as nothing more than a black box used by judges to uphold favored laws and strike down disfavored ones."[104] And as Judge Lawrence VanDyke added, also dissenting, "By my count, we have had at least 50 Second Amendment challenges since *Heller*—significantly more than any other circuit—all of which we have ultimately denied."[105] When the Supreme Court decided *Bruen*, it granted certiorari in *Duncan*, vacated the judgment, and remanded the case for further consideration in light of *Bruen*.[106]

But the above decisions illustrate how slippery intermediate scrutiny—or any other form of means-end scrutiny—can be. Judges decide cases based on their subjective value judgments unless they are reined in by the objective standards of text and history; means-end tests give their preferences free rein.

### *C. The Matter of Shall-Issue Laws*

*Bruen* states in footnote 9 that "nothing in our analysis should be interpreted to suggest the unconstitutionality of the 43 States' 'shall-issue' licensing regimes, under which 'a general desire for self-defense is sufficient to obtain a [permit].'"[107] However, "because any permitting scheme can be put toward abusive ends, we do not rule out constitutional challenges to shall-issue regimes where, for example, lengthy wait times in processing license applications or exorbitant fees deny ordinary citizens their right to public carry."[108]

In arguing that a pure text-history test is unworkable, Lund says that footnote 9 is an example of *Bruen* itself failing to apply its own test consistently. Stating that the first shall-issue law was apparently passed in 1961, Lund argues that "the Court does not provide so much as a shred of evi-

[103] *Duncan*, 19 F.4th at 1119 (Berzon, J., concurring).
[104] *Id*. at 1139 (Bumatay, J., dissenting).
[105] *Id*. at 1165 (VanDyke, J., dissenting).
[106] Duncan v. Bonta, 142 S. Ct. 2895 (2022).
[107] *Bruen*, 142 S. Ct. at 2138 n.9.
[108] *Id*.

dence that any kind of licensing requirements had ever been imposed on the general population before the 20th century."[109]

But that disregards that most shall-issue laws provide for *concealed* carry, while unlicensed *open* carry was the general rule from 1607 to 1900.[110] Moreover, *Heller* approved of antebellum judicial decisions that upheld restrictions on concealed carry because open carry was allowed.[111] Open carry satisfied the textual right to bear arms, while restricting concealed carry reflected early post-founding practice in some states. A handgun could be freely (though openly) carried in the years leading up to the enactment of shall-issue laws in the 20th century.

Further, *Bruen*'s suggestion was dictum, albeit strong dictum. Shall-issue laws were not before the Court, and in fact petitioners conceded that shall-issue laws, which exist in 43 states, are constitutional.[112] They understood that the Court decides cases incrementally rather than taking great leaps forward. Had they recklessly petitioned the Court to invalidate permitting systems per se, the petition likely would have been denied. The plaintiffs only sought licenses to carry, and the Court would not have wished to go further than necessary by overturning the laws of almost all states.

"In our adversarial system of adjudication, we follow the principle of party presentation," the Court has explained elsewhere.[113] "[W]e rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present," inasmuch as the system "is designed around the premise that [parties represented by competent counsel] know what is best for them, and are responsible for advancing the facts and argument entitling them to relief."[114] For *Bruen* to expand the issue to include whether there were 1791 analogues to today's shall-issue laws would have violated these basic principles. While Lund would not likely disagree with this, his suggestion that the Court's comments on carry licenses violat-

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[109] Lund 291-92 (citing David B. Kopel, *Restoring the Right to Bear Arms:* New York State Rifle & Pistol Association v. Bruen, 2022 CATO SUPREME CT. REV. 305, 325-26 (2022)).

[110] Kopel, *Restoring the Right*, *supra* note 33, at 326.

[111] *Heller,* 554 U.S. at 626, 629.

[112] In response to New York's argument that "there is no example in all Anglo American history of the carry rights petitioners seek," petitioners stated, "In fact, at least 43 states allow just that, while, as in *Heller*, only a few jurisdictions follow New York's lead of presumptively denying a right that the Constitution guarantees to all." Reply Brief for Petitioners, *Bruen*, No. 20-843, at 1 (Oct. 14, 2021).

[113] United States v. Sineneng-Smith, 140 S. Ct. 1575, 1579 (2020) (holding it to be an abuse of discretion for the Ninth Circuit to interject a theory of the case not presented by the parties).

[114] *Id*. (citations omitted & brackets in original).

ed its own text-history approach disregards the early post-Founding judicial decisions upholding restrictions on one mode of carry if an alternative mode was permitted.

## IV. CONCLUSION: TEXT-AND-HISTORY, NOT MEANS-ENDS SCRUTINY, IS THE BEST TEST TO PROTECT SECOND AMENDMENT RIGHTS

Finally, post-*Bruen* judicial decisions demonstrate the viability of the text-history approach. New York responded to *Bruen* by greatly limiting the places where firearms may be carried. In a 182-page opinion, Judge Glenn T. Suddaby of the Northern District of New York applied a thorough text-history analysis and issued a preliminary injunction against most of New York's new law.[115] The Second Circuit issued a stay of the injunction, and the Supreme Court denied a motion to vacate the stay. However, Justice Alito, joined by Justice Clarence Thomas, issued the following statement: "The District Court found, in a thorough opinion, that the applicants were likely to succeed on a number of their claims, and it issued a preliminary injunction as to twelve provisions of the challenged law."[116] He invited the applicants to seek further relief "if the Second Circuit does not, within a reasonable time, provide an explanation for its stay order or expedite consideration of the appeal."[117] Evidently, at least some Justices on the Court are keeping a close eye in how the inferior courts are treating *Bruen*.

On both First and Second Amendment grounds, Judge John L. Sinatra, Jr., of the Western District of New York, issued a preliminary injunction against a portion of the gun ban at places of worship or religious observation,[118] and he did the same in a separate case against the gun ban on private property without an invitation.[119]

Lund concludes that courts will not protect a robust Second Amendment "unless judges from across the political spectrum arrive at a shared consensus that the right remains valuable today, just as they have with respect to the freedom of speech."[120] However, he goes on, "*Bruen*'s instruc-

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[115] *Antonyuk*, 2022 WL 16744700 (N.D.N.Y. 2022), *stay granted*, 2022 WL 18228317 (2d Cir. 2022), *motion to vacate stay denied*, *Antonyuk*, 2023 WL 150425 (U.S. 2023).

[116] *Antonyuk*, 2023 WL 150425, at *1 (statement of Alito, J.).

[117] *Id.*

[118] *Hardaway*, 2022 WL 16646220 (W.D.N.Y. 2022), *appeal filed* (2d Cir., Nov. 15, 2022).

[119] *Christian*, 2022 WL 17100631 (W.D.N.Y. 2022) (preliminary injunction against gun ban on private property without invitation), *appeal filed* (2d Cir., Nov. 15, 2022).

[120] Lund 300.

tion to focus on regulatory traditions will not provide the education that judges need because that test is inherently manipulable."[121] But all rules are subject to manipulation. And as demonstrated by the pre-*Bruen* lower courts, means-ends scrutiny is the mother of manipulation. No matter what the text and historical tradition dictated, courts usually found a way to balance the right away and to uphold virtually all restrictions. The judges in the inferior courts don't necessarily need to *like* the Second Amendment, they just need to do their duty and follow Supreme Court precedent.

As *Bruen* recognized about the two-step approach of the lower courts, step one is correctly rooted in text and history, while step two involves means-ends scrutiny, allowing courts to balance away the right. That's why step two "is one step too many."[122] *Bruen* thus provides the best and most workable formula for protecting the fundamental right to keep and bear arms: when the text covers one's conduct, the activity is presumptively protected and the burden is on the government to show that its restriction is consistent with our historical tradition.[123]

Other Views:

- Randy Barnett & Nelson Lund, *Implementing* Bruen, LAW & LIBERTY (Feb. 6, 2023), https://lawliberty.org/implementing-bruen/.
- Ryan Busse, *One Nation Under Guns*, THE ATLANTIC (Dec. 14, 2022), https://www.theatlantic.com/ideas/archive/2022/12/gun-violence-scotus-bruen-ruling-mass-shootings/672446/.
- N.Y. State Rifle & Pistol Ass'n v. Beach, 19-156-cv (2d Cir. Aug. 26, 2020), *available at* https://casetext.com/case/ny-state-rifle-pistol-assn-v-beach.

[121] *Id*. at 306.
[122] *Bruen*, 142 S. Ct. at 2127.
[123] *Id.* at 2129-30.

# ORIGINALISM CARRIES ON[*]

DONALD A. DAUGHERTY, JR.[**]

A review of ERWIN CHEMERINSKY, A MOMENTOUS YEAR IN THE SUPREME COURT: OCTOBER TERM 2021 (American Bar Association 2022)

For many years, the political left has warned that because of the composition of its Supreme Court, the United States is experiencing a right-wing revolution that has been turning back the clock on various civil rights and otherwise inflicting numerous other harms on the country. Now, long after liberals first began crying that he was at the door, the conservative judicial wolf may have finally, actually arrived with the Court's October 2021-2022 Term. However, viewed with clear eyes, this wolf looks more like some domesticated mutt than the dire creature liberals have predicted, and far less menacing than real threats to the country.

Regardless, no one disputes that the Term was "A Momentous Year in the Supreme Court," the title of a post-term review by Dean Erwin Chemerinsky published recently by the American Bar Association.[1] The book is the second term summary Chemerinsky has written for the ABA. It offers a compact yet insightful overview of the cases and their implications, as well as some thoughts about what the Court may do in coming terms.

Chemerinsky is a brilliant legal scholar whose in-person talks demonstrate an encyclopedic knowledge of not just caselaw, but the specific background facts of each case. He is very much a political progressive but, in the book's Introduction, he promises to discuss the Term in a neutral manner.

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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 Litigation Counsel, Defense of Freedom Institute. The opinions expressed in this article are the author's personally, and not those of his employer.

[1] ERWIN CHEMERINSKY, A MOMENTOUS YEAR IN THE SUPREME COURT: OCTOBER TERM 2021 (2022), *available at* https://www.americanbar.org/products/inv/book/426889972/.

Chemerinsky acknowledges his deeply-held, personal views about the law, and he allows that these may sometimes color his analysis. Nonetheless, he largely keeps his promise.

Chemerinsky avoids heavy-handed caricatures, tired handmaiden memes, speculation about chambers intrigue, and other examples of lazy, nonlegal analysis that infect the writing of too many court watchers. Like a good jurist, Chemerinsky has the self-discipline and intellectual honesty to work to keep his personal opinions out of his legal analysis. This may have been especially challenging here because, as he notes, "the October 2021 term was truly one of the most momentous in recent history," and not in a way that aligned with his progressive point of view.

Statistically, the Term was fairly unremarkable. Chemerinsky notes that the number of cases decided ticked up slightly from the past two terms to 60, but the Court's docket continues to be substantially lighter than before John Roberts became Chief Justice. Nineteen cases were decided 6-3 (the most since at least 1937), 9 were decided 5-4, and only 29% were unanimous, which is the smallest percentage in recent history. Notwithstanding the attention that greeted *Dobbs v. Jackson Women's Health Organization*, the decision overturning *Roe v. Wade*, the Roberts Court continued to overturn precedent at a much lower rate than the Warren, Burger, and Rehnquist Courts.

Chemerinsky states that "virtually every major case was resolved in a conservative direction."[2] This is true of the Term's five blockbuster cases—*Dobbs*, *West Virginia v. EPA*, *Carson v. Makin*, *Kennedy v. Bremerton School District*, and *New York State Rifle and Pistol Association v. Bruen*—the outcomes of which pleased political conservatives.

Besides examining the five blockbuster cases, the book includes chapters discussing the Term's cases on civil rights, criminal law and procedure, elections, federal jurisdiction, free speech, immigration, Indian law, and the state secrets doctrine. Not all of those went in a conservative direction. For example, the Court upheld the Biden Administration's rescission of its predecessor's "remain in Mexico" immigration policy, and Chemerinsky notes that "[t]here were several cases involving federal criminal statutes where the criminal defendant triumphed."[3] However, none of these other cases were what made the Term so momentous.

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[2] *Id.* at 3.

[3] *Id.* at 51.

Rather than a conservative coup, it would be more accurate as a legal matter to characterize the Term as reflecting outcomes that are rooted in an originalist/textualist[4] approach. It is also accurate to say that, for a majority of the Court, living constitutionalism and other approaches that invite judges to inject their personal senses of justice, morality, and good public policy are dead, at least for the foreseeable future. Instead, as has occurred over the course of the Roberts Court, many issues that the Court previously arrogated to itself are being returned to the federal political branches and the states. This leaves battles over those issues to be fought there, with both liberals and conservatives having a chance to persuade voters to support their candidates and policies. Many of the outcomes from the Term decried by liberals can be redressed through political processes—if a consensus to do so exists.

Chemerinsky laid out his criticisms of originalism in greater detail in his other recent book, "Worse Than Nothing: The Dangerous Fallacy of Originalism."[5] But as that book's title suggests, he and most other critics of originalism offer no alternative. Originalism certainly has its limits and can be improved by fair criticism, but you can't beat something with nothing. Thus, many attacks on the methodology come off as little more than knee jerk, ad hoc reactions to politically-disfavored outcomes, not principled disagreement with the legal approach that led to them.

In the book's Introduction, Chemerinsky repeats an assertion he has made elsewhere, describing originalism dismissively as "not long ago . . . regarded as a controversial theory of the far right."[6] This is inaccurate and unfair. Liberal hero Justice Hugo Black advocated for originalism during his years on the Court from 1937 to 1971. In fact, interpreting the Constitution by looking to the original public understanding of its text dates back to the beginning of judicial review, and is reflected in landmark decisions of the Marshall Court like *Marbury v. Madison* and *McCulloch v. Maryland*.

In any event, as Chemerinsky acknowledges, originalism is embraced by a majority of the current Justices. Even the Court's newest addition, Justice

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[4] To clarify terms, by textualism, I mean interpreting the Constitution or statutes from the words on their face, along with the text's structure and established canons of construction. Like textualism, originalism focuses on text, but it comes into play most often when the interpreter is construing older legal texts, where the meaning of words has changed over time. To try to capture the commonly understood meaning of an older text at the time it became law, originalism may look to historical context and tradition in addition to other textualist methods of construction.

[5] ERWIN CHEMERINSKY, WORSE THAN NOTHING: THE DANGEROUS FALLACY OF ORIGINALISM (2022).

[6] Chemerinsky, *supra* note 1, at 5.

Ketanji Brown Jackson, testified at her March 2022 confirmation hearing, "I believe that the Constitution is fixed in its meaning" and that "original public meaning [is] a limitation on my authority to import my own policy."[7] Further, during oral argument this past October in a case over alleged racial gerrymandering, Jackson's questioning exhibited an originalist mindset, at least for interpreting the Fourteenth Amendment.[8] In fact, Jackson's approach has sparked calls for a theory of "progressive originalism."[9]

Commenting in the Introduction on Justice Stephen Breyer's retirement at the end of the Term, Chemerinsky asserts that liberal Justices are pragmatic while conservatives are dogmatic. Chemerinsky states that Breyer "advocated interpreting statutes to achieve their purpose on a Court that moved sharply away from that approach in favor of focusing on the plain language of laws." Proponents of legislation always try to make the text further their intentions, however, so that a statute's language and its purpose are usually closely connected. Looking for some extratextual purpose invites judges to substitute their views for those of the legislators who voted to enact the statute. And to the extent courts clarify ambiguities or fill in gaps that legislators have created either intentionally or by carelessness, they may only encourage more bad lawmaking.

Concluding his Introduction, Chemerinsky notes the deep political polarization in the United States and wonders how the Term's decisions "decisively on one side" will affect the Court's reputation. He cites low public approval ratings for the Court in a fall 2021 Gallup poll.[10] However, he neglects the fact that approval of the other branches of the federal government is even lower; a September 2021 Gallup poll found that "[t]rust in the three branches of the federal government is low on a relative basis," and that while only 54% of American adults trusted the federal judiciary, trust was substantially less

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[7] Andrew Koppelman, *Ketanji Brown Jackson's originalism*, THE HILL, April 10, 2022, https://thehill.com/opinion/judiciary/3263173-ketanji-brown-jacksons-originalism/.

[8] Debra Cassens Weiss, *Justice Jackson uses originalism to undercut 'conservative juristocracy*,' ABA JOURNAL, Dec. 13, 2022, https://www.abajournal.com/news/article/justice-brown-jackson-uses-originalism-to-undercut-conservative-juristocracy.

[9] *See, e.g.*, *Launching Originalism Watch and Exploring Progressive Originalism*, CONSTITUTIONAL ACCOUNTABILITY CENTER, May 25, 2021, https://www.theusconstitution.org/blog/launching-originalism-watch-and-exploring-progressive-originalism/; Mark Joseph Stern, *Hear Ketanji Brown Jackson Use Progressive Originalism to Refute Alabama's Attack on the Voting Rights Act*, SLATE, Oct. 4, 2022, https://slate.com/news-and-politics/2022/10/ketanji-brown-jackson-voting-rights-originalism.html.

[10] Chemerinsky, *supra* note 1, at 10.

for the President (44%) and Congress (37%).[11] Americans have lost faith in all of their institutions—governmental and private—over many decades, and this is not somehow unique to the Supreme Court. Furthermore, there are significant segments of the American political establishment that, because they do not like the outcomes of cases decided by the current Court, want to trash its reputation down to the levels of institutions that they inhabit. That their efforts have had some success does not necessarily reflect poorly on the Court.

Also not helpful to the Court's reputation was the leak of the *Dobbs* draft opinion in early May 2022, which Chemerinsky refers to only briefly, observing that it was "unprecedented" and cut against the "[s]ecrecy [which] is exalted at the Court."[12] As with political efforts to diminish its reputation, the leak shouldn't reflect on the Court, but on the source of the leak, who presumably disagreed with the outcome and hoped to change it and/or undermine the Court's authority generally. Although the outcome didn't change, the leak did give an additional talking point to those who want to complain that the Court has become simply another political branch.

However, while unauthorized disclosure of the *Dobbs* draft was unprecedented for the Court, such leaks are an everyday occurrence for the Executive and Legislative branches. In fact, they are an essential tool of political tradecraft. Also unlike members of Congress, Justices do not hold demonstrations outside the Capitol, shaking their firsts and braying at representatives responsible for the poorly-drafted statutes out of which the Court must try to make sense. Thankfully, for the sake of the Republic, it is hard to envision the Supreme Court exhibiting such hallmarks of the political branches anytime soon.

The first blockbuster case Chemerinsky examines in the book is *Dobbs*, and he writes that the memorable Term "will be most remembered for overruling *Roe v. Wade*."[13] Although this is likely true, subsequent developments should diminish the decision's practical effect. Less than a year after the decision, and notwithstanding the tumult that greeted it, *Dobbs* has proven to be a boon for liberals, who have racked up early political victories in favor of abortion rights. *Dobbs* was an important case, but less because of abortion than for its restorative effect on our constitutional structure of government,

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[11] Megan Brennan, *Americans' Trust in Government Remains Low*, GALLUP, Sept. 30, 2021, https://news.gallup.com/poll/355124/americans-trust-government-remains-low.aspx.

[12] Chemerinsky, *supra* note 1, at 14.

[13] *Id.* at 13.

including requiring citizens to govern themselves, even in areas they may prefer not to face.

In *Dobbs*, the Court overruled *Roe* and *Casey v. Planned Parenthood*, which, respectively, first found and later reaffirmed a constitutional right to abortion. Writing for a five-Justice majority, Justice Samuel Alito stated that regulation of "[a]bortion presents a profound moral question" not addressed by the Constitution, and that the Court's decision would "return that authority to the people and their elected representatives."

No longer the swing vote that he was before the addition of Justices Brett Kavanaugh and Amy Coney Barrett, the Chief Justice concurred by himself in the judgment only. Roberts would have overruled *Roe* to the extent that it prohibited regulation of pre-viability abortions, but would "leave for another day" the issue of whether there is a constitutional right to abortion. Given that a prime characteristic of the Roberts Court has been to direct issues away from the Supreme Court to be decided elsewhere through the federal political processes or by the states (e.g., redistricting), the Chief Justice's position is surprising. Roberts explained that certiorari had been granted on the issue of fetal viability only, and that the majority's "dramatic and consequential rule" went beyond it. Such caution, however, would not protect the Court's reputation from those intent on trashing it and, more likely, would breed further contempt, along with continuing litigation over *Roe*'s status.

Given that few have ever argued that *Roe* has any real grounding in the Constitution, the dissent offered only gauzy support for it. The dissent argued that *Roe* and cases protecting the rights to access contraception and to same-sex intimacy and marriage were "all part of the same constitutional fabric, protecting autonomous decisionmaking over the most personal of life decisions."

Echoing the dissent's concern, Chemerinsky cites various unenumerated rights found by the Court to be liberty interests protected by the Fourteenth Amendment's Due Process Clause which, he believes, cannot be justified after *Dobbs*. However, this seems to be little more than a scare tactic raised in the absence of sound legal footing for *Roe*. Only one of the Justices—Clarence Thomas in a solo concurrence—suggested that the Court should reconsider cases like *Griswold v. Connecticut*, *Lawrence v. Texas*, and *Obergefell v. Hodges*, while the rest of the Justices in the majority went out of their way to make clear that such precedent was not at risk.

The strongest legal argument in favor of upholding *Roe* was based on stare decisis, given that a constitutional right to abortion had been the law of the

land for five decades. However, keeping a long-standing decision solely because it is long-standing—without regard for its weak legal merits—puts the cart before the horse, and would have argued against overruling other poorly-reasoned cases like *Plessy v. Ferguson*.

Chemerinsky also cites the dissent's assertion that overruling *Roe* would greatly damage the Court's public perception, with Justice Sonia Sotomayor wondering at oral argument about the "stench" caused by such a decision. Again, those who don't like the outcome in *Dobbs* trash the Court without hesitation or regard for its standing with the public, so this contention rings a bit hollow. In any event, this institutional argument in favor of keeping *Roe* did little to support its validity as a legal matter.

As the *Dobbs* majority pointed out, even *Casey* was highly critical of *Roe*. After *Roe* was first decided, it was not uncommon for pro-choice legal scholars like John Hart Ely and (then-Professor) Ruth Bader Ginsburg to denounce the asserted constitutional basis for *Roe*. As *Roe* became a badge of progressive bona fides, such analyses became more rare. A notable exception is Akhil Amar, who wrote after the *Dobbs* leak, "I am a Democrat who supports abortion rights but opposes *Roe*," which "was simply not grounded either in what the Constitution says or in the long-standing, widely embraced mores and practices of the country."[14]

Although Chemerinsky does not go as far as Amar, and he certainly would argue against overruling *Roe*, he says little about its legal merits. Rather, he focuses on the potential implications of its reversal. For example, he "[e]xpect[s] to see doctors and women prosecuted for violating state laws prohibiting abortion much more frequently than occurred prior to *Roe*," although he doesn't explain the basis for his expectation.[15] He also is not reassured by the fact that eight Justices made clear that they would not support eroding other precedent protecting basic aspects of privacy and autonomy based on *Dobbs*.

However, as the *Dobbs* majority stated, abortion is "inherently" and "fundamentally different": where one side of the political argument sees an outpatient medical procedure, the other sees infanticide. Although opposition to abortion both in the courts and the public square have been unrelenting in the decades since *Roe*, this is not the case for contraception, interracial marriage, same-sex marriage, or other widely-accepted matters that liberals

[14] Akhil Amar, *The End of* Roe v. Wade*: A Precedent With Weak Constitutional Reasoning*, WALL ST. J., May 14, 2022, https://www.wsj.com/articles/the-end-of-roe-v-wade-11652453609.

[15] Chemerinsky, *supra* note 1, at 21.

contend are at risk after *Dobbs*. There have never been annual marches on the Supreme Court building in favor of, for example, outlawing contraception or interracial marriage, nor has any litigation strategy to such an effect gone anywhere. Thus, notwithstanding the claims of abortion advocates, the case should be largely self-contained.

Chemerinsky acknowledges that "*Dobbs* means that the issue of abortion is left to the political process, for the states and perhaps Congress."[16] From a constitutional point of view, this is as it should be. Pro-choice advocates are likely correct that most Americans generally favor some level of access to abortion, but because *Roe* took it out of the voters' hands, it has never been determined what level that is in each state.

Chemerinsky complains, "States will be able to prohibit abortion or allow abortion, whatever they choose."[17] In fact, California, New York, Washington, Illinois, and other blue states are now racing to enact laws that will make them the nation's leading abortion havens. Easy access may lead to abortion tourism, in the same way that Oregon has drawn people since *Gonzalez v. Oregon* upheld the state's physician-assisted suicide statute. Even in purple and red states, voters and supreme courts have rejected regulations supported by the pro-life movement.

In coming years, Americans will work out through political processes what limitations on abortion they are willing to live with. Like most other Western democracies, Americans will be forced to consider fetal pain, abortions based on race, sex, or disability, and other wrenching issues arising out of the practice. As that plays out, the current excitement over *Dobbs*—and enthusiasm for abortion—may fade.

Chemerinsky writes, "All of this will lead to litigation and the Court will have to decide if there are any constitutional limits on the states or if the matter is truly entirely left to the political process."[18] Again, given the polls cited by pro-choice advocates, abortion should find support in much of the country. At the least, Americans will have to take ownership of the lines they draw and not look to the Court to save them from difficult moral decisions about when human life begins.

While the societal impact of *Dobbs* will be limited to abortion and, further, the procedure appears likely to remain available throughout most of the country, the book's next chapter discusses two administrative law cases that

[16] *Id.* at 20.
[17] *Id.*
[18] *Id.* at 21.

will have an impact far beyond the subjects immediately at issue in them. As Chemerinsky points out, both the blockbuster case *West Virginia* and *National Federation of Independent Business v. Department of Labor* "invalidated administrative actions in areas of great social significance, climate change and vaccinations[,] [b]ut even more crucial, they provide a path for challenges to countless agency actions in the lower courts."[19]

In *West Virginia*, a 6-3 Court rejected the EPA's sweeping claim that a vague, rarely-used provision of the Clean Air Act empowered it to impose draconian carbon emission reduction mandates that would transform America's power industry.[20] Apart from its immediate effect on balancing national interests in reliable energy and air quality, *West Virginia* continues a recent trend that may help to pare back the goliathan administrative edifice.

The Court relied on the "major questions doctrine" to decide that the EPA had overstepped its congressional authority. For the majority, Roberts wrote that the doctrine requires Congress to give agencies clear direction when acting on questions of major economic or social significance. In the absence of such legislative guidance on a major question, the agency's action is invalid.

The Court was skeptical of the EPA's statutory interpretation, which would have greatly enhanced its ability to address through regulation—without clear congressional authorization—momentous subjects like climate change and the economy. The EPA contended that it had discovered in an obscure provision of the Clean Air Act far-ranging authority that no one had ever before noticed since its enactment in 1970. The Court allowed that the EPA's plan "may be a sensible 'solution to the crisis of the day,'" but said that it was "not plausible that Congress gave EPA the authority to adopt on its own such a regulatory scheme in [the provision]. A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body."

In contrast, Chemerinsky writes, Justice Elena Kagan "began her dissent by describing the enormous peril to the planet from climate change," and how the decision stripped the EPA of the power Congress gave it to respond to "the most pressing environmental challenge of our time."[21] Of course, even Congress doesn't have planet-wide jurisdiction, and as a legal matter, whether

[19] *Id.* at 26.
[20] West Virginia v. EPA, 597 U.S. __ (2022).
[21] Chemerinsky, *supra* note 1, at 29.

the EPA had in fact been given such power by Congress in the first place was the very issue before the Court.

Kagan also accused Justices in the majority of betraying their principles, asserting that "the current Court is textualist only when being so suits it" and that when it doesn't, "special canons like the 'major questions doctrine' magically appear as get-out-of-text-free cards."

Chemerinsky echoes Kagan by "guess[ing] that few judges or lawyers had heard of the major questions doctrine until very recently."[22] This misses the mark. The rationale for the doctrine is hardly newfangled or judicial gloss motivated by hostility towards progressive environmental policy or the administrative state; rather, as Chemerinsky recognizes, the doctrine is grounded in the separation of powers, which is fundamental to the constitutional structure of the federal government. Similarly, the interpretive tenet that "elephants don't hide in mouseholes" (i.e., the previously unheard-of authority to overhaul the country's energy sector likely isn't found in an obscure statutory provision) is well-established. As Chemerinsky does in mischaracterizing originalism, those who don't like the results that come from application of the major questions doctrine try inaccurately to dismiss it as only recently conjured up to achieve a "conservative" result.

Furthermore, the major questions doctrine may be a way of reviving the non-delegation doctrine—which dates back almost a hundred years—while still accepting realities of the modern federal government. The Article I, Section 1 command that "*All* legislative Powers herein granted shall be vested in a Congress of the United States" casts doubt on administrative authority to regulate even less-than-major questions. If anything, the major questions doctrine seems to be a practical approach to reining in the administrative state without reconsidering less-than-originalist precedent dating back to the New Deal.

Similarly, the major questions doctrine may help to rectify the mistaken assumption by the Founding Fathers that each of the three federal branches would jealously guard its authority and not cede it to the other two. In fact, over the past decades, at least Congress has proven happy to let Executive Branch bureaucrats make decisions for it. Like *Dobbs* forcing voters and their representatives to decide the availability of abortion for themselves, the major question doctrine may help to force Congress to reassert control over lawmaking consistent with the Constitution.

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[22] *Id.* at 34.

As in *West Virginia*, the Court struck down an administrative rule in *NFIB*.[23] Specifically, the Court invalidated an emergency temporary standard promulgated by OSHA requiring that individuals working in places with more than 100 employees be vaccinated against COVID-19 or tested on a weekly basis.

Chemerinsky notes that although the majority opinion didn't invoke the major questions doctrine expressly, its "reasoning was much the same as in" *West Virginia*: "The Court said, 'this is no everyday exercise of federal power. It is instead a significant encroachment into the lives—and health—of a vast number of employees. We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance.'"[24]

Again construing the statute at issue to reach the opposite conclusion from the majority, the dissenters found clear authority for OSHA to deal with the risk of spreading COVID in the workplace. To the extent that OSHA's policy was unusually aggressive, the dissent argued that it "respond[ed] to a workplace health emergency unprecedented in the agency's history." Although personal bodily autonomy had been paramount for the dissenters in *Dobbs*, it became less so in the face of COVID.

A third administrative law decision that Chemerinsky discusses is *Biden v. Missouri* which, unlike *West Virginia* and *NFIB*, upheld the contested federal regulation.[25] In the case, the Centers for Medicare and Medicaid Services had ordered facilities receiving federal funds to have their workers vaccinated against COVID. The decision was issued along with *NFIB*, and Chemerinsky asserts, "It is hard to reconcile that these two decisions came from the same Court on the same day" because they reached different conclusions about COVID policies.[26] Chemerinsky himself provides a reasonable reconciliation a few sentences later, however, when he explains that the federal government has more legal authority to impose conditions on recipients of federal funds than on private businesses.

Many legal trends that began before the pandemic were accelerated by it. This includes the assertion of ever expanding power by federal agencies. Furthermore, newly asserted authority often seemed to go beyond any subject matter expertise an agency might have. For example, OSHA is understood to

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[23] Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, Occupational Safety & Health Admin., 595 U.S. __ (2022).

[24] Chemerinsky, *supra* note 1, at 31.

[25] Biden v. Missouri, 595 U.S. __ (2022).

[26] Chemerinsky, *supra* note 1, at 33.

be concerned with the health and safety of employees in the workplace, not with that of all Americans in any context. Similarly, shortly before the Term began, the Court had struck down the moratorium on evictions mandated by the Centers for Disease Control and Prevention, which has no particular insight into landlord-tenant matters.[27] These claims of expanded authority seemed less a matter of bringing expertise to bear than an effort to impose preferred policies by any means necessary.

Addressing the Term's Religion Clause cases in the next chapter, Chemerinsky writes that *Carson* and *Kennedy* reflect the "deep political divide on the Supreme Court, and in the country, over the Constitution and religion."[28] Liberals understand the Establishment Clause "through Thomas Jefferson's metaphor that there should be a wall separating church and state," and the Supreme Court had followed that approach since the late 1940's.[29]

Jefferson's metaphor, however, is a weak reed on which to rest any interpretation of the Religion Clauses. His reference to a "wall" in a short letter written more than a decade after the Bill of Rights was enacted and in response to religious minorities concerned about government-established religion in their states was aimed at protecting their free exercise, not promoting strict separation.[30] And Jefferson's views on religion generally were unorthodox for his times and not widely shared, and he was not involved in drafting the Bill of Rights because he was then serving in France.

Chemerinsky writes that in contrast to strict separation, conservatives believe the Establishment Clause is only violated where the government "coerces religious participation or gives assistance that favors some religions over others," and that this view is now ascendant at the Court.[31]

In *Carson*, a six-Justice majority held that where Maine provided funds for parents in rural areas without public schools to send their children to private schools, it could not exclude religious schools.[32] Chemerinsky writes that as a result, "whenever the government provides aid to private secular schools it is constitutionally required to make that aid available to religious institutions as well."[33]

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[27] Alabama Ass'n of Realtors v. Dep't of Health & Human Servs., 141 S. Ct. 2485 (2021).

[28] Chemerinsky, *supra* note 1, at 91.

[29] *Id.*

[30] *See Jefferson's Letter to the Danbury Baptists* (Jan. 1, 1808), *available at* https://www.loc.gov/loc/lcib/9806/danpre.html.

[31] Chemerinsky, *supra* note 1, at 91.

[32] Carson v. Makin, 596 U.S. __ (2022).

[33] Chemerinsky, *supra* note 1, at 94.

*Carson* stated that the First Amendment protects against "indirect coercion or penalties on the free exercise of religion, not just outright prohibitions" on free exercise, and that this principle applies to state efforts to withhold otherwise available public benefits from religious organizations. The case continued a line that began with *Trinity Lutheran v. Comer*, which held that Missouri violated the Free Exercise Clause when it subsidized resurfacing playgrounds to protect children from injury at public and secular private schools, but not religious schools.[34] The Court stated that such discrimination against religion must meet strict scrutiny and that Missouri's interest in avoiding an establishment of religion did not justify denying to religious schools a generally available benefit. *Carson* similarly rejected Maine's defense, citing *Trinity Lutheran*.

Chemerinsky writes that the *Trinity Lutheran–Carson* line of cases marks "a significant change in the law":

> For decades, the issue before the Court was determining when *may* the government provide assistance to religious schools without violating the Establishment Clause of the First Amendment. Now the Court says that the Free Exercise Clause means that the government *must* provide aid for religious schools whenever it subsidizes secular private education.[35]

Although Chemerinsky doesn't refer to it, *Carson* also relied on *Zelman v. Simmons-Harris*, which held that an Ohio school choice program under which "private citizens 'direct government aid to religious schools wholly as a result of their own genuine and independent private choice'" did not offend the Establishment Clause.[36] *Trinity Lutheran-Carson* took a further step to hold that excluding religious schools from such benefits violated the Free Exercise Clause.

In *Kennedy,* Chemerinsky writes, the Court found for the first time that "a teacher's prayer in a public school setting was constitutionally permissible. Indeed, the Court held that restricting this violated the teacher's free speech and free exercise of religion rights."[37] There, the petitioner was a high school football coach who had been fired by the public school district that employed him for praying briefly and quietly on the 50-yard line of the field after games.

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[34] 582 U.S. __ (2017).

[35] Chemerinsky, *supra* note 1, at 95.

[36] 536 U.S. 639, 649 (2002).

[37] Chemerinsky, *supra* note 1, at 96 (citing Kennedy v. Bremerton School District, 597 U.S. __ (2022)).

For yet another 6-3 majority, Justice Neil Gorsuch wrote that the Free Exercise and Free Speech Clauses work in tandem to doubly protect religious speech as "a natural outgrowth of the framers' distrust of government attempts to regulate religion and suppress dissent." The Court explained that the school district infringed upon the coach's free exercise rights because its actions "were neither neutral nor generally applicable" and "by its own admission, the District sought to restrict [his] actions at least in part because of their religious character." The Court held that the coach's free speech rights had also been violated because he prayed in his capacity as a private citizen, not as a government employee.

Applying strict scrutiny, the Court found further that the district could not justify infringing the coach's First Amendment rights. Rejecting the school district's defense that the coach's termination was required by the Establishment Clause, the majority overruled *Lemon v. Kurtzman*, which had set forth a multi-factor test for determining whether government action violated the Clause.[38] Gorsuch recognized that "this Court long ago abandoned *Lemon* and its endorsement test offshoot," stating that now "the Establishment Clause must be interpreted by 'reference to historical practices and understandings.' '[T]he line' that courts and government 'must draw between the permissible and the impermissible' has to 'accor[d] with history and faithfully reflec[t] the understanding of the Founding Fathers.'" As Chemerinsky notes throughout the book, moving away from judge-made tests like *Lemon* towards a strictly text-based approach is among the most significant of the Court's recent trends.

As a final defense, the district argued that some students might feel compelled to join the coach in his post-game prayer to get playing time in games. However, no evidence supported this defense, and the Court rejected the argument that "*any* visible religious conduct by a teacher or coach should be deemed—without more and as a matter of law—impermissibly coercive on students."

The Court found—on facts that were not disputed by the parties—that the coach was entitled to summary judgment. To reach its decision, the majority had accepted as undisputed the district's stated grounds for dismissing the coach, namely, his public prayers after three games in 2015. Even so, and unusually for a Supreme Court decision, there was substantial disagreement

[38] 403 U.S. 602 (1971).

between the majority and the dissent as to how to read the evidentiary record in the case and what the relevant facts even were.

Sotomayor's dissent sought to frame the case as one about coercion of students to participate in a government-established religious ritual, instead of the coach's free exercise and speech rights. She included three photographs to bolster her version of events. However, one photograph did not depict any of the three instances relied on by the district for terminating the coach, one showed him surrounded by players from the opposing team (over whom he had no coercive leverage), and the third showed him by himself.

Although the Court and most lower courts had criticized and ignored *Lemon* for two decades, Sotomayor objected to overruling it formally. However, the value of retaining a discredited legal theory is unclear, and *Kennedy* simply tidied up the jurisprudence. As Scalia wrote in a concurrence thirty years ago, the *Lemon* test had "stalk[ed] our Establishment Clause jurisprudence" "[l]ike some ghoul in a late-night horror movie."[39] The majority opinion put the test to its long overdue final rest.

Chemerinsky concludes the chapter by noting that, "[f]or decades, the Court took a robust approach to the Establishment Clause and provided relatively weak protections under the Free Exercise Clause."[40] But now, he says, it is "taking . . . exactly the opposite course."[41] However, rebalancing the way the Court has resolved any tension between the clauses may be appropriate in an era when the religious faithful may be nearing minority status. With the nation's dominant culture increasingly secularized (and sometimes even hostile to religion), it shouldn't be surprising that the need to protect individual rights of believers against government overreach gains in importance.

Moreover, as *Kennedy* pointed out, along with the Free Speech Clause, the Religion Clauses work together with "'complementary purposes, not warring ones where one Clause is always sure to prevail over the others.'" The prohibition on government-established religion serves to enhance, not inhibit, free exercise. This is more in keeping with what Jefferson and others understood the clauses to mean at the time of the Bill of Rights than the strict separation theory adopted by the Court a century and a half later.

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[39] Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring).

[40] Chemerinsky, *supra* note 1, at 100.

[41] *Id.*

The last blockbuster case Chemerinsky examines is *Bruen*.[42] Although its holding was narrow, he writes, the Court gave "greater protection for Second Amendment rights than virtually any other in the Constitution," and the case "will have enormous implications for gun regulation in the United States."[43]

Chemerinsky recounts how until *Heller v. District of Columbia* was decided in 2008,[44] the Court had "never once declared unconstitutional any law—federal, state, or local—as violating the Second Amendment."[45] He concedes, however, that before *Heller* there were only a handful of Supreme Court cases construing the Second Amendment (and the most recent was from 1939), so little precedent of any kind existed. Never having served as the basis for striking down a statute made the Second Amendment nearly alone among all other Bill of Rights provisions; well before 2008, the Court had struck down scores of federal, state, and local laws for violating rights of free speech and free exercise, the prohibition on establishment of religion, freedom from unreasonable search and seizure and cruel and unusual punishment, and the like. As stated in *McDonald v. Chicago*, there is no reason to believe there was any intention at the time of either the Founding or the enactment of the Fourteenth Amendment to make the right to keep and bear arms second class.[46]

Even after *Heller* and *McDonald*, Chemerinsky writes, "[t]here were no Supreme Court decisions about the Second Amendment for the last twelve years, a time during which the composition of the Court changed greatly and became much more conservative."[47] However, this does not discredit *Bruen*, but simply suggests that *Heller* and *McDonald*'s protection of individual Second Amendment rights came from a more "liberal" Court. In any event, the outcome in *Bruen* was hardly out of line with the two prior cases, nor was it at all unexpected.

If anything, the Court had been too reticent to give further direction to lower courts and legislators after *Heller* and *McDonald*. Such caution has been a hallmark of the Roberts Court. Now, however, given that there is still a paucity of Second Amendment caselaw, and the fact that a majority without the Chief Justice seems ready to offer guidance to lower courts and legislators

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[42] N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. __ (2022).
[43] Chemerinsky, *supra* note 1, at 121.
[44] 554 U.S. 570 (2008).
[45] Chemerinsky, *supra* note 1, at 121-22.
[46] 561 U.S. 742 (2010).
[47] Chemerinsky, *supra* note 1, at 123.

on the contours of the right, it is unlikely that another decade will pass between *Bruen* and the Court's next Second Amendment decision.

Adopted in 1911, the New York statute at issue in *Bruen* prohibited having weapons in public without a permit, and it required an applicant to establish that "proper cause exists" for such a license to be issued. New York courts had interpreted "proper cause" to require that an applicant "demonstrate a special need for self-protection distinguishable from that of the general community."

For a six-Justice majority, Thomas wrote that "the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home," and that state laws restricting concealed weapons permits to those who can show some special cause were unconstitutional.

Since *Heller* and *McDonald*, most circuits had adopted a two-step test, which combined history and means-end scrutiny, to evaluate gun restrictions. The Court accepted the historical approach as consistent with *Heller*. However, it rejected the means-end component, stating that the government may not simply posit an important interest served by the challenged law, but "must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." By doing so, Chemerinsky writes,

> The Court expressly rejected any balancing of the government's interest in regulating guns with a claim of Second Amendment rights; as Justice Thomas wrote, "[T]he Second Amendment is the very product of interest balancing by the people and *it surely elevates above all other interests* the right of law-abiding, responsible citizens to use arms for self-defense."[48]

Chemerinsky is correct that a movement away from the balancing of factors by a court, as occurs under the various tiers of scrutiny, towards an approach based more exclusively on text and historical analysis, would be an important development from the Term, especially if it catches on in other areas of constitutional jurisprudence.

Although, as in *Heller*, the *Bruen* majority saw application of the Second Amendment as straightforward, Thomas's opinion included an extensive discussion of the proper use of history in interpreting legal texts, including analogic reasoning for applying the text to present day circumstances beyond those anticipated at the time the text's meaning was fixed. For example, such reasoning could assist in understanding the permissible regulation of "arms" beyond those that existed in 1791.

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[48] Chemerinsky, *supra* note 1, at 124.

The majority made clear that Second Amendment rights are not absolute, offering as an example the government's authority to regulate guns in "sensitive places." History establishes that prohibitions on guns in legislative assemblies, polling places, and courthouses were widely accepted in 18th and 19th century America, and so more recently enacted analogous prohibitions are permissible for schools, government buildings, and other places where, similarly, people congregate and law enforcement is presumptively available.

As in the other blockbuster cases, the dissent focused on the policy issue that New York's law sought to address—namely, gun violence in that state. Breyer cited depressing statistics about the numbers of Americans killed annually by firearms. Of course, this problem is not uniform across the country; to the extent such laws would be justified by the local level of gun violence, the meaning of the Second Amendment rights would vary by region.

Regarding methodology, Breyer wrote that the Court should not have rejected strict scrutiny, which is the usual standard for assessing restrictions on fundamental constitutional rights: "although I agree that history can often be a useful tool in determining the meaning and scope of constitutional provisions, I believe the Court's near-exclusive reliance on that single tool today goes much too far." Breyer's position would not have changed the outcome, however, as the New York law would almost certainly have failed strict scrutiny.

Breyer also noted that history is often unclear, with inconsistent traditions and practices, and that attorneys and judges may lack the training and resources needed to sift through extensive historical evidence. Such problems, though, are hardly insurmountable. Through dueling expert testimony in an adversarial system, evidence is admitted routinely in all kinds of litigation to resolve complex, disputed issues, and there is no reason such evidence can't be used to shed light on the meaning of legal texts.

At the chapter's end, Chemerinsky identifies what he sees as the crux of the matter, namely, that there is "a complete disagreement over who should decide whether gun regulations are allowed."[49] The six Justices in the majority see it as their role "to enforce the Second Amendment and to declare unconstitutional laws that infringe it," while the dissenters "see this as a matter for the legislature and the political process."[50]

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[49] *Id.* at 129.
[50] *Id.*

As a threshold matter, it is hard to ignore the irony in Chemerinsky's assertion that a right that is express under the Constitution (i.e., "to keep and bear arms") should be left to politicians, while a putative right about which the Constitution is silent (i.e. abortion) should be guarded aggressively by the judiciary.

Also ironic is Chemerinsky's reversing (presumably intentionally) the labels usually associated with conservatives and liberals—"restraint" and "activism."[51] Judicial conservatives value restraint and humility in decisionmaking, deferring to the political branches in non-legal matters. Because originalism/textualism looks backward for authority from laws that were written in the past, it will necessarily never be au courant with policy matters; that is the responsibility of the political branches. At the same time, the Court must still ultimately say what the law is, especially with regard to constitutional matters, and no one has ever argued for blanket deference by the courts. Enforcing constitutional boundaries is hardly "activist," but is at the heart of the judiciary's role.

As gun violence has risen in America, the Court has failed to provide much guidance on Second Amendment law. If Second Amendment jurisprudence develops to the same extent as that of other constitutional provisions, what legislators can and can't do will become clearer. Then, if some political consensus can be achieved, appropriate legislation should follow.

In the book's Conclusion, Chemerinsky finds some common ground, observing that no one, "liberal or conservative, would deny that October 2021 was a momentous term in the Supreme Court" and, in light of the 6-3 conservative majority, "a harbinger of what is to come."[52]

A significant trend from the Term identified by Chemerinsky may be a gradual move away from means-end scrutiny of restrictions on constitutional rights toward an analysis more exclusively rooted in history. *Bruen* and *Kennedy* were the clearest examples of this. Whether Thomas and Gorsuch will continue to successfully push their colleagues in this direction will be something to watch for going forward.

*West Virginia* will have the most impact of the Term's cases if it serves to revitalize the separation of powers. Relying on the major questions doctrine, challenges to executive administrative authority will likely increase, although many plaintiffs may file beyond the Beltway in more friendly Circuits, like

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[51] *Id.*

[52] *Id.* at 137.

the Fifth. Relatedly, the Court has already agreed to hear next term a case that may eliminate the *Chevron* doctrine, which urges judicial deference to agency interpretation of ambiguous statutes.

Chemerinsky's criticism notwithstanding, originalism/textualism will continue to be the dominant interpretive methodology on the Court. In its truest application, the approach should have little to do with conservative politics and much more to do with using the proper tools (e.g., text, structure, history) and determining the proper constitutional locus for decisionmaking. Seen this way, there is no reason scholars like Chemerinsky can't work to develop some form of "progressive originalism," such as suggested by Justice Jackson.

Relatedly, it will be interesting to see whether Chemerinsky and other prominent figures in legal education begin to adopt originalism/textualism. If not, an unfortunate disconnect will grow between what future lawyers are taught and the actual practice of law (at least before the Supreme Court).

In closing, Chemerinsky opines with regret, "the Court would be very different today if Justice Ginsburg had retired in 2014 when President Obama could have appointed her successor or if she had lived a few more months so that President Biden would have filled that seat on the Court."[53] (Ginsburg said she didn't believe Obama could get a sufficiently liberal successor confirmed.) Repeating a lament made in the Introduction, Chemerinsky acknowledges, "The current Court is very much a product of Donald Trump rather than Hillary Clinton winning the presidency in 2016."[54] Because Trump had little interest in or patience for legal niceties such as the separation of powers, he "outsourced" much of the judicial appointment process to members of the conservative legal movement, who then helped to produce the current Court, and a momentous Term.

Other Views:

- *The U.S. Supreme Court term in review*, NPR, July 5, 2022, https://www.npr.org/2022/07/05/1109883082/the-u-s-supreme-court-term-in-review.

[53] *Id.* at 142.
[54] *Id.* at 143.

- David Cole & Rotimi Adeoye, *A Radical Supreme Court Term in Review*, ACLU (July 7, 2022), https://www.aclu.org/news/civil-liberties/a-radical-supreme-court-term-in-review.
- Erwin Chemerinsky, *Even the Founders Didn't Believe in Originalism*, THE ATLANTIC (Sept. 6, 2022), https://www.theatlantic.com/ideas/archive/2022/09/supreme-court-originalism-constitution-framers-judicial-review/671334/.

# TEXTUALISM IN ALABAMA[*]

JAY MITCHELL[**]

Textualism is alive and well in Alabama. This interpretive doctrine teaches that legal texts have objective meaning and that it is the job of judges to find and apply that meaning. Justice Antonin Scalia and lexicographer Bryan Garner distilled the textualist philosophy and outlined its key operating principles in their seminal treatise *Reading Law*. But textualist principles are not new—they are time-tested tools that have guided Americans for centuries, including right here in Alabama.

This article seeks to demystify textualism and show how it operates in this state. I begin with a brief introduction to textualism—what it is, where it comes from, and why it's a foundational part of our legal system. Next, I describe how the court on which I serve, the Alabama Supreme Court, has relied on (or, in some cases, departed from) textualist principles. I then highlight some open questions and gray areas in our caselaw. My hope is that this article will help litigants, attorneys, scholars, and citizens understand how legal interpretation works in Alabama. More broadly, I hope that it inspires non-Alabamians to examine how textualist principles apply in their own states.

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[*] Note from the Editor: The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. To join the debate, please email us at info@fedsoc.org. This essay was originally published in the *Alabama Law Review*. 74 ALA. L. REV. 1089 (2023). It is reprinted here, with minor alterations, with permission.

[**] Associate Justice, Supreme Court of Alabama. The views expressed in this article are my own, not necessarily those of my colleagues. I thank my law clerks for their helpful assistance with this article, especially Annie Wilson, Hunter Myers, and Zach Gillespie. I also thank William H. Pryor Jr., Kevin Newsom, Andrew Brasher, Aditya Bamzai, Jeff Anderson, and Othni Lathram for their helpful conversations and comments.

## I. A BRIEF INTRODUCTION TO TEXTUALISM

Textualism, in its simplest form, is the idea that a law's text *is* the law.[1] This principle applies to all written law—constitutional and statutory alike.[2] When presented with a dispute over the meaning of written law, a textualist judge does not speculate about what legislators privately *wanted* the law to accomplish, nor does he ask what a more sensible law *should* have said. He asks only how the text would be best understood by a reasonable, well-informed person reading the text in its historical and linguistic context.

In holding that text itself constitutes the law, the doctrine of textualism stands in contrast to the competing doctrine of purposivism, which holds that the law is what legislators subjectively intended it to be,[3] and the various theories of judicial updating, which treat the written law as merely a starting

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[1] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 397 (2012) ("The traditional view is that an enacted text is itself the law.").

[2] *See* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 938–39 (2017) (describing the traditional textualist view, originating with the Framers, that "constitutional interpretation should mimic ordinary statutory interpretation").

[3] Justice David Brewer captured the essence of purposivism in his majority opinion in *Church of the Holy Trinity v. United States*, when he wrote that "a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers." 143 U.S. 457, 471 (1892). For Justice Brewer, the way to ascertain the intention of a law's makers was not simply to analyze the law's text, but rather to examine "the evil which [congressmen] intended to be remedied, the circumstances surrounding the appeal to congress, [and] the reports of the committee of each house." *Id*. at 465. *Holy Trinity*-style reasoning had its heyday in the 20th century, but was abandoned by the U.S. Supreme Court before that century came to a close. SCALIA & GARNER, *supra* note 1, at 12–13. Even legal-process purposivists—a more modern school of purposivists who "cast purposivism as an objective framework that aspires to reconstruct the policy that a hypothetical 'reasonable legislator' would have adopted"—differ from textualists in that they care more about how "a reasonable person would address the mischief being remedied" by a law than they do about how "a reasonable person would [understand the law's] language . . . ." *See generally* John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 76 (2006). Purposivists of all stripes are united by a willingness to subordinate a law's most plausible semantic meaning to the law's perceived background "purpose." *Id*. I note that some scholars have advocated that "purposivism" be reserved only for objective-framework purposivists, while "intentionalism" should be used for purposivists focused on subjective intent. *See* Lawrence B. Solum, *Legal Theory Lexicon 078: Theories of Statutory Interpretation and Construction*, LEGAL THEORY LEXICON (May 21, 2017), https://lsolum.typepad.com/legal_theory_lexicon/2017/05/theories-of-statutory-interpretation.html. This article, however, uses "purposivism" in its broader sense.

point that can be revised by judges in a common-law fashion.[4] For textualists, a law's meaning depends not on the wishes of legislators or the fiat of judges, but on the "objective indication" of the law's words.[5]

But just because the textualist inquiry is objective does not mean it is easy. Textualist judges are not robots. We understand that legal interpretation requires more than plugging a string of words into a dictionary and running with the first results that come up. A written law, like any text, acquires meaning from its context, and that context is often rich with nuance. Weighing all the relevant contextual clues can be difficult, especially when those clues conflict with each other. Even textualist judges can disagree about how to prioritize competing clues and, consequently, about the best interpretation of a law.[6] But textualists are united in their convictions that legal texts have objective meaning,[7] that judges are capable of discerning that meaning, and that the meaning of a law's text *is* the law.[8]

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[4] *See, e.g.*, David A. Strauss, *Do We Have a Living Constitution?*, 59 DRAKE L. REV. 973, 976–77 (2011) (urging judges to take a "common law approach" to the Constitution, which Strauss describes as an approach that "emphasizes precedent and tradition but that allows for [judicial] innovation . . . ." in contravention to the "original understanding" of the Constitution's text); DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010) (similar); Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 353 (7th Cir. 2017) (Posner, J., concurring) (arguing that judges should embrace the philosophy of "judicial interpretive updating," which would allow judges to "updat[e] old statutes" to keep pace with changing times, even if the judges know that "the Congress that enacted [the statute] would not have accepted" the "updated" meaning).

[5] ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 29 (1997).

[6] For an example involving constitutional interpretation, *compare* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 358–71 (1995) (Thomas, J., concurring in the judgment) (concluding that the "historical evidence from the framing" supports the view that the "freedom of speech" protected by the First Amendment includes anonymous speech), *with id.* at 371–85 (Scalia, J., dissenting) (reaching the opposite conclusion). For an example involving statutory interpretation, *compare* Van Buren v. United States, 141 S. Ct. 1648, 1654–61 (2021) (Barrett, J.) (holding, after extensive textualist analysis, that the federal Computer Fraud and Abuse Act does not criminalize the act of using a computer to obtain information a forbidden purpose), *with id.* at 1663–68 (Thomas, J., dissenting) (reaching the opposite conclusion).

[7] Sometimes a text's objective meaning is indeterminate or nonsensical. In that case, the law cannot be applied because unintelligible texts are inoperative. *See* SCALIA & GARNER, *supra* note 1, at 134; Standard Oil Co. v. State, 59 So. 667, 667 (Ala. 1912) (a law with no "intelligible application" is "simply void"); Upson v. Austin, 4 Ala. 124, 128 (Ala. 1842) (explaining that laws can be "ineffectual for uncertainty").

[8] SCALIA, *supra* note 5, at 29; Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1120 (1998) (describing textualism as the belief that "the judicial branch serves best by enforcing enacted words rather than unenacted (more likely, imagined) intents, purposes, and wills").

Textualism is often discussed alongside a related term: originalism. Judges and scholars do not always agree about what, if any, differences exist between these two terms. Some use the word "textualism" to apply only to statutes, while using "originalism" to describe the application of textualist principles to the federal Constitution.[9] Others describe originalism as a canon of textualist interpretation,[10] or else use the terms interchangeably.[11] Terminology aside, in practice both doctrines reflect the same underlying commitments: the belief that a law's text *is* the law, and the belief that the meaning of a text is fixed at the time of its enactment.[12] In other words, the meaning of a law is its *original public* meaning, not its *modern* meaning.

The distinction between original meaning and modern meaning matters little for recent laws, but it can matter a great deal for older constitutional provisions and statutes whose language might have undergone linguistic drift.[13] Thus, the federal government's constitutional obligation to protect against "domestic violence," requires the national government to defend states from riots and insurrections within a state's territory (the 18th-century meaning of "domestic violence") but does not require it to prevent spousal abuse (the modern meaning).[14]

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[9] Justice Gorsuch has, at times, adopted this practice. *See* Rachel del Guidice, *Gorsuch Touts Originalism, Textualism in Address to Conservative Legal Society*, DAILY SIGNAL (Nov. 17, 2017), https://www.dailysignal.com/2017/11/17/gorsuch-touts-originalism-textualism-in-address-to-conservative-legal-society/ ("Originalism has regained its place at the table with the Constitution[al] interpretation and textualism in the reading of statutes.").

[10] Justice Scalia, for instance, described originalism as the instantiation of the fixed-meaning canon. SCALIA & GARNER, *supra* note 1, at 78–92.

[11] *See* Joseph S. Diedrich, *A Jurist's Language of Interpretation*, WIS. LAW., July–Aug. 2020, at 36, 42 ("Many lawyers and laypeople perceive textualism and originalism as two sides of the same coin.").

[12] *See* Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 367 (2005) ("the typical textualist judge seeks to unearth the statutes' *original* meanings"); *id.* at 376 ("When confronting a statute, all mainstream interpreters start with the linguistic conventions (as to syntax, vocabulary, and other aspects of usage) that were prevalent at the time of enactment.").

[13] *See, e.g.,* New Prime Inc. v. Oliveira, 139 S. Ct. 532, 539 (2019) (discussing and applying the "'fundamental canon of statutory construction' that words generally should be 'interpreted as taking their ordinary . . . meaning . . . at the time Congress enacted the statute'" (citations omitted)); *accord* Grable & Sons Metal Prod., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 320 n.* (2005) (Thomas, J., concurring) (noting the possibility that the meaning of "arising under" shifted between the time of the federal Constitution's ratification in 1788 and the enactment of 28 U.S.C. § 1331 in 1948).

[14] Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 281 (2017); U.S. CONST. art. IV, § 4.

*A. Textualism's Origins and Development*

Textualism is sometimes characterized (usually by its detractors) as an innovation, or even as the wholesale creation of Justices Antonin Scalia and Clarence Thomas. While it's true that Justices Scalia and Thomas have done much to popularize textualism, the doctrine itself is not new.

As far back as *Marbury v. Madison*, Americans understood that the written text of the Constitution is law and that "courts, as well as other departments, are bound by that instrument" as written. It was, after all, Chief Justice Marshall's conviction that "the written text" of a law *is* the law that "formed the core of the argument for the power of judicial review" embraced in *Marbury*.[15] As Marshall explained, the reason courts can (and must) refuse to enforce unconstitutional laws is not because the judicial branch somehow trumps the legislative branch—it emphatically does not[16]—but because both branches are jointly subordinate to a "supreme law": the written Constitution.[17]

*Marbury* focused on the paramount importance of the written *Constitution*, but early American courts took a similarly text-focused approach to *statutes*. Justice Salmon P. Chase, riding circuit in 1800, captured the spirit of the age when he wrote:

> By the rules, which are laid down in England for the construction of statutes, and the latitude which has been indulged in their application, *the British Judges have assumed a legislative power* . . . . Of those rules of construction, none can be more dangerous, than that, which distinguishing between the intent, and the words, of the legislature, declares, that a case not within the meaning of a statute, according to the opinion of the Judges, shall not be embraced in the operation of the statute, although it is clearly within the words. . . . For my part . . . I shall always deem it a duty to conform to the expressions of the legislature, to the letter of the statute,

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[15] Michael Stokes Paulsen, *The Irrepressible Myth of* Marbury, 101 MICH. L. REV. 2706, 2741 (2003).

[16] *See* THE FEDERALIST NO. 78 (Alexander Hamilton); *see also* Birmingham-Jefferson Civic Ctr. Auth. v. City of Birmingham, 912 So. 2d 204, 223 & n.21 (Ala. 2005) (Parker, J., concurring specially) (explaining the difference between the legitimate power of judicial *review* announced in *Marbury* and the illegitimate power of judicial *supremacy* asserted in, e.g., *Cooper v. Aaron*, 358 U.S. 1, 18 (1958)).

[17] The Supreme Court of Alabama has adopted this justification in its own exercise of judicial review. *See*, *e.g.*, S. Express Co. v. Whittle, 69 So. 652, 659 (Ala. 1915).

> when free from ambiguity and doubt; without indulging a speculation, either upon the impolicy, or the hardship, of the law.[18]

Justice Chase was reminding the parties that courts lack authority to override a statute's clear semantic meaning, even if the judge thinks doing so would avoid injustice or better conform the statute to its background policy goals.[19] Other members of the Founding generation, including Jefferson,[20] Madison,[21] Hamilton,[22] and Brutus (the most influential antifederalist),[23] echoed Chase's sentiment when they warned against the dangers of atextual interpretation.

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[18] Priestman v. United States, 4 U.S. (4 Dall.) 28, 30 n.1 (1800) (Chase, J.); *see also* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 86-87 n.336 (2001).

[19] *See* Manning, *supra* note 18, at 92 (explaining that the U.S. Supreme Court in the early 19th century "expressly disclaimed authority to adjust an otherwise clear statute in order to avoid a perceived hardship or injustice or supply an omission thought to be warranted by the statute's overall policy"); *see also, e.g.*, Evans v. Jordan, 13 U.S. 199, 203 (1815) (Washington, J.) ("[T]his Court would transgress the limits of judicial power by an attempt to supply, by construction, this supposed omission of the legislature. [An] argument, founded upon the hardship of this and similar cases, would be entitled to great weight, if the words of this [statute] were obscure and open to construction. But considerations of this nature can never sanction a construction at variance with the manifest meaning of the legislature, expressed in plain and unambiguous language.").

[20] *See* Letter from Thomas Jefferson to Wilson C. Nicholas (Sept. 7, 1803) ("Our peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction."), *available at* https://founders.archives.gov/documents/Jefferson/01-41-02-0255#TSJN-01-41-02-0255-fn-0001-ptr (last visited Oct. 11, 2022).

[21] *See* Letter from James Madison to Sherman Converse (Mar. 10, 1826) ("In the exposition of laws, and even of Constitutions, how many important errors, may be produced by mere innovations in the use of words and phrases, if not controuled by a recurrence to the original and authentic meaning attached to them."), *available at* https://founders.archives.gov/documents/Madison/99-02-02-0630 (last visited Oct. 11, 2022); *see also* Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 536 & nn.75–76 (2003) (collecting similar quotes).

[22] Nelson, *supra* note 21, at 544 n.117 (citing Alexander Hamilton, *Opinion on the Constitutionality of an Act to Establish a Bank* (Feb. 23, 1791) ("[W]hatever may have been the intention of the framers of a constitution, or of a law, that intention is to be sought for in the instrument itself, according to the usual & established rules of construction. . . . [A]rguments drawn from extrinsic circumstances, regarding the intention of the [lawmakers], must be rejected."), *available at* https://founders.archives.gov/documents/Hamilton/01-08-02-0060-0003 (last visited Oct. 11, 2022)).

[23] BRUTUS XI (Jan. 31, 1788) (warning that allowing judges to prioritize the "spirit" of laws above their "letter" would "enable them to mould the government, into almost any shape they please"), *available at* https://teachingamericanhistory.org/document/brutus-xi/ (last visited Oct. 11, 2022). The Federalists agreed with Brutus that atextual exercise of the judicial power was anathema, and they denied that the Constitution granted federal judges any such power. *See supra* notes 19–22; *see also* Manning, *supra* note 18, at 79–85.

It is little surprise that the Founding generation, which had just fought a bloody revolution to establish a "government of laws, and not of men,"[24] viewed fidelity to written law as paramount. Experience had taught them that judges who view themselves as empowered to prioritize "the reasoning spirit" of laws "without being confined to the[ir] words or letter," would inevitably "erode the principle of a government of limited and enumerated powers."[25]

The Court continued to reflect that understanding well into the 19th century,[26] admonishing litigants in 1845:

> *[T]he judgment of the court cannot, in any degree, be influenced by the construction placed upon it by individual members of Congress* in the debate which took place on its passage, *nor by the motives or reasons assigned by them* for supporting or opposing amendments that were offered. The law as it passed is the will of the majority of both houses, and *the only mode in which that will is spoken is in the act itself*.[27]

Justice Holmes similarly wrote, this time at the turn of the century:

> We ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used . . . . *We do not inquire what the legislature meant; we ask only what the statute means*.[28]

Courts, of course, have strayed from textualist principles from time to time, most famously during the Warren Court's heyday of living constitutionalism.[29] But it is the deviation from textualism, not textualism

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[24] *See* JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES § 304, at 184 (New York, Harper & Bros. 1840) (describing the principle that government "ought to be a government of laws, and not of men" as "the fundamental maxim of a republic").

[25] Manning, *supra* note 18, at 80.

[26] There were, of course, fits and starts along the way. *See id.* at 101–02 (conceding that lower federal courts, "at times," departed from a text-focused approach in favor of a purposivist approach and that "[e]ven the Supreme Court did so on occasion").

[27] Aldridge v. Williams, 44 U.S. 9, 12 (1845) (emphasis added).

[28] Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899) (emphasis added). Justice Felix Frankfurter would later echo this sentiment, explaining, "We [judges] are not concerned with anything subjective. We do not delve into the mind of legislators or their draftsmen, or committee members." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 539 (1947).

[29] *See, e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961); Reynolds v. Sims, 377 U.S. 533 (1964); Griswold v. Connecticut, 381 U.S. 479 (1965); Miranda v. Arizona, 384 U.S. 436 (1966).

itself, that is remarkable in our nation's history.[30] Since the Warren Court era—thanks in large part to the influence of Justices Scalia and Thomas—textualism has been restored to its preeminent role.[31] As Justice Elena Kagan observed, "we're all textualists now."[32]

*B. Why Textualism?*

When I became a judge, I swore an oath to uphold the constitutions of the United States and Alabama.[33] Both constitutions refer to their own text as law and establish specific requirements for making additional laws.[34] According to those requirements, a statutory law is a text enacted by both branches of the legislature and signed by the executive (or enacted on reconsideration over the executive's veto).[35] Under our constitutions, the unexpressed intentions of individual legislators are not law, and neither are the policy preferences of judges.[36] Only a document that has gone through the rigorous process of bicameralism and presentment (or constitutional amendment) qualifies.[37] The rule of bicameralism and presentment requires agreement between both branches of the legislature—and, usually, the executive—as to a specific set of words. A judge who casts aside those words

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[30] Frank H. Easterbrook, *The Absence of Method in Statutory Interpretation*, 84 U. CHI. L. REV 81, 81 (2017) (observing that the U.S. "Supreme Court is dominantly textualist," and that "[n]o justice these days is a purposivist").

[31] *See generally* William H. Pryor Jr., *Textualism After Antonin Scalia: A Tribute to the Late Great Justice*, 8 FAULKNER L. REV. 29 (2016).

[32] Harvard Law School, *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg.

[33] *See* ALA. CONST. art. XVI, § 279.

[34] *See* U.S. CONST. art. VI, § 2 ("This Constitution . . . shall be the supreme Law of the Land."); ALA. CONST. preamble ("the following Constitution" controls the "form of government for the State of Alabama").

[35] *See* U.S. CONST. art. I, § 7; ALA. CONST. art. V, § 125.

[36] Judges are empowered to decide individual *cases* and *controversies*, but we are not empowered to promulgate or repeal laws. *See* Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 936 (2018) ("[C]ourts have no authority to erase a duly enacted law from the statute books"). Even judges acting in their common-law capacity cannot invent or promulgate new laws in the fashion of a legislature. Gamble v. United States, 139 S. Ct. 1960, 1983 (2019) (Thomas, J., concurring). And, in Alabama, judges' common-law powers are simultaneously granted and constrained by statutory law. *See* ALA. CODE § 1-3-1 (1975).

[37] *See, e.g.*, *Ex parte* Christopher, 145 So. 3d 60, 69 (Ala. 2013) ("No law can be enacted or amended apart from the constitutionally mandated procedure, known as bicameralism and presentment."); Pruitt v. Oliver, 331 So. 3d 99, 111–12 (emphasizing that courts "are not at liberty to amend statutes to conform to what we might think the legislature should have done," and cannot "assume the legislative prerogative to correct defective legislation").

in favor of something (such as an unexpressed intention or policy goal) has usurped legislative power by enforcing as "law" a rule that was not validly enacted. That usurpation contravenes our constitutions and the oath we judges swear to defend them. "Sneering at the promise in the oath is common in the academy," as Judge Easterbrook once observed, but the oath "matters greatly to conscientious public officials."[38] It matters to me, and it should matter to everyone who cares about how and by whom we are governed.

That, in my view, is reason enough to be a textualist. But there are practical reasons to be one too. First among them is that textualism safeguards predictability and stability in law. By anchoring the meaning of a text to the objective indication of its words at a fixed point in time, textualism constrains judges' ability to "update" laws as they go along. For the textualist judge, a statute enacted in 1789 carries the same meaning today as it did two hundred years ago, and it will continue to carry that meaning until it is amended or repealed by the People's elected representatives. This commitment to fixed meaning allows members of the public to govern themselves and structure their affairs without having to worry that next year's judges will pull the rug out from under them.

In a similar vein, textualism promotes fair notice.[39] By focusing on what a reasonable citizen would understand the law to mean—rather than on legislators' intentions or judges' preferences—textualism ensures that the law is accessible to the people who are bound by it.

Textualism also promotes legislative competence. When judges refuse to fix policy problems for the legislature, the legislative branch has a stronger incentive to draft clear, coherent laws at the outset. In contrast, purposivism encourages strategic behavior by legislators (who know they can circumvent the legislative process by sprinkling their preferred language into committee reports, floor debates, or amicus briefs—even if that language never would have been able to garner a majority of votes), and judicial updating encourages legislative laziness (why take pains to avoid mistakes or think through additional contingencies if you know judges will do it for you?).

This is not to say that textualism is foolproof. Judges are human beings. Despite our best efforts, we make mistakes. Neither textualism nor any other

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[38] Easterbrook, *supra* note 8, at 1122; *see also* William H. Pryor Jr., *Against Living Common Goodism*, 23 FEDERALIST SOC'Y REV. 24, 36 (2022) ("The judicial oath obliges judges, as a moral duty, to support the written text that is our Constitution.").

[39] *See generally* Note, *Textualism As Fair Notice*, 123 HARV. L. REV. 542, 557 (2009).

interpretive approach can eliminate the possibility of judicial error. But textualism is far less error-prone than its two competitors.

Compare it, first, with judicial updating. While textualism confines judges to our narrow sphere of expertise and training (the interpretation and application of legal texts), judicial updating invites judges to opine on all sorts of abstract and far-reaching political, social, and economic questions outside the judicial wheelhouse. There's a reason that the People elect *legislators* to formulate public policy, and there's every reason to think they are better at it and better situated to be accountable for those choices than judges are.

Now consider purposivism. Unlike judicial updating, purposivism correctly recognizes that policy judgments belong to the legislative branch. But purposivism goes astray by misunderstanding what "the legislative branch" is and does. Purposivists assume that, since legislators have the power to make law, the law must be defined as whatever legislators wanted it to be, whether they express their desires in the text or not. Thus, for a purposivist, the meaning of a law's text is only *evidence* of the law's true meaning—and the text-based evidence can be overcome by legislative history or other subjective-intent evidence (such as amicus briefs filed on behalf of legislators) indicating that the legislators *wanted* the law to mean something other than what the law actually says.[40] As explained above, that view is wrong as a matter of first principles: our constitutions authorize the enactment of texts, not the enactment of intentions.[41] But even setting aside that objection, the subjective inquiry required by purposivism is inherently unreliable. That is so for several reasons.

For one thing, evidence of legislative purpose is highly vulnerable to strategic manipulation. A legislator who knows that courts will rely on legislators' statements to extend (or limit) a statute beyond its text can easily mislead judges by asserting—either in the legislative record or in amicus briefs—that the proposed law enacts his policy preferences, even if he knows those preferences are not shared by his colleagues.

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[40] *See, e.g.,* David K. Ismay & M. Anthony Brown, *The Not So New Textualism: A Critique of John Manning's Second Generation Textualism*, 31 J.L. & POL. 187, 190–91 (2015) (defending purposivism by arguing that "purposivists, who are more willing to consult the full range of available evidence of statutory intent, are more likely to discern what Congress was actually trying to accomplish when passing a statute").

[41] *See* Easterbrook, *supra* note 30, at 82 ("Intents are irrelevant even if discernible (which they aren't), because our Constitution provides for the enactment and approval of texts, not of intents. The text is not evidence of the law; it *is* the law."); SCALIA AND GARNER, *supra* note 1, at 397–98 (objecting to the "false notion" that a statute's text is merely "evidence" of legislative intent).

A deeper problem is that evidence of subjective intent is almost always non-representative. Even if we leave aside the possibility of strategic manipulation and assume that all statements made by individual legislators are uttered in good faith, the fact remains that each statement represents the views of only the legislator who made it.[42] Usually only a handful of legislators give statements on a bill, and there is no reason to assume that statements of *those* legislators represent the views of the median, or "swing," legislator—i.e., the views of the legislator whose vote was necessary to ensure the law's passage. If anything, the opposite is true: the legislators most likely to comment on a law are usually those who are either strongly opposed to, or strongly in favor of, its enactment.[43]

Subjective-intent evidence is non-representative in another way, too: it discounts the role of the executive branch. Even perfect evidence of legislators' intent would tell us nothing about the intent of the executive, whose approval (absent legislative override of the executive's veto) is often necessary for a bill to become law.[44] If we care about lawmakers' intents, the executive's intent should matter too, because she is an integral part of the lawmaking process.

And the executive's veto is just one example of the many "veto gates" that are built into the legislative process.[45] There are numerous other ways in which the lawmaking process gives "political minorities extraordinary power to block legislation,"[46] such as committees' drafting rules, the threat of filibuster, and "countless other procedural devices that temper unchecked majoritarianism."[47] The ultimate statutory language that comes out of this process often does not represent a singular coherent purpose. The text, rather, is usually the product of an awkward but carefully crafted compromise. A judge who prioritizes the legislature's perceived overall purpose above the

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[42] *See* State v. $223,405.86, 203 So. 3d 816, 848 (Ala. 2016) (Shaw, J., concurring in the result) (making this point and explaining that "[t]he views of a single legislator are irrelevant").

[43] Easterbrook, *supra* note 30, at 91.

[44] In Alabama, a bill can also become a law without the governor's signature if the governor takes no action on the bill within a certain timeframe. *See* ALA. CONST. art. V, § 125.

[45] Manning, *supra* note 3, at 77.

[46] *Id.*

[47] John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2390 (2005).

ordinary semantic meaning of the enacted text risks undoing the legislative bargain that enabled the law's enactment in the first place.[48]

I've saved the most technical problem with subjective-intent evidence for last. Even if we assume that a judge has perfect information about the mental states of everyone involved in the legislative process, subjective intent *still* would not be a reliable way of giving meaning to a law. That's because there is no principled method judges can rely on for aggregating individual politicians' subjective intentions into a unitary group intention. To see this problem in action, consider the following classic illustration, in which three legislators (1, 2, and 3) enact an ambiguous statute that has three plausible meanings (A, B, and C):

> Legislator 1 prefers A to B to C;
>
> Legislator 2 prefers B to C to A; and
>
> Legislator 3 prefers C to A to B.

Now imagine that you're a purposivist judge trying to decide which meaning the legislature as a whole preferred. You'll quickly run into a problem: In a contest between A and B, A wins 2-1; in a contest between B and C, B wins 2-1; but in a contest between C and A, C wins 2-1. The legislature prefers A to B, prefers B to C, yet—somehow!—prefers C to A. Even though each individual legislator has a rational set of preferences, aggregating those preferences into a unitary "group preference" or "legislative intention" yields an irrational result: an endless cycle with no winner.[49] It is impossible for a judge in such a scenario—even one who knows *everything* about *every* legislator's mental state—to say which preference should control.[50]

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[48] *See* Rodriguez v. United States, 480 U.S. 522, 525–26 (1987) (explaining that "no legislation pursues its purposes at all costs" and rejecting the assumption that "whatever furthers the statute's primary objective must be the law").

[49] *See generally* KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed. 1963) (formally proving that such an irrational result cannot be avoided when three or more individuals are faced with three or more alternatives).

[50] Our legislative voting systems put an end to preference cycling by picking a policy proposal, fixing that proposal to text, and then holding up-and-down votes on each proposal until one gets a majority. The ultimate outcome thus depends on the order in which proposals are considered, which means that the legislators who control the order in which proposals are voted—that is, the legislators who "control the agenda"—have enormous power over which proposal ultimately gets adopted. "The existence of agenda control makes it impossible for a court—even one that knows each

The textualist judge faces no such problem. The textualist judge simply asks which of the possible meanings is the most objectively reasonable and then applies that meaning.[51] Discerning objective meaning isn't always easy, but it is far less fraught than trying to peer into the heads of over a hundred legislators and aggregate their individual desires into a coherent whole.

## II. TEXTUALISM IN THE ALABAMA SUPREME COURT

Since its earliest days, the Supreme Court of Alabama has endorsed textualist principles. But we have not always faithfully applied those principles, and we sometimes describe our interpretive approach in confusing or conflicting ways. A primary goal of this article is to clear up some of that confusion and—when it can't be cleared up—to flag the open questions.

The simplest place to begin is with our modern court's canonical statements of legal interpretation. Below are two typical examples. The first deals with constitutional interpretation, and the second with statutory interpretation. But, as you can see, the fundamental idea in each statement is the same. Start with the constitution:

> [W]e look to the plain and commonly understood meaning of the terms used in [a constitutional] provision to discern its meaning. . . . The object of all construction is to ascertain and effectuate the intention of the people in the adoption of the constitution. The intention is collected from the words of the instrument, read, and interpreted in the light of its history.[52]

Now statutes:

> The cardinal rule of statutory interpretation is to determine and give effect to the intent of the legislature as manifested in the language of the

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legislator's complete table of preferences—to say what the whole body would have done with a proposal it did not consider in fact." Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547–48 (1983).

[51] If all three meanings are equally plausible, the textualist judge must turn to some other rule of decision, such as the "rule that a tie goes to the defendant," Tellabs, Inc. v. Makor Issues & Rts., Ltd., 551 U.S. 308, 330 (2007) (Scalia, J., concurring in the judgment), or the rule that unintelligible laws are inoperative, *see* SCALIA & GARNER, *supra* note 1, at 134; *cf.* Easterbrook, *supra* note 30, at 82 ("When texts run out of meaning, we should put them down and go to other sources of law, rather than invent things in their name.").

[52] Barber v. Cornerstone Cmty. Outreach, Inc., 42 So. 3d 65, 79 (Ala. 2009) (quoting State v. Sayre, 24 So. 89, 92 (Ala. 1897)); *see generally* Clint Bolick, *Principles of State Constitutional Interpretation*, 53 ARIZ. ST. L.J. 771 (2021) (explaining that state constitutions must be interpreted according to the meaning those provisions bore to the ratifying public *in that state*, and cautioning against interpreting state constitutions in lockstep with the federal Constitution).

> statute. . . . Words must be given their natural, ordinary, commonly understood meaning, and where plain language is used, the court is bound to interpret that language to mean exactly what it says.[53]

These formulations may seem simple enough at first glance, but they contain some nuances that can trip up unwary litigants. A few aspects of our interpretive approach, in particular, deserve unpacking.

*A. The Role of "Intent"*

The most common stumbling block for Alabama litigants involves our court's use of the word "intent." As the two quotations above illustrate, our caselaw routinely asserts that the goal of legal interpretation is to ascertain the law's "intent," which sometimes leads litigants to assume that our court endorses purposivism.[54] In fact, the opposite is true. As the quotes above go on to explain, the only "intent" Alabama courts are supposed to consider is the intent "manifested in the language" or "words" of the law.[55] That qualification is crucial. It means that the process of ascertaining a law's "intent" is an objective exercise focused on the statute's text, not a subjective one focused on lawmakers' unexpressed goals or desires. Our court has spelled out that point many times over the centuries. As far back as 1890:

> The office of construction is to ascertain what the language of an act means, and not what the Legislature may have intended. "Index animi sermo."[56] *The court knows nothing of the intention of an act, except from the words in which it is expressed, applied to the facts existing at the time; the meaning of the law being the law itself.*[57]

And again in 2020:

> *The intention of the Legislature, to which effect must be given, is that expressed in the act*, and the courts will not inquire into the motives which influenced the Legislature or individual members in voting for its passage, nor indeed as to the intention of the draftsman or of the Legislature so far as it has not been expressed in the act. So in ascertaining the meaning of an act the court

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[53] Swindle v. Remington, 291 So. 3d 439, 457 (Ala. 2019) (quoting *Ex parte* State Dep't of Revenue, 683 So. 2d 980, 983 (Ala. 1996)).

[54] Recall that purposivism is the belief that the meaning of a law is determined by the lawmakers' intentions, purposes, or goals rather than by the objective indication of the law's words. Accordingly, purposivists prioritize a law's (perceived) animating purpose over its text. *See supra* Part I.

[55] *See supra* notes 52–53 and accompanying text.

[56] "Speech is the indication of the mind."

[57] Maxwell v. State, 7 So. 824, 827 (Ala. 1890) (emphasis added).

> will not be governed or influenced by the views or opinions of any or all of the members of the Legislature, or its legislative committees or any other person.[58]

The upshot here is that when our caselaw speaks about the "intent" of a law, it is usually describing the intent that a reasonable member of the public would ascribe to a reasonable lawmaker, based simply on reading the law's text in context. Alabama courts do not—or, at least, are not supposed to—inquire about *actual* legislators' subjective goals or purposes.[59] When a law's objective semantic meaning diverges from the subjective intentions of the legislators who enacted it, only the former governs; the latter is irrelevant.[60] If the rule were otherwise, judges could decide legal disputes by taking legislative opinion polls and ignore enacted text entirely.[61]

Our court's reliance on an objective concept of intent "track[s] a long tradition of discerning intent 'solely on the basis of the words of the law,'" read objectively in light of their context, "and not by investigating any other source of information about the lawgiver's purposes."[62] Even so, I try to avoid the term "intent" when I write judicial opinions because I'm concerned it has become a source of confusion. Many modern-day lawyers—including some appellate lawyers—are unfamiliar with the technical, objective sense in which judges have long used that word, so they mistakenly equate any talk of "intent" with *subjective* intent or purposivism. That mistake leads them to argue for their preferred interpretation by appealing to legislators' subjective goals, beliefs, or purposes (usually by arguing that a contrary result would

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[58] State v. Epic Tech, LLC, 323 So. 3d 572, 597 (Ala. 2020) (quoting James v. Todd, 103 So. 2d 19, 28–29 (Ala. 1957)) (emphasis added) (internal alteration marks omitted).

[59] Bynum v. City of Oneonta, 175 So. 3d 63, 69–70 (Ala. 2015) ("[I]n ascertaining the meaning of a statute the court will not be governed or influenced by the views or opinions of any or all of the members of the Legislature, or its legislative committees or any other person"); *see also* Manning, *supra* note 3, at 83 (explaining that the "reasonable lawmaker" is an "idealized, rather than actual, legislator").

[60] *See, e.g.*, Fulton v. State, 54 So. 688, 689 (Ala. 1911) ("[I]f the intention of the lawmakers has not been carried into effect by the language used, it is better that we should abide the words of the statute, than to reform it according to the supposed intention.").

[61] *See* Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 65 (1988) ("Imagine how we would react to a bill that said, 'From today forward, the result of any opinion poll among members of Congress shall have the effect of law.' We would think the law a joke at best, unconstitutional at worst. This silly 'law' comes uncomfortably close, however, to the method by which courts deduce the content of legislation when they look to subjective intent.").

[62] Pryor, *supra* note 38, at 36 (quoting H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 895 (1985)).

amount to poor public policy and thus would be inconsistent with legislators' desires) rather than by analyzing the statute's objective semantic meaning. I think that judges could probably avoid most of that confusion if we spoke more in terms of "meaning" and less in terms of "intent." "Meaning" is clearer,[63] more intuitive to most litigants, and serves as a useful reminder that legislators' private intentions—even if they were knowable (which they usually aren't[64])—are not law.

*B. Interpreting Language As "Commonly Understood"*

A second common pitfall involves the rule that judges must give a law's words their "natural," "ordinary," or "commonly understood meaning." Some litigants assume this rule requires a mechanistic or hyperliteral approach to legal interpretation. Again, that assumption is mistaken.

When judges say words should be given their "ordinary" meaning, we do not mean that each word in a text always takes its literal meaning or its most statistically-common meaning. We mean instead that words must be given the meaning that an ordinary reasonable person would ascribe to them after reading them in context. The reasonable person is not a robotic literalist, so a textualist cannot be either.[65] Textualists understand that words do not exist in a vacuum and that sometimes contextual clues reveal that a term carries an idiomatic or technical meaning as opposed to a more common meaning.

To see this principle in action, consider two scenarios. In the first scenario, the legislature passes a statute containing a single provision, which criminalizes "deliberate importation or introduction of new viruses into the State of Alabama." Every court would hold that the text's ordinary meaning prohibits people from intentionally bringing new infectious diseases into the state.

In the second scenario, the legislature enacts the same text, but this time as part of the Alabama Cybersecurity Act, in which every other provision deals with computer crimes. This time, every court (and every reasonable citizen)

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[63] *See* Frankfurter, *supra* note 28, at 538–39 ("it is better to use a less beclouding characterization" than the word "intent"); Easterbrook, *supra* note 30, at 81 ("At the same time as the Justices tell us to pay heed to the 'intent' of Congress, they concede that 'intent' is empty and that meaning is objective.").

[64] *See supra* Part I.B.

[65] *See*, *e.g.*, Franchise Tax Bd. of Cal. v. Hyatt, 139 S. Ct. 1485, 1498 (2019) (Thomas, J.) (condemning "ahistorical literalism"); Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1825 (2020) (Alito, J., dissenting) ("As Justice Scalia explained, 'the good textualist is not a literalist.'" (quoting SCALIA, *supra* note 5, at 24)).

would recognize that the word "virus" carries its idiomatic meaning of "malicious software" rather than its more common meaning of "biological disease." In both instances, the meaning of the law is clear to any reasonable reader, even though the meaning is different in the second scenario than in the first. Context does all the work.

It bears repeating here that the contextual inquiry is an objective one. Judges care about context because it affects how a reasonable reader would understand the text, not because it reveals the inner workings of legislators' minds. To stick with the "virus" example: In the first scenario, where the no-new-viruses law was passed in isolation, courts would (correctly) refuse to consider evidence that legislators subjectively intended "virus" to mean "computer virus," because the latter meaning is nonstandard and is unsupported by any contextual clues. Even if a survey showed that *every single* legislator privately intended "virus" to mean "computer virus" it would not matter—under our constitutions, intentions are not laws, only texts are.[66] Likewise, in the second scenario, courts would refuse to consider evidence indicating that legislators secretly wanted "virus" to mean "biological disease," because no reasonable person would assume that the word "virus" carries its biological meaning when used in the context of a computer-crimes act. In both cases, the subjective intent of legislators is irrelevant. All that matters is how a reasonable reader would interpret the text in context. That is what our court means when it says that a text's "normal" or "plain" meaning "'may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens . . . .'"[67]

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[66] *See Bynum*, 175 So. 3d at 69 ("[I]n ascertaining the meaning of a statute the court will not be governed or influenced by the views or opinions of any *or all* of the members of the Legislature. . . ."); *see also* Young Americans for Liberty v. St. John IV, No. 1210309, 2022 WL 17073690, at *14 (Ala. Nov. 18, 2022) (Mitchell, J., concurring in part and concurring in the result) ("[T]he subjective intentions that animate a law are not the law; only the text of a law is the law."); *$223,405.86*, 203 So. 3d at 848 (Shaw, J., concurring in the result) ("'[T]o seek the intent of the provision's drafters or to attempt to aggregate the intentions of [the] voters into some abstract general purpose underlying the Amendment, contrary to the intent expressed by the provision's clear textual meaning, is not the proper way to perform constitutional interpretation.' . . . The words of a law must speak for themselves.") (citation omitted).

[67] *Barber*, 42 So. 3d at 79 (quoting District of Columbia v. Heller, 554 U.S. 570, 576–77 (2008)).

*C. "Construction" and the Canons*

Like all courts, the Alabama Supreme Court relies on canons of construction to aid our textual interpretation. A canon of construction is any "principle that guides the interpreter of a text."[68] If that definition sounds broad, that's because it is. Canons are rules of thumb that describe how people interpret texts, so *every* principle of interpretation is a canon.[69]

At a high level, canons of construction can be sorted into two buckets: descriptive and prescriptive. Descriptive canons, as their name suggests, help judges (indeed, all readers) ascertain the most plausible meaning of a text by describing how English text is ordinarily understood. Descriptive canons encompass all rules of grammar, usage, and context that help a reader understand what a text means.[70] Familiar examples include the general/specific canon (if there is a conflict between a general law and a specific law, the specific law prevails), the associated-words canon (words in a list bear on each other's meaning), and the gender/number canon (abstract masculine pronouns include the feminine, abstract singular nouns include plural nouns, and vice versa). While there are many varieties of descriptive canons—"semantic," "syntactic," "contextual," and so on—the ultimate point of each is the same: to describe how reasonable English speakers use and understand our language, including legal language.

Prescriptive canons are different. Prescriptive canons do not tell judges how to ascertain the most plausible meaning of a text; instead, they tell judges how to choose between multiple (already-ascertained) possible meanings. Some of the so-called substantive canons fall into this bucket,[71] with the most

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[68] *Canon*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[69] Karl Llewellyn once argued that canons have limited utility because "there are two opposing canons on almost every point." Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401 (1950). Textualists often dispute Llewellyn's critique by pointing out that many of the "canons" he cites are not actually canonical at all (in the sense of being well established), but rather are simply obscure, silly, or widely-contradicted judicial assertions. *See* SCALIA & GARNER, *supra* note 1, at 59–62.

[70] *See generally* SCALIA & GARNER, *supra* note 1 (cataloguing several of these canons).

[71] But perhaps not all. It seems plausible to me that some of the so-called clear-statement canons—which often get tagged with the "substantive canon" or "normative canon" label—serve a semantic purpose rather than a normative purpose. There are perhaps dozens of clear-statement canons, but to give a few well-known examples: judges usually require laws to contain a "clear statement" before interpreting the law to delegate vast power to an administrative agency; to strip courts of jurisdiction; to create new private causes of action; to override a state's sovereign immunity; to apply retroactively; or to derogate a longstanding common-law rule. Each of these clear-statement

notable examples being the federal doctrine of *Chevron* deference,[72] and Alabama's parallel doctrine that judges should defer to an agency's interpretation of a statute that the agency is charged with enforcing,[73] even if the agency's interpretation "may not appear as reasonable as some other interpretation."[74]

Canons of construction undergird all interpretation, but not all canons are equally useful—some may be entirely illegitimate[75]—and no canon is absolute.[76] Litigants often go astray by treating canons as algorithms rather than guideposts.[77] It is not enough to recite a canon, assert its applicability, and declare the case won. The difficult work of legal interpretation lies in

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canons reflects the universal intuition that texts—including legal texts—aren't usually interpreted to require highly unusual or drastic results unless the text says so in unmistakably clear terms. Properly applied, then, many clear-statement canons may simply provide guidance on what a text is most plausibly understood to mean in light of this country's legal history and tradition; they do not (or, at least, need not and should not) tell judges to discard the most plausible meaning in favor of a less-plausible meaning.

[72] *See generally* Chevron v. Nat. Res. Def. Council, 467 U.S. 837 (1984). There is some dispute about whether *Chevron* deference is best described as a "canon" or as something else. *See generally* Kristin Hickman, *Categorizing* Chevron, 81 OHIO ST. L.J. 611 (2020). But the doctrine plainly fits within the definition of canon provided by Black's, because it is a "principle" that purports to "guide[] the interpreter of a text." *See supra* note 68.

[73] *See Ex parte* Chestnut, 208 So. 3d 624, 640 (Ala. 2016).

[74] Kids' Klub, Inc. v. State Dep't of Hum. Res., 874 So. 2d 1075, 1092 (Ala. Civ. App. 2003) (citation omitted). Another example of a substantive canon that courts often confront is the *Moses H. Cone* canon, which holds that any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. *See* Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24–25 (1983); *see also* Calderon v. Sixt Rent a Car, LLC, 5 F.4th 1204, 1215 (11th Cir. 2021) (Newsom, J., concurring) (arguing that "the *Moses H. Cone* canon is just made up" and that courts "should rethink it").

[75] *See infra* text accompanying notes 111–15 and Part III.D.

[76] The rule that no canon is absolute is itself a canon. SCALIA & GARNER, *supra* note 1, at 59 ("No canon of interpretation is absolute."). So a more precise statement would be "No canon is absolute, except for this one."

[77] *See, e.g.*, Facebook, Inc. v. Duguid, 141 S. Ct. 1163, 1175 (2021) (Alito, J., concurring in the judgment) ("Canons of interpretation can help in figuring out the meaning of troublesome statutory language, but if they are treated like rigid rules, they can lead us astray."); Heyman v. Cooper, 31 F.4th 1315, 1323 (11th Cir. 2022) (Newsom, J.) ("[L]ike all tools, the canons are sometimes of limited utility. When that's true, we shouldn't stubbornly insist on pounding square pegs into round holes. If we do, we're likely to do more harm than good. Our obligation remains to the duly enacted text.").

analyzing the canon's relevance to the case at hand and the extent to which it is complemented—or contradicted—by other indicia of meaning.[78]

An example from one of our recent cases illustrates the point nicely. Alabama's Workers' Compensation Act provides that certain settlement agreements become irrevocable "unless within 60 days after the agreement is signed . . . the court on a finding of fraud, newly discovered evidence, or other good cause, [relieves] all parties of the effect of the agreement."[79] The question before our court in *Ex Parte ACIPCO*[80] was whether a settlement contract could be set aside after the 60-day period based on a finding of mental incompetence. The insurance company thought not. In its view, mental incompetence is a form of "other good cause" for setting aside an agreement, and so is included within the types of claims that are subject to the 60-day deadline. The injured worker disagreed, pointing to a different provision of Alabama law, § 8-1-170, which says that contracts entered into by incompetents are void at the outset and cannot be enforced. The insurer responded by citing the "general/specific canon," which provides that when two statutory provisions conflict, the specific provision trumps the general. The insurance company correctly identified and described the general/specific canon, but the parties—and the court—disagreed about how to apply that canon.

To start, there was disagreement over which statute is the "general" and which is the "specific." The workers' compensation statute is more specific with respect to workers' compensation settlements, but the incompetency statute is more specific with respect to contracts by incompetent persons. In a case involving the effect of mental incompetency on a workers' compensation settlement, which type of specificity matters more? The answer is not immediately obvious, and good arguments could be (and were) made on both sides.

Even assuming that the workers' compensation statute is more specific—and therefore trumps the incompetency statute in the event of a conflict—that still leaves the question whether the two statutes really do conflict with

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[78] The brilliant 19th-century English jurist James Fitzjames Stephen once quipped that canons of construction should be called "minims than maxims," because "the exceptions and disqualifications to them are more important than the so-called rules" themselves. 2 JAMES FITZJAMES STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 94 n.1 (London, Macmillan & Co. 1883).

[79] ALA. CODE § 25-5-292 (1975).

[80] *Ex parte* Am. Cast Iron Pipe Co. (*Ex parte ACIPCO*), No. 1200500, 2022 WL 4395533 (Ala. Sept. 23, 2022).

each other. In her opinion for the court, Justice Sarah Hicks Stewart explained that there was no conflict because the incompetency statute and the workers' compensation statute could be read harmoniously.[81] She pointed out that both statutes are compatible with the common-law doctrine that an "agreement" requires mutual assent: since mentally incompetent people lack capacity to assent, the injured worker's settlement contract was never a legally valid "agreement" under either statute, and thus was not subject to the 60-day deadline under the workers' compensation statute.[82] Justice William B. Sellers's dissenting opinion took a different view about the definition of "agreement" and the applicability of the general-specific canon,[83] which goes to show that even after extensive briefing and argument, judges can disagree about whether and how canons apply. The case also illustrates why it's crucial for litigants to know the canons and their limitations.

Ten years ago, Justice Scalia and the renowned linguist Bryan Garner wrote a book on textualist methodology called *Reading Law*, which highlights fifty-seven of the most important canons, provides prototypical examples of when they apply (or don't), and gives advice about how to weigh them in the event of a conflict or tension between the canons. Perhaps most helpfully of all, *Reading Law* also refutes over a dozen false canons—interpretive rules that lawyers or judges often invoke but which lack any solid foundation.[84] Our court, along with the Supreme Court of the United States and courts within the Eleventh Circuit, has cited *Reading Law* numerous times.[85] It is a resource that I and many other jurists turn to when we are confronted with a difficult interpretive question.[86]

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[81] *Id.* at *5.

[82] *Id.* at *5–6.

[83] *See id.* at *7–8 (Sellers, J., dissenting).

[84] *See* SCALIA & GARNER, *supra* note 1, at 341–410.

[85] By my count, there are over 400 opinions citing *Reading Law* from our court, the Supreme Court of the United States, and courts within the Eleventh Circuit—though some of these citations come from special writings rather than main opinions.

[86] Last year, my law clerks and I put together a field guide that indicates whether and to what extent our court has relied on (or rejected) each of the canons described in *Reading Law*. I've included that document as an appendix to the original version of this article, in the hopes that Alabama judges and practitioners might find it useful. *See* Jay Mitchell, *Textualism in Alabama*, 74 ALA. L. REV. 1089, 1117 (2023), *available at* https://www.law.ua.edu/lawreview/files/2023/05/4-Mitchell-1089-1133.pdf. I urge readers from other states to consider compiling similar documents for their own jurisdictions.

*D. Alabama's Plain-Meaning Rule: "Construe Only If Ambiguous"*

All this discussion about canons of construction brings us to another feature of textualism in Alabama: the so-called "plain-meaning rule." The plain-meaning rule is a canon created by judges, for judges. It essentially says that courts shouldn't resort to "judicial construction" when interpreting a law if the law's text is "unambiguous."[87] Or, to put the same point differently, if the text's meaning is "plain" then "there is no room for judicial construction."[88]

The plain-meaning rule is often described as the most important feature of textualism in Alabama,[89] but the meaning of that rule is—well—not exactly plain.[90] Several features of the rule can make it difficult for litigants (and judges) to navigate.

To begin, the name of the rule itself is confusing. The "plain-meaning rule," as our court has described it, is *not* the same thing as the principle, discussed in Part II.B, above, that words should be given their "plain" (as in, "natural" or "commonly understood") meaning. Rather, according to our Court, the plain-meaning rule functions as a bar on certain types of outside sources by telling judges not to consider those sources unless the law's "plain" (as in "clear" or "obvious") meaning is ambiguous.[91] The rule effectively operates in Alabama as a two-step injunction:

> Step 1: Read the text and decide—without engaging in "construction"—whether the meaning of the text is plain.

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[87] *Ex parte* McCormick, 932 So. 2d 124, 132 (Ala. 2005).

[88] *Id.*

[89] *See* Marc James Ayers, *Unpacking Alabama's Plain-Meaning Rule of Statutory Construction*, 67 ALA. LAWYER 31, 32 (2006) ("In Alabama, while all of the various canons are certainly recognized, one has achieved 'primary' status: the Plain Meaning Rule.").

[90] Something similar may be true of the version of the "plain-meaning rule" applied in federal courts. *See, e.g.*, Arthur W. Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299, 1308 (1975) (arguing that federal "courts have no clear idea about what the plain meaning rule is . . . . Indeed, it frequently seems that some courts feel that recitation of the plain meaning rule in one of its forms is a compulsory rite, the meaning of which is lost in antiquity" and which "is essentially meaningless" in practice).

[91] *See* DeKalb County LP Gas Co. v. Suburban Gas, 729 So. 2d 270, 275 (Ala. 1998) ("If the language of the statute is unambiguous, then there is no room for judicial construction. . . ."); *id*. at 277 ("[W]e must look first to the plain meaning of the words the legislature used. We should turn to extrinsic aids to determine the meaning of a piece of legislation only if we can draw no rational conclusion from a straightforward application of the terms of the statute.").

> Step 2: If the meaning is plain, apply it. If not, resort to judicial "construction" to help illuminate its meaning.

That formulation raises two additional difficulties. The first is that the rule seems circular. Any act of ascribing meaning to words requires the reader to construe those words.[92] Telling a judge "don't construe a statute unless it's ambiguous," is a bit like telling your accountant, "don't check my math unless it's wrong." Neither command makes much sense. Just as your accountant can't know whether your math is wrong until she's checked it, a judge can't know what a law means—let alone whether that meaning is "plain"—until he's construed it.

The way our court has avoided this circularity is by tacitly drawing a distinction between "interpretation" on the one hand, and "construction," on the other. Interpretation—that is, the bare act of looking at written words and intuiting their meaning—is something all people do automatically whenever we read language. But "construction" (at least for purposes of our court's plain-meaning-rule cases) involves something extra—some additional work or some extra considerations on the part of the judge—which judges are supposed to avoid unless the text is ambiguous.

So what is the plus-factor that transforms (necessary) interpretation into (forbidden) construction? Our precedents do not give a clear answer. Some of our cases seem to indicate that a judge is engaged in forbidden "construction" whenever he consults any source other than the isolated statutory provision.[93] Other cases suggest that the plain-meaning rule prevents judges from engaging in policy considerations or consulting subjective-intent evidence unless the text is ambiguous, but that it does not prohibit judges from considering sources that shed light on the text's objective semantic meaning (such as historical context, related statutory

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[92] *Construe*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("To analyze and explain the meaning of"); *see also* SCALIA & GARNER, *supra* note 1, at 13–15 (explaining that "construction" and "interpretation" are "interchangeabl[e]").

[93] *See, e.g.*, *DeKalb County LP Gas*, 729 So. 2d at 276–77 (declaring several semantic canons, including the rule that all provisions of a statute should be construed together, off-limits to judges unless the provision read in isolation is ambiguous).

provisions, semantic canons of construction, and so on).[94] That inconsistency permeates our plain-meaning-rule jurisprudence.[95]

The second difficulty with the plain-meaning rule is that there is no agreed-upon threshold for determining whether a statute's meaning is ambiguous.[96] Justice Brett Kavanaugh once observed that some judges "apply something approaching a 65-35 rule," meaning that if the judges are moderately confident in their understanding of a statute's meaning then they will declare the statute "clear and reject reliance on [post-interpretive] canons."[97] Meanwhile, other judges "apply more of a 90-10 rule," requiring a statute's meaning to be *overwhelmingly* obvious before they are willing to "call it clear."[98] As far as I can tell, our court has never explored this issue.

I discuss the plain-meaning rule more below, but for now the key takeaway is that the rule, whatever its drawbacks, is unavoidable in Alabama law. Litigants must be prepared to discuss the rule and its application anytime there's a dispute about statutory or constitutional interpretation. Marc Ayers has published an excellent practitioner's guide on the plain-meaning rule, in which he explains that Alabama litigants who want to rely on an external source or canon to advocate for their preferred interpretation of a text typically must convince the court either that: (1) the source or canon is a tool to determine the text's plain meaning, rather than a gloss applied on top of (or in contravention to) that plain meaning; or (2) the text is ambiguous on its face; or (3) the text is incoherent or absurd on its face.[99] That guide was published almost two decades ago, but it is still—and, barring a major shift

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[94] *See, e.g.*, State Farm Fire & Cas. Co. v. Lambert, 285 So. 2d 917, 918 (Ala. 1973) (holding that questions of statutory interpretation "cannot be answered apart from the historical context within which the statute was passed"); Bean Dredging, L.L.C. v. Ala. Dep't of Revenue, 855 So. 2d 513, 517 (Ala. 2003) (stating that interpretation requires courts to read statutes "as a whole," rather than reading single provisions in isolation); Winner v. Marion Cnty. Comm'n, 415 So. 2d 1061, 1064 (Ala. 1982) (applying a semantic canon—the associated-words canon—without a threshold finding of ambiguity); *Ex parte* Emerald Mountain Expressway Bridge, L.L.C., 856 So. 2d 834, 843 (Ala. 2003) (applying a clear-statement canon before making a threshold determination of ambiguity).

[95] *See* Ayers, *supra* note 89, at 36 n.5 (giving examples of cases that purport to rely on *DeKalb County* yet reach a contrary result).

[96] United States v. Turkette, 452 U.S. 576, 580 (1981) ("[T]here is no errorless test for identifying or recognizing 'plain' or 'unambiguous' language."); *see also, e.g.*, Easterbrook, *supra* note 61, at 62 ("There is no metric for clarity.").

[97] Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2137–38 (2016) (book review).

[98] *Id.*

[99] *See generally* Ayers, *supra* note 89.

in our jurisprudence, will long remain—an important tool for navigating the plain-meaning rule in this state.

## III. ONGOING DEBATES AND OPEN QUESTIONS

No article about textualism in Alabama would be complete if it didn't acknowledge the gaps and incongruities in our court's jurisprudence. Below is a list of some particularly important unresolved questions about how our court does—or should—approach legal interpretation. My hope is that practitioners and scholars will keep these questions in mind and, in appropriate cases, suggest sensible answers.

### *A. What Is the Meaning of the Plain-Meaning Rule?*

As just discussed, the plain-meaning rule simultaneously requires a judge to *interpret* a law (which he must do in order to assess whether it is "plain") and prohibits him from *construing* that law (unless it is not "plain"). In order for the plain-meaning rule to make sense, then, there must be some dividing line between ordinary "interpretation," which the rule requires, and "construction," which it restricts. What is that line?

Our earliest cases suggest that the type of "construction" prohibited by the plain-meaning rule was only the type of construction that "enlarged" or "extended" a statute beyond its natural meaning.[100] On that early understanding of "construction," then, the plain-meaning rule may have been just another way of reminding judges not to subordinate a statute's objective semantic meaning to the legislature's perceived background purpose (or to the judge's own policy goals). In other words, "don't make it up."

"Don't make it up" is as unobjectionable a principle as you'll find in the law. Indeed, it captures the entire textualist philosophy in a nutshell. But our

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[100] *See, e.g.*, Nashville & D.R. Co. v. State, 30 So. 619, 622 (Ala. 1901) ("[T]he courts have no power to enlarge or diminish [a statute] by construction or amendment."); E. Tennessee, Va. & Ga. R.R. Co. v. Bayliss, 77 Ala. 429, 434 (1884) ("The statute ought not to be extended by construction to cases not included in its clear and unambiguous terms."); Noles v. State, 24 Ala. 672, 696 (1854) ("This statute . . . may not be enlarged, by construction, beyond the plain import of the terms in which it is couched."); State v. Adams, 2 Stew. 231, 243 (Ala. 1829) (Taylor, J.) (condemning "[t]he practice of extending statutes far beyond their legitimate meaning, indeed of often giving them a construction directly in opposition to the plain intention of those who made them"); *id.* at 246 (Saffold, J.) ("Courts have no authority, in order to carry into effect their own notions of expediency, to extend the operation of statutes, by construction, to persons or things not within their legitimate meaning, though they be equally within their reason."); White v. St. Guirons, Minor 331, 337 (Ala. 1824) ("[A statute's] operation cannot by construction be extended to matter not mentioned.").

modern cases have expanded the plain-meaning rule beyond that simple command. Some of our modern cases seem to assume that the type of "construction" prohibited by the plain-meaning rule is the reliance on *any* source apart from the provision at issue read in isolation.[101] On that view, the plain-meaning rule prohibits judges from relying on "outside" evidence of semantic meaning, even if that outside evidence reveals that a law's original public meaning is different from the meaning that modern judges would ascribe to the law after reading it in isolation. (I have doubts about whether that formulation is coherent in theory or workable in practice; I tend to agree with Judge Henry Friendly that it is "illogical to hold that a 'plain meaning' shuts off access to the very materials that might show it not to have been plain at all."[102])

A competing line of cases suggests that the plain-meaning rule's limitation on "construction" applies only to policy-oriented canons of construction[103]—also called "normative canons" or "substantive canons"[104]—and to reliance on intent-focused evidence,[105] but does not apply to semantic canons. For example, our court has suggested that it is always appropriate to consult related statutory provisions,[106] historical context,[107] and certain clear-statement canons.[108] Under this latter line of cases, then, the plain-meaning rule prohibits judges from entertaining hardship or policy arguments if the

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[101] *See supra* note 93.

[102] *See* William Baude & Ryan D. Doerfler, *The (Not So) Plain Meaning Rule*, 84 U. CHI. L. REV. 539, 548 (2017) (quoting Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, *in* BENCHMARKS 196, 206 (1967)) (internal alteration marks omitted); *see also, e.g.*, Frankfurter, *supra* note 28, at 541 ("If the purpose of construction is the ascertainment of meaning, nothing that is logically relevant should be excluded.").

[103] *See, e.g.*, *Ex parte* Ankrom, 152 So. 3d 397, 419–20 (Ala. 2013) (describing the plain-meaning rule as a restriction on consequentialist or policy-oriented reasoning).

[104] *See supra* Part II.C.

[105] *See, e.g.*, *$223,405.86*, 203 So. 3d at 830–40 (describing the plain-meaning rule as "a response to the constitutional mandate of the doctrine of the separation of powers set out in Art. III, § 43, Alabama Constitution of 1901," and indicating that the rule operates as a bar on "legislative history" and similar subjective-intent-focused evidence).

[106] *See* Ala. Dep't of Revenue v. Greenetrack, Inc., No. 1200841, 2022 WL 2387030, at *7 (Ala. June 30, 2022) (collecting cases).

[107] *See, e.g.*, *Lambert*, 285 So. 2d at 918 (holding that questions of statutory interpretation "cannot be answered apart from the historical context within which the statute was passed").

[108] *See, e.g.*, *Ex parte Emerald Mountain*, 856 So. 2d at 843 (applying an anti-exemption canon without a threshold finding of ambiguity); *Ex parte* Jenkins, 723 So. 2d 649, 651 (Ala. 1998) (applying the anti-retroactivity canon without a threshold finding of ambiguity).

text is unambiguous, but it does not prohibit judges from consulting outside sources that shed light on the text's semantic meaning.

In my own view, this latter line of cases makes more sense than the former. It is also more consistent with our earliest plain-meaning jurisprudence and with the separation-of-powers rationale that is often cited in support of the plain-meaning rule.[109] But it still leaves the question of whether it is *ever* appropriate for judges to decide cases based on either policy considerations or subjective-intent evidence. On the textualist account, policy determinations belong to the legislature alone—and that is true whether a law's text is "ambiguous" or not.[110] Textualists recognize that legislative history and certain "substantive" canons[111] can be used to shed light on the social and linguistic conventions that prevailed at the time of a law's enactment (because those conventions affect the law's original public meaning).[112] But—at least on the typical textualist account[113]—those tools cannot be used to reach a result at odds with the most plausible semantic meaning of the text,[114] nor can they be used to supply meaning to a text that is incoherent.[115]

### *B. What Is a Principled Dividing Line Between "Plain Meaning" and "Ambiguity"?*

By restricting reliance on certain canons to cases of "ambiguity," the plain-meaning rule requires judges to make threshold determinations about whether a statute's language is clear. How much clarity is enough? Our cases don't say. Sometimes our court will try to articulate a standard of clarity by

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[109] *See supra* note 105.

[110] *See* Baude & Doerfler, *supra* note 102, at 541 ("[I]rrelevant information shouldn't become useful just because the text is less than clear.").

[111] *See supra* note 71.

[112] *See* Matter of Sinclair, 870 F.2d 1340, 1342–43 (7th Cir. 1989) (Easterbrook, J.) (explaining that legislative history may be used to illuminate semantic meaning, including by shedding light on how words are typically used in a particular historical context, but cannot be used to show private intent at variance with the text); *see also supra* note 71.

[113] Justice Amy Coney Barrett has argued that the standard textualist account is too quick to discount substantive canons. *See generally* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV 109, 110 (2010) (arguing that certain substantive canons are permissible exercises of "the judicial power" as that phrase was originally understood).

[114] *See* SCALIA AND GARNER, *supra* note 1, at 343 (rejecting "[t]he false notion that the spirit of a statute should prevail over its letter"); *see generally* Bamzai, *supra* note 2 (arguing that the modern substantive principle of deferring to administrative agencies has no basis "in traditional interpretive methodology" or in "the views of the Framers").

[115] *See* SCALIA AND GARNER, *supra* note 1, at 134 ("An unintelligible text is inoperative.").

saying something like, "a statute is ambiguous when it is of doubtful meaning,"[116] but that just raises the same question in different form—how much doubt is enough?

The reality is that most laws that produce litigation are at least a little unclear—at least *somewhat* susceptible to multiple interpretations. This is not to say that all interpretations are equally plausible (they rarely are), just that colorable arguments can often be made on both sides. Litigation is expensive, and most people know better than to throw away a small fortune pursuing pie-in-the-sky legal theories. So if a little bit of unclarity were enough to render a text "not plain," then there wouldn't be much point to the plain-meaning rule because the ambiguity-dependent canons could be invoked in every non-frivolous case.

If a little bit of ambiguity is not enough, how much is? Should courts try to quantify the amount numerically, as Justice Kavanaugh did when he wrote that some judges apply a 90-10 rule while others apply something closer to 65-35?[117] Or perhaps there are other heuristics for assessing clarity, such as whether a competing interpretation has been adopted by other courts (if many other judges disagree about what a statute means, perhaps that in itself is proof that the meaning isn't clear).

If the answer to these questions is that there's no way of drawing a principled and useful dividing line between plain meaning and ambiguity, then perhaps—as Justice Kavanaugh[118] and others[119] have suggested—our court should do away with the plain-meaning rule and replace it with a simpler maxim: "If an outside source helps ascertain the original public meaning, consider it; if not, don't."

### *C. What Assumptions Should Judges Make About the "Reasonable" or "Ordinary" Reader?*

I've now mentioned several times that textualism requires judges to ask themselves how a reasonable person would understand the law's text. That raises an obvious question—what are the attributes of such a person? Is he the average person on the street? Probably not—our cases say he must be

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[116] S & S Distrib. Co. v. Town of New Hope, 334 So. 2d 905, 907 (Ala. 1976).

[117] *See* Kavanaugh, *supra* note 97, at 2137–38.

[118] *Id.*

[119] *See, e.g.*, Baude & Doerfler, *supra* note 102, at 541 ("The plain meaning rule . . . has not been justified, and perhaps cannot be."); Frankfurter, *supra* note 28, at 541 ("If the purpose of construction is the ascertainment of meaning, nothing that is logically relevant should be excluded.").

"reasonably well informed."[120] Fair enough. But what does it mean for a reader to be reasonably well informed? Are judges to assume that a well-informed reader would have consulted a dictionary? Would have consulted case books? Our precedents do not give a clear answer. There is not even a consensus among textualists about this point.[121] But the answer matters a great deal to legal interpretation, particularly when it comes to provisions that employ technical terms whose significance might not be at all apparent to the average person.[122]

*D. Are Certain Descriptive Canons Faulty?*

I've already expressed skepticism about the legitimacy of normative canons and won't rehash those concerns here.[123] The controversy surrounding normative canons is a philosophical one—a fundamental dispute about the scope of judicial power. Descriptive canons do not raise that sort of philosophical concern (everyone agrees that judges can consult objective indicia of meaning when interpreting texts), but they do raise empirical concerns. Because descriptive canons are supposed to be objective, they are only as useful as they are accurate. A rule telling judges "*may* is mandatory, and *shall* is permissive" would qualify as a descriptive canon (because it purports to describe how people use language), but it would be an inaccurate, worse-than-useless one.

In recent years, lawyers and linguists have questioned whether certain well-known descriptive canons accurately capture how people use language. A particular focus of criticism has been the series-qualifier canon, which purports to describe how postpositive modifiers normally attach to antecedents.[124] There may be reasons to doubt the empirical validity of other

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[120] *See, e.g.*, *S & S Distrib. Co*, 334 So. 2d at 907 (quotation marks and citation omitted).

[121] *Compare, e.g.*, Easterbrook, *supra* note 30, at 82 (a law means what the "median voter" would take it to mean) *with* Easterbrook, *supra* note 61, at 61, 65 (a law means what "a skilled, objectively reasonable user of words" who was "thinking about the same problem" as the legislature would take it to mean); *compare* SCALIA AND GARNER, *supra* note 1, at 69 (a law means what "common" people would reasonably understand it to mean) *with id.* at 324 (a law means what "the members of the bar practicing in that field reasonably enough assume" that it means).

[122] One common example of such a term is "person"—a term which, when used in the legal context, almost always includes corporations and other "artificial persons" in addition to human persons.

[123] *See supra* Part III.A.

[124] *See Facebook*, 141 S. Ct. at, 1174 (Alito, J., concurring in the judgment).

canons as well.[125] These empirical concerns are worth taking seriously. They also serve as a useful reminder that litigants must do their homework when they rely on a canon of construction because not all descriptive canons apply in all situations, and some descriptive canons might be so misguided that they should never apply at all.

*E. What Is the Role of Stare Decisis?*

Textualism does not always mesh neatly with stare decisis. Textualism teaches that the text of a law *is* the law. But the doctrine of stare decisis suggests that judicial precedent is also law—perhaps even a higher law. Robust versions of stare decisis, such as the one currently favored by the United States Supreme Court, allow judges to adhere to their past interpretation of enacted text even if the judge realizes that the prior interpretation is objectively wrong. This incongruity is what led Justice Scalia to declare that "stare decisis is not part of my [textualist] philosophy; it is a pragmatic exception to it."[126] Justice Thomas, meanwhile, believes the exception is unwarranted: "If a prior decision demonstrably erred in interpreting such a law," he has argued, "judges should exercise the judicial power—not perpetuate a usurpation of the legislative power—and correct the error. A contrary rule would permit judges to 'substitute their own pleasure' for the law."[127]

My experience indicates that, in practice, the Alabama Supreme Court tends to adhere more closely to Justice Thomas's approach to stare decisis, though we haven't said so explicitly. Just last year, we overruled multiple precedents because litigants demonstrated that those precedents were "not

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[125] Judges often disagree about the semantic weight that should be attached to a statute's title. *Compare, e.g.*, Yates v. United States, 574 U.S. 528, 552 (2015) (Alito, J., concurring in the judgment) *with id*. at 558-59 (Kagan, J., dissenting); *see also* Tobias A. Dorsey, *Some Reflections on* Yates *and the Statutes We Threw Away*, 18 GREEN BAG 2D 377, 379, 386–90 (2015) (noting that all parties and all the justices in *Yates* overlooked a federal law that prohibits courts from assigning interpretive weight to a statute's title); *Ex parte* N.G., 321 So. 3d 655, 661 (Ala. 2020) (Mitchell, J., dissenting) (making a similar point with respect to Alabama's statutory prohibition on assigning interpretive value to titles and headings). To give another example, I recently questioned whether courts' heavy reliance on the prior-construction canon is appropriate and noted some circumstances in which that canon "may not be justified" as an empirical matter. *Ex parte* Mobile Pub. Libr., No. SC-2022-0450, 2022 WL 4007503, at *2 n.2 (Ala. Sept. 2, 2022) (Mitchell, J., concurring specially).

[126] SCALIA, *supra* note 5, at 140.

[127] Gamble v. United States, 139 S. Ct. 1960, 1985 (2019) (Thomas, J., concurring) (quoting THE FEDERALIST NO. 78 (Alexander Hamilton)).

supported by the text,"[128] "not plausible" readings of the text,[129] or impermissibly "substitute[d] our [court's] judgment for that of the Legislature."[130] Even so, some of our older decisions describe stare decisis as a doctrine of "great[] potency," and have indicated that our court may choose to prioritize its own precedents over enacted text if it wishes.[131] These conflicting approaches have not been reconciled, so the key questions about the limits of stare decisis—"Is the doctrine legitimate with respect to cases interpreting statutory and constitutional text?[132] And if so, in what circumstances?"—call out for definitive resolution.

## IV. CONCLUSION

In this article, I have provided an overview of textualism and done my best to explain how textualist principles have been applied by the Alabama Supreme Court. But for any questions this article may have answered, many more remain. I've flagged some of these open questions in Part III, above, but that section is not exhaustive. By thinking carefully about such questions and proposing sensible answers to them, practitioners and scholars can help courts refine legal interpretation in Alabama and, I hope, across the nation.

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[128] *Ex parte* Pinkard, No. 1200658, 2022 WL 1721483, at *5 (Ala. May 27, 2022).

[129] State v. Grant, No. 1210198, 2022 WL 4115310, at *6 (Ala. Sept. 9, 2022).

[130] *Id.* (internal quotation and alteration marks omitted).

[131] *See, e.g.,* Hexcel Decatur, Inc. v. Vickers, 908 So. 2d 237, 242 (Ala. 2005) (refusing to consider whether prior precedent was erroneous because "[i]n a contest between the dictionary and the doctrine of stare decisis, the latter clearly wins") (quotation marks and citation omitted).

[132] A more robust version of stare decisis may be appropriate in common-law cases, because "the common law included 'established customs,'" and common-law judges were required to issue judgments "according to the known . . . customs of the land." *Gamble*, 139 S. Ct. at 1982–83 (2019) (Thomas, J., concurring) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *68–69 (1765)) (internal alteration marks omitted). In other words, judges in common-law cases generally were expected to adhere to longstanding precedents because those precedents helped form the law the judges were tasked with applying. *Id.* at 1983 (Thomas, J., concurring). But even "the common law did not view precedent as unyielding when it was 'most evidently contrary to reason' or 'divine law.'" *Id.* (quoting 1 BLACKSTONE, COMMENTARIES *69–70).

# IS CONGRESS A SALVAGEABLE INSTITUTION?*

TED HIRT**

A review of PHILIP A. WALLACH, WHY CONGRESS (Oxford University Press 2023)

Constitutional law scholars and practitioners have focused substantial attention on the imbalances in power among the three branches of our federal government. Many conservative writers are troubled by the increasing reach of administrative agencies and by an expansive presidency.[1] Other writers, on both the Left and the Right, bemoan the power of the Supreme Court to effect societal changes.[2] Lurking in the background is a central question: why is Congress, the legislative branch of the government, not asserting its rightful place in our system of governance? By default, the executive branch and the federal judiciary aggressively fill the gap in lawmaking and thereby govern the lives of American citizens with little accountability. In *Why Congress*, Philip A. Wallach provides a fresh perspective on this debate.[3] He makes a strong case that Congress can, and must, reassert its primacy as the national policymaker.

Wallach brings considerable expertise to this important task. He is a Senior Fellow at the American Enterprise Institute, where he studies separa-

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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.*, RICHARD A. EPSTEIN, THE DUBIOUS MORALITY OF MODERN ADMINISTRATIVE LAW (2020).

[2] *See e.g.*, Brad Snyder, *The Supreme Court Has Too Much Power and Liberals Are to Blame*, POLITICO, July 27, 2022, https://www.politico.com/news/magazine/2022/07/27/supreme-court-power-liberals-democrats-00048155.

[3] PHILIP A. WALLACH, WHY CONGRESS (2023).

tion-of-powers issues. Before joining AEI, Wallach was a Senior Fellow in governance studies at the Brookings Institution, where he authored *To the Edge: Legality, Legitimacy, and the Responses to the 2008 Financial Crisis*. He was also affiliated with the R Street Institute, and he served as a fellow with the House Select Committee on the Modernization of Congress in 2019. Wallach has a Ph.D. in Politics from Princeton University.

## I. THE ESSENTIAL QUESTION – WHY CONGRESS?

Wallach's thesis is that Congress is the unique institution in which Americans can and should reconcile their often divergent judgments about and interests in national policy. In other words, Congress "must be a place where many voices find ways to harmonize."[4] Wallach acknowledges that Congress, like our country at large, is deeply polarized and sometimes balks at enacting laws. But he contends that Congress has flexibility to adjust to various interests, and that when it works, its "fluctuating coalitions act as engines of national cohesion, and our representatives are able to make regular adjustments to the demands of a changing world."[5] Congress also faces a dual challenge. On the one hand, the Senate and the House each must determine how "to organize themselves to corral our nation's dizzying diversity of interests rather than be stampeded by them."[6] But both bodies also must "resist the urge to achieve consensus by means of suppressing or excluding diverse voices."[7]

Wallach also believes that the critics of Congress who deride its inefficiency, particularly when compared to the executive branch, miss several important points. Congress is "drawn from the whole of our diverse, factious country" and therefore "can forge a sense of national identity."[8] The critics also ignore the values that our representative government serves, including "building coalitions, generating trust, and creating real political accountability."[9] He points out that members of Congress can craft compromises, particularly when legislators encounter "unexpected issues" that cause political opponents to find common cause, and they can build trust to re-

[4] Wallach *supra* note 3, at 1.
[5] *Id*. at 3.
[6] *Id.* at 16.
[7] *Id.*
[8] *Id.* at 40.
[9] *Id.* at 41.

solve the specific problem.[10] He also notes that the "continuous nature" of a representative assembly builds in incentives to cooperate; the "mutual give-and-take across the whole range of issues allows accommodation of different groups' most intense preferences, while also allowing the 'losers' in one round of bargaining to keep faith with a larger process they trust will serve them in another round."[11]

Congress traces its origins to the English Parliament, an institution that evolved over many centuries. After the 1215 Magna Carta, it provided a practical forum in which to work out the "tensions between the king and his barons."[12] Over time, it was to become an "embodiment of the nation and its interests."[13] For our Founders, however, the premise that the North American colonies' interests were advanced by "virtual representation" in Parliament rang hollow. In 1774, James Wilson argued that the single most important protection in the British constitution was "the presence of representatives drawn from the body of the people," but the colonists had no such representatives, nor were the members of Parliament affected by the laws they imposed on the colonists.[14]

Given that historical context, the Framers' challenge was to create a sovereign national government that could govern effectively (unlike the loose system under the Articles of Confederation) while respecting federalist principles protecting state interests, large and small. Congress would have to be a "mediating body."[15] Wallach invokes James Madison's counsel in *Federalist No. 10* that factions must be managed, not suppressed: we must "commit to a political system that copes with our differences."[16] He acknowledges the often bitter conflicts between the Federalists and the Republicans during the 1790s, but he does not discuss how Congress navigated these issues during the 19th century.[17]

Wallach explains that criticism of Congress mounted after the Civil War. Then-Professor Woodrow Wilson, in his 1885 book *Congressional*

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[10] *Id.* at 40.
[11] *Id.* at 40-41.
[12] *Id.* at 19.
[13] *Id.* at 21.
[14] *Id.* at 23.
[15] *Id.* at 25.
[16] *Id.* at 2 (citing THE FEDERALIST NO. 10, at 42-48 (James Madison) (George W. Carey & James McClellan eds., 2001)).
[17] It is unfortunate that Wallach does not discuss how Congress functioned during the Civil War. For an excellent exposition on Congress's relations with the Lincoln Administration, I recommend Fergus M. Bordewich's CONGRESS AT WAR (2020).

*Government*, contended that Congress did its important work in closed committee rooms, with no oversight by the members; as a result, the public had no understanding of what Congress was enacting on the public's behalf.[18] Wilson advocated governance by "responsible parties" headed by "a few authoritative leaders" who could develop better policy choices by reconciling competing interests in a "structured" setting.[19] Wilson envied the strong leadership of the Liberal government of William Gladstone then dominant in the United Kingdom, which "he saw as incomparably better able to formulate and then implement a coherent program."[20] Soon thereafter, the House did enact several procedures that consolidated more control in the Speaker. Wallach notes that Congress perennially struggles with how it should organize itself internally to effectively govern. If Congress becomes too open, it faces ineffectiveness and susceptibility to undue influence by outside interests. If congressional leadership exercises tight control, there can be a stranglehold by specific factions or ideological interests.[21]

In 1908, Wilson wrote *Constitutional Government in the United States*, in which he contended that the "president's election by the whole nation made him the natural spokesperson for the general good."[22] In other words, Wilson argued presidential leadership should push Congress out of the way of national policymaking.

## II. WHEN CONGRESS WORKED

Wallach contends that the public perception that Congress is ineffective, or outmoded, is shaped in part by Wilson's influential narrative in which "a singular president would better represent the nation's interests than a plural Congress."[23] It was in the "simple, grand choices of presidents that the American people could give direction to their political leaders."[24] That perception is vindicated when Congress appears unable to reconcile the many

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[18] Wallach, *supra* note 3, at 32. *See* WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS (1885), *available at* https://www.gutenberg.org/files/35861/35861-h/35861-h.htm.

[19] Wallach, *supra* note 3, at 32.

[20] *Id.*

[21] *Id.* at 37-38.

[22] WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES (1908), *available at* https://www.loc.gov/item/08017752/.

[23] Wallach, *supra* note 3, at 35.

[24] *Id.* at 34.

diverse interests to which its individual members must respond.[25] Wallach explains that Congress "has not always been as it is now."[26] Instead, it "flourished in some of the last century's most difficult moments."[27]

In two successive chapters, Wallach assembles persuasive evidence that Congress can function quite effectively and efficiently when circumstances require. He selects two examples: the World War II period, when Congress both partnered with the executive branch and acted to check against its excesses, and the Johnson Administration, when Congress enacted landmark civil rights legislation. Wallach recounts these episodes to show that Congress has been able to summon up the will to exercise its law- and policy-making authority.

Wallach observes that little attention has been paid to congressional activity during the World War II era.[28] Instead, an American's typical image of wartime leadership is of the "rousing speeches and shrewd diplomacy" of President Franklin D. Roosevelt and of the military leadership of generals such as George Marshall, Dwight Eisenhower, George Patton, and Douglas MacArthur. Unfortunately, a false notion persists that the isolationist attitude of the pre-World War II Congress carried over to the time of the war. Wallach tries to set the story straight on how Congress operated effectively during that crisis.[29]

During World War II, Congress sought to pursue the paramount interest of winning the war "without compromising the constitution."[30] Congress supported the war effort by appropriating vast amounts of funding and increasing taxes. But Congress pushed back against efforts of the Roosevelt Administration to centralize government power over the economy. For example, Congress resisted the administration's insistence on levying highly progressive taxes on wartime salaries. After the Republicans gained seats in the 1942 midterm elections, Congress repudiated Roosevelt's ambitions. Wallach also emphasizes that Congress was not obstructionist; indeed, it attempted compromise over tax and expenditure policies.[31]

Congress also played a positive role in ensuring that the broad powers accumulated by the federal government during the War did not persist.

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[25] *Id.* at 4, 9, 17-18.
[26] *Id.* at 1.
[27] *Id.*
[28] *Id.* at 45-46.
[29] *Id.* at 46-55.
[30] *Id.* at 46.
[31] *Id.* at 47-51.

"Congress stood on the side of what might be called a return to normalcy, including restoring the primacy of free enterprise as soon as practicable and dismantling some of the [New Deal] bureaucracies."[32] Congress resisted the administration's efforts to create invasive post-war economic planning in which the federal government would play an outsized role. In 1943, Congress terminated several New Deal agencies, including the Works Progress Administration and the National Youth Administration, that Congress believed had outlived their usefulness.[33] Congress also confronted the various problems created by the Office of Price Administration. Price controls had disrupted meat production, and support for the OPA waned due to the public outcry.[34]

Congress also acted aggressively to prevent the Roosevelt Administration from creating an unprecedented civilian manpower draft.[35] The administration reasoned that the military's Selective Service system could be expanded to impose the mandatory assignment of civilian employment under the auspices of the Office of War Mobilization. Congress countered by invoking public sentiment that civilian employment should remain a matter of free choice, rejecting a government regimentation of the workforce as had been adopted both by fascist Germany and Stalinist Russia.

Wallach cites this congressional activism as an important positive example for our present era.[36] Congress wanted to return to the pre-war path of "liberty and free opportunity," rejecting reformist efforts to create a post-World War II New Deal with rights to guaranteed employment and medical care. The public supported Congress's effort to resist the "executive-driven pressures toward state-managed, labor-dominated corporatism."[37]

Wallach's second example of congressional action, also forgotten in our historical imagination, is how Congress achieved passage of the Civil Rights Act of 1964. Wallach notes that, contrary to the popular perception, the "foundational change in social relations" effected by that law was the result not solely of figures like President Lyndon B. Johnson or the Reverend Martin Luther King, Jr., but also was made possible by the close working relationship that Johnson had with Congress.[38] Wallach contends that

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[32] *Id.* at 60.
[33] *Id.* at 61.
[34] *Id.* at 62-63.
[35] *Id.* at 63-64.
[36] *Id.* at 66-67.
[37] *Id.*
[38] *Id.* at 70-71.

"[b]oth Democrats and Republicans felt intense pressure to establish themselves as the party of civil rights, leading to virtuous competition between them."[39]

Wallach frames his argument by noting that the administration of President John F. Kennedy inherited a divided Democratic party, with a liberal wing anxious for reform and a southern bloc that was resistant to upsetting the status quo.[40] Even before Kennedy's assassination, he contends, Congress had begun to work on possible legislation, knowing that southern congressional resistance had to be overcome.[41] Kennedy's assassination created an opportunity for President Johnson to move aggressively for passage of a bill.[42]

Wallach explains that moderate Democrats and moderate Republicans accommodated the southern senators' demands to have a voice (on behalf of their constituents) in order to articulate their opposition to the legislation. The moderates tolerated extensive filibustering, but the southern senators ultimately conceded that the legislation was inevitable.[43] In that way, the southern Democrats preserved their public position and their ideological opposition to desegregation, but they ultimately yielded to majoritarian forces. As Wallach emphasizes, "they still told their constituents to accept the law of the land."[44] Wallach singles out the late Senator Richard A. Russell as an example of that attitude.[45]

Wallach contrasts the legislative struggle that culminated in the enactment of the Civil Rights Act of 1964 with administratively imposed affirmative action policies, which took on increased importance and occasioned bitter controversy in the decades following the Act.[46] He notes that then-Senator Hubert H. Humphrey characterized claims that the Act would create legal quotas as a "bugaboo."[47] Affirmative action was "never properly contested in the legislative arena," and, as a result, its opponents always have

[39] *Id.* at 71.
[40] *Id.* at 73-75.
[41] *Id.* at 75-77.
[42] *Id.* at 79-80.
[43] *Id.* at 83-90.
[44] *Id.* at 89.
[45] *Id.* at 88-90.
[46] *Id.* at 91-92.
[47] *Id.* at 91.

been able to question its basic legitimacy, and to seek its reversal in the courts.[48]

## III. HOW THINGS WENT BADLY WRONG

In Part Two of his book, "Congress Transformed," Wallach describes how Congress as an institution significantly changed during the three decades after the Civil Rights Act of 1964.[49] One change was a diminishment of accountability.

One reason for the change in that period was a broad push for social and economic reform by some liberal House Democrats. They believed that the conservative chairmen of the committees were obstacles to liberal legislation, and over time in the 1970s, the reformers were able to defeat some of the chairs.[50] The House Democratic Caucus enacted rules that "transformed subcommittees into independent bastions of power."[51] Ironically, Wallach notes, this "fragmentation of power" created "more access points for special interests," which could target a few staffers on various subcommittees to advance their agendas by, among other things, blocking unfavorable legislation.[52] The Senate, in turn, made it harder to filibuster a bill.[53]

The Legislative Reorganization Act of 1970 made committee hearings and roll call votes public and created easier procedures to consider amendments to bills. Wallach observes that some of these changes made committee meetings "more performative and less deliberative."[54] Finally, although the 1970s campaign finance reform laws created some welcome restrictions on financial contributions to members of Congress, the restrictions had several unintended effects. "The absence of public financing for congressional campaigns, along with the lack of aggregate limits on political action committee (PAC) contributions, incentivized interest groups to spread their influence widely throughout Congress," and its decentralized system gave them multiple opportunities to do so.[55] While one objective of these reforms had been to enable Congress to "grapple with the major issues of the

[48] *Id.* at 92.
[49] *Id.* at 97-175.
[50] *Id.* at 100-03.
[51] *Id.* at 103.
[52] *Id.*
[53] *Id.* at 105-06.
[54] *Id.* at 108-09.
[55] *Id.* at 109.

day," they instead "drove Congress to an extreme of decentralization that spread members' attention thin."[56]

Congress in this era also augmented its ability to conduct oversight over operations of the executive branch. It placed sunset provisions into the funding of many of the newer administrative agencies, and it attached appropriations riders to some bills to forbid agency officials from using funds to carry out specific policies.[57] Congress also created the Congressional Research Service to assist it in policy development, and it created the Office of Technology Assessment to provide it expertise on technological issues.[58] It enacted the Budget and Impoundment Control Act of 1974, a rebuff to President Nixon's refusal to spend appropriated funds on programs that he opposed.[59] A War Powers Resolution halted presidential discretion in funding the unpopular Vietnam War.[60] The now widely-respected Congressional Budget Office was also created during that period.[61]

But increased oversight also resulted in more members engaging in "mere spectacle," rather than actual lawmaking.[62] The reforms were well-intended, but Congress could not function as a second executive branch and could not push back effectively against the president or the agencies.[63]

Turning to the 1980s, Wallach observes that Congress fractured, often along partisan lines, during both the Carter and Reagan Administrations.[64] The Democrats were divided between conservatives and liberals, and Congress did not work well with the one-term Carter Administration. One illustration was the cumbersome process by which Congress enacted an energy regulation package in 1978. In the Senate, 17 subcommittees claimed jurisdiction over the issue, and the bill "was adulterated by interests of every variety."[65] Wallach acknowledges that the compromise legislation was the result of a "Madisonian accommodation."[66] But he contends that the decentralization of power in Congress made it less manageable.[67] The pub-

[56] *Id.* at 109, 8.
[57] *Id.* at 113-14.
[58] *Id.* at 112.
[59] *Id.* at 111.
[60] *Id.*
[61] *Id.*
[62] *Id.* at 113.
[63] *Id.* at 119.
[64] *Id.* at 125-35.
[65] *Id.* at 116.
[66] *Id.*
[67] *Id.* at 114-17.

lic's perceptions of Congress also were "abysmal" during this period—approval dropped from 47% in 1974 to 19% in fall 1979.[68]

President Reagan's 1980 election victory resulted in Republican control of the Senate for the first time since 1955. With the cooperation of Democratic House Speaker Thomas P. "Tip" O'Neill, Jr., bipartisan coalitions enacted a number of important budget reconciliation bills, the rescue of the cash-strapped Social Security system in 1983, and the Gramm-Rudman-Hollings Act of 1985, which was intended to get control over the nation's out-of-control deficits.[69] Despite these examples of legislative cooperation, various House rules changes resulted in increased centralization of committee power, and committees became "instrumentalities of ideological majorities."[70] Speaker O'Neill's successor, Jim Wright, abandoned "consensual politics" and tried to exert personal control over the House.[71]

As Wallach explains, Wright's conduct engendered a strong backlash from Republicans, especially Congressman Newt Gingrich, who, with other conservatives, issued broad critiques of congressional power in several books published by AEI and the Heritage Foundation.[72] Gingrich championed a "mature anti-Congress ideology," embraced by his party after its loss of the Senate in the 1986 midterm elections.[73] Conservatives criticized the expanded oversight of the executive branch through congressional investigations and budget limitation riders, and they advocated a line-time veto for the president.[74] Ironically, some Reaganites began to mirror Woodrow Wilson's advocacy of a powerful presidency.[75] Wallach observes that this "anti-Congress, pro-executive synthesis" championed by some conservatives reflected frustration with the House Democrats' control of that chamber, but also a new embrace of the president as a voice above the clash of special interests.[76] Conservatives also contended that congressional Democrats were "meddling" in foreign policy through intrusive oversight investigations;

[68] *Id.* at 118.
[69] *Id.* at 124-25.
[70] *Id.* at 125-26.
[71] *Id.* at 128-29.
[72] *Id.* at 126-27.
[73] *Id.* at 130.
[74] *Id.*
[75] *Id.* at 131.
[76] *Id.* at 131-32.

such policymaking, they argued, was uniquely within the president's purview.[77]

Wallach describes the 1990s as a time of complex political maneuvering.[78] After a Republican victory in the 1994 midterm elections, then-House Speaker Gingrich began an aggressive reform campaign. He pushed enactment of the Unfunded Mandates Reform Act, which was intended to deter Congress from imposing new responsibilities on states without new funding, and the Congressional Accountability Act, which subjected members of Congress and their staffs to various federal labor laws.[79] But he failed to enact a balanced budget amendment.[80] A line-item veto statute was enacted, but the Supreme Court later held it unconstitutional.[81] There was a continued "redistribution of power away from committees and toward the Speaker."[82] Gingrich engaged in unsuccessful brinkmanship with President Clinton over omnibus appropriation bills to fund the government in 1995-1996, resulting in an unpopular and disruptive government shutdown.[83] Wallach's verdict is that Gingrich "was a quintessential anti-institutionalist working within Congress," whose "uncompromising stance" weakened Congress.[84]

As he continues his narrative of Congress's largely unsuccessful efforts to be sufficiently effective as a lawmaking body, Wallach concedes that bipartisanship has persisted in three "highly consequential areas: defense authorizations, annual appropriations, and crisis responses."[85] But with respect to appropriations, government shutdowns occurred in 2013, 2018, and 2019, and "debt ceiling standoffs led to frayed nerves" in 2011, 2013, and 2021. These problems continue to crop up in the context of the rapid deterioration of the United States' overall fiscal situation. We recently experienced another round of brinkmanship on the debt ceiling, and are due for more in the not-too-distant future.[86] Wallach observes that these all-too-frequent crises "consume huge amounts of legislative energy and create serious ad-

[77] *Id.* at 133.
[78] *Id.* at 133-45.
[79] *Id.* at 139-40, 137.
[80] *Id.* at 140.
[81] Clinton v. City of New York, 524 U.S. 417 (1988).
[82] Wallach, *supra* note 3, at 137.
[83] *Id.* at 141-42.
[84] *Id.* at 145.
[85] *Id.* at 171.
[86] *Id.* at 172.

ministrative difficulties—not to mention being deeply embarrassing."[87] While sometimes there is vigorous congressional action, particularly in response to national emergencies, this style of "bipartisan crisis legislating," although "vastly superior to paralysis," does not serve the country well.[88]

Wallach identifies two prominent examples of Congress's failure to perform its lawmaking function. First, he outlines its failure to develop a coherent immigration policy, a failure that "reveals a Congress that is failing to live up to its constitutional responsibility."[89] Second, he describes its reaction to the recent COVID-19 pandemic and examines "why Congress did so little to attempt to resolve thorny conflicts."[90]

Wallach traces the origin of our immigration policy crisis to a 1965 statute that liberalized immigration.[91] He notes that the statute resulted in both elevated levels of legal immigration and a "major influx of unauthorized immigrants."[92] According to Wallach, the estimated unauthorized population more than doubled in the 1990s, to more than 8 million in 2000, and would rise to more than 12 million in 2007.[93] Congress attempted immigration reform in the 1980s, but critics perceived its efforts as intended to benefit special interests like agribusiness and pro-immigration groups.[94] Looking back at the 1980s, Wallach concludes that that the early reform efforts failed in part because congressional leaders did not try to build broad coalitions—in sharp contrast to the efforts that led to the Civil Rights Act of 1964.[95]

After years of witnessing Congress's failure to reform immigration law, the Obama Administration sought to ease restrictions by executive order.[96] The Trump Administration rescinded the order and attempted (unsuccessfully) to construct a southern border wall using emergency funds.[97] These actions show that the failure of Congress to legislate invites the executive

[87] *Id.*
[88] *Id.* at 173.
[89] *Id.* at 182.
[90] *Id.* at 202.
[91] *Id.* at 182-83.
[92] *Id.* at 183.
[93] *Id.* at 185.
[94] *Id.* at 186.
[95] *Id.* at 187.
[96] *Id.* at 188-90.
[97] *Id.* at 192-95.

branch to fill the vacuum.[98] That failure results in policy that "is likely to be fragmented, unreliable, and illegitimate."[99]

Wallach blames the legislative standstill on immigration policy on a lack of trust between the proponents of reform and skeptics of high levels of immigration.[100] He asserts that "immigration policy offers so many dimensions on which to form compromise," but Congress has failed to grapple with the issues because of partisan and special interest group divisions, not even attempting to have an open debate and exploration of possible reform measures.[101]

Wallach's final case study is Congress's response to the Covid pandemic. He has a mixed verdict on how well Congress reacted. On the one hand, he acknowledges that Congress acted quickly on a series of appropriations laws that sought to address the potential economic side-effects of the pandemic, such as by sending funds to prop up state and local government finances.[102] On the other hand, he is highly critical of Congress's reluctance to scrutinize the actions of the Centers for Disease Control of issuing "guidance" to state and local officials leading to closure of schools and churches and widespread social distancing.[103] He contends that Congress should have engaged in much more aggressive oversight of the agency's decision-making, and that it could have, and should have, blocked the agency edicts that resulted in the closure of public schools and mandatory masking and social distancing of American citizens.[104] Wallach is particularly skeptical of how the CDC was able, essentially, to shut down the nation's economy based on very slim empirical data as to the spread of the COVID virus.[105] Wallach also observes that Congress inquired little into how the Food and Drug Administration engaged in testing for effective vaccines.[106] Some individual legislators criticized the public health agencies that made emergency decisions, but Congress did not actively assert its legislative responsibility to answer these questions as a body.[107] Instead, it "tended to shovel more

[98] *Id.* at 197.
[99] *Id.* at 181.
[100] *Id.* at 185-87, 196.
[101] *Id.* at 197.
[102] *Id.* at 204-08.
[103] *Id.* at 213-16.
[104] *Id.* at 215.
[105] *Id.* at 214-16.
[106] *Id.* at 219
[107] *Id.* at 216.

money into these same agencies and add to their remits."[108] In summary, Congress failed to seek any kind of resolution on some of the most difficult political questions posed by the pandemic.[109]

Wallach warns that congressional paralysis means that political struggles will be relocated to the courts and agencies.[110] He is skeptical of the openness of federal executive agencies to diverse views and observes that, "in practice well-organized, directly interested parties dominate comment processes."[111] Nor should courts be expected to act as super-legislatures given the limited records before them for review.[112] The relocation of responsibility and authority to the courts and agencies undermines Congress as our legislature. If this persists, over time, citizens will conclude that they have no recourse for solving their problems other than the courts and the agencies.[113]

## IV. WHAT CAN BE DONE TO REPAIR CONGRESS?

In the final part of his book, "Three Futures for Congress," Wallach imagines several directions that Congress could take in the 2020s and beyond.[114] He looks at Congress from the perspective of hypothetical observers in 2039, the institution's 250th anniversary.[115] Wallach designs these imagined futures to show the reader how Congress could become wholly irrelevant to the governing of our country, or how it could reassert itself and emerge again as the nation's premier lawmaking body.[116]

Wallach begins with the most pessimistic narrative, "Decrepitude."[117] In a letter, "Reflections on Congress at 250: An Institution Hollowed Out but Capable of Mischief," a "Disappointed Observer" laments Congress's decline.[118] The era is marked by government shutdowns. Congress's failure to

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[108] *Id.* at 220.
[109] *Id.* at 221.
[110] *Id.* at 181, 197.
[111] *Id.* at 231.
[112] *Id.*
[113] *Id.* at 229-31.
[114] *Id.* at 223-64.
[115] These scenarios recall the famous 1888 novel by Edward Bellamy, LOOKING BACKWARD: FROM 2000 TO 1887, in which an American awakes to discover that the United States has become a utopian socialist society. *See* https://www.gutenberg.org/files/624/624-h/624-h.htm.
[116] Wallach, *supra* note 3, at 223-24.
[117] *Id.* at 225-35.
[118] *Id.* at 225-28.

deal with a debt ceiling crisis leads directly to the financial panic of 2032, which results in a decline in the United States' financial standing. Total public debt has risen above 150% of GDP. Domestic politics are "nastier as appropriators fight over an ever-shrinking slice of the pie."[119]

Because Congress is failing, executive agencies have a free hand "so long as they go through the motions of providing a vaguely plausible legal justification."[120] The Supreme Court functions as a super-legislature, and "each of the nine justices is treated as an avatar of certain causes and groups."[121] In this dismal scenario, members of Congress continue to solicit donors, perform some constituent services, and use the floor of each chamber to advance their causes, but they do little lawmaking.[122]

Wallach explains that this scenario describes a Congress that continues to act as it has, without correction. He warns that this scenario will mean leader dominance squeezing out all cross-partisan activity, even fewer attempts at incremental problem-solving through legislation, more weaponization of oversight hearings, and a "routinization of impeachments."[123] Wallach observes that "we can say with some certainty that the decrepit Congress described here would be unlikely to show any creativity, charity, or even common sense" in addressing national policy issues.[124] Congress would be the mere shell of an institution. Social media would distort the voices of special interests, and the host platforms would censor speech (as they do today).[125]

Wallach next imagines a scenario in which Congress is a "Rubber Stamp," a status imaginable based on its response to the Covid pandemic.[126] In this hypothetical future, the House of Representatives adopts remote voting and eliminates floor voting. More importantly, a 2024 shutdown results in the automatic continuation of appropriations at their pre-existing levels. Congress, in order to advance democracy, expands the number of representatives to 1,776, making it more likely that representatives serve coherent communities.[127] The Senate abolishes the filibuster, and a consti-

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[119] *Id.* at 226.
[120] *Id.* at 227.
[121] *Id.*
[122] *Id.* at 227-28
[123] *Id.* at 229.
[124] *Id.*
[125] *Id.* at 232-33.
[126] *Id.* at 239-47.
[127] *Id.* at 237-38.

tutional amendment dictates that presidential appointees are automatically confirmed if the Senate fails to act on their nominations within specified time periods.[128] The appropriations process moves with dispatch because each chamber must act under deadlines.[129]

Wallach depicts these possible changes as arguably establishing a truly democratic national government, no longer bound by traditional anti-majoritarian principles. These reforms would address the concerns, first expressed by the Wilsonians, that a "parochial Congress stands between America and good governance."[130] Wallach cautions that, although this scenario might appear to resemble the British parliamentary system, the reality would be a concentration of power in the presidency.[131] Congress would be relegated to the minor role of providing constituent services. The fundamental Madisonian principle that Congress is designed to regulate factions would be destroyed.[132] Wallach warns that if we subordinate Congress to the popular will, we are abandoning pluralism.[133] He also cites the late political scientist (and prominent conservative) James Burnham, who emphasized in 1959 that a vigorous Congress is indispensable to the protection of "constitutional government, juridical defense, and liberty."[134]

Wallach's final chapter, "Revival," paints an optimistic picture of a possible future Congress.[135] In this scenario, Congress faces an immigration crisis in 2027 straightforwardly and enacts legislation.[136] As part of that process, a new House Speaker first secures committee chairs sympathetic to the bill's passage, then commits to significant independence for such chairs, and polls the entire House before making appointments to the Rules Committee.[137] After vigorous floor debates in the House and the Senate, and several filibusters, an "old-fashioned conference committee" crafts a final bill that is

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[128] *Id.* at 239.
[129] *Id.*
[130] *Id.* at 242.
[131] *Id.* at 242-43.
[132] *Id.* at 246-48.
[133] *Id.* at 248.
[134] *Id.* at 249 n.20 (citing JAMES BURNHAM, CONGRESS AND THE AMERICAN TRADITION 401 (1959)).
[135] *Id.* at 251-63.
[136] *Id.* at 253-54.
[137] *Id.* at 253.

a product of broad coalition building.[138] Success then leads to a series of new laws on antitrust, Big Tech, and other issues.[139]

With reinvigorated committees, Congress also creates two support agencies: the Congressional Regulation Office and the Congressional Artificial Intelligence Lab.[140] Finally, the nation's worsening fiscal crisis results in a new budget law that coordinates the committee process to address issues such as health care entitlements.[141]

Wallach asks whether Congress can only be revived through a reshaping of our political processes or institutions. He points out that some commentators have recommended changing the law to allow House elections to use multimember districts, in which votes would be apportioned, as opposed to the current system of single-member winner-takes-all elections.[142] Some reformers have recommended a "radical expansion" of the House, including a recent report by the American Academy of Arts and Sciences that recommends increasing the size of the House to 585 seats.[143] That modest reform might give the House needed energy. Additional campaign finance reform measures may reduce the distortions of today's politics.[144]

Wallach's primary critique is of the structure of congressional processes, including the tight control and limited debate imposed by both Democratic and Republican leadership.[145] In contrast, he does not view the filibuster as an obstacle to reform and proper congressional functioning.[146] Wallach suggests some reforms, including that the Senate adopt unanimous consent agreements and require a continuous floor presence of its members.[147] He also says Congress should work bills through committees and have extensive floor debate so that diverse ideas can be considered before final passage of a bill.[148] Weakening the Speaker's control of the House Rules Committee also would help restore the neglected committee system.[149]

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[138] *Id.*
[139] *Id.* at 254.
[140] *Id.*
[141] *Id.* at 252-55.
[142] *Id.* at 257.
[143] *Id.* at 258.
[144] *Id.*
[145] *Id.* at 258-60.
[146] *Id.* at 259-60.
[147] *Id.* at 259.
[148] *Id.* at 260.
[149] *Id.*

Wallach acknowledges that Congress faces an almost overwhelming challenge in trying to regulate the manifold activities of executive branch agencies.[150] Here, he diverges from many conservative commentators who would rein in the broad delegations of lawmaking authority to agencies that are permitted under Supreme Court precedent and through congressional complacency.[151] Wallach states that "lawmakers have neither the will nor the ability to take on that role."[152] He recommends consideration of bills such as the REINS (Regulations in the Executive In Need of Scrutiny) Act, under which economically significant agency rulemakings would require congressional approval.[153]

Wallach concludes on a positive note. He contends that the American people have the right to have "an assembly that includes all of the most important of the diverse elements in our society, taking each of their concerns seriously."[154] This is different from "blunt majority rule."[155] He urges that we revitalize Congress as "a bulwark against tyranny"—"the only way we know to make our extended republic thrive."[156]

Other Views:

- THE FETTERED PRESIDENCY: LEGAL CONSTRAINTS ON THE EXECUTIVE BRANCH (L. Gordon Crovitz & Jeremy Rabkin eds., American Enterprise Institute 1989), *available at* https://www.aei.org/wp-content/uploads/2017/03/The-Fettered-Presidency.pdf.
- WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS (1885), *available at* https://www.gutenberg.org/files/35861/35861-h/35861-h.htm.
- Kathy Kiely, *Congress is a mess, these books argue — but maybe not messy enough*, WASHINGTON POST, April 5, 2023, https://www.washingtonpost.com/books/2023/04/05/katie-porter-book-why-congress/.

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[150] *Id.* at 259-62.

[151] *See, e.g.*, Epstein, *supra* note 1; PETER J. WALLISON, JUDICIAL FORTITUDE: THE LAST CHANCE TO REIN IN THE ADMINISTRATIVE STATE (2018).

[152] Wallach, *supra* note 3, at 261.

[153] *Id.* at 261-262.

[154] *Id.* at 263.

[155] *Id.*

[156] *Id.*

# HISPANIC-SERVING INSTITUTIONS AND EMERGING CONSTITUTIONAL ISSUES*

ALEXANDER M. HEIDEMAN**

In 2019, Florida Gulf Coast University's (FGCU) "Florida Educational Equity Report" noted that FGCU "continues to see an increase in enrollment of Hispanic students currently accounting for approximately 20 percent of enrollment."[1] The report further noted that "[o]nce the University reaches 25 percent Hispanic enrollment, we will be eligible to apply for the Hispanic[-]Serving Institution designation (HSI) which would open up the door to additional federal funding."[2] By December 2021, FGCU was close to achieving its goal. It only needed to increase its percentage of Hispanic students from 24% to 25% of the student population.[3]

> "Achieving an HSI status allows us to become eligible for a lot of funding. That then can support our students, our faculty and support our staff so it's really important to have [the] ability to have access to additional funding that is specifically designated for Hispanic[-]serving institutions," vice-president of student success and management, Mitch Cordova said.[4]

As of September 2022, FGCU is at 24.5% Hispanic enrollment, and it has started "to prepare various Federal Grant applications."[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.

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[1] PRECIOUS G. GUNTER, FLORIDA EDUCATIONAL EQUITY REPORT 1 (2019), *available at* https://www.fgcu.edu/equity/documentsandreports/files/2019EquityReport.pdf.

[2] *Id.*

[3] Stephanie Fernandez, *Local University Aims to Become Hispanic Serving Institution*, FOX4NOW (Dec. 15, 2021, 10:51 PM), https://www.fox4now.com/news/local-news/local-university-aims-to-become-hispanic-serving-institution.

[4] *Id.*

[5] PRECIOUS G. GUNTER, FLORIDA EDUCATIONAL EQUITY REPORT 19 (2022), *available at*

Federal funding is no small part of the drive towards gaining HSI status. From FY 2011 through FY 2021, HSIs received a total of $2.387 billion in federal funding.[6] And available federal funding is only increasing. The FY 2023 appropriations package included over $324.5 million in funding for HSIs, a nearly $60 million increase in funding from FY 2022.[7]

In addition to FGCU, many other colleges and universities are actively pursuing the HSI designation. In December 2020, UCLA "announc[ed] the goal of having UCLA designated as an HSI by 2025."[8] The university intends to "build[] up . . . campus support infrastructure for Latinx students,"[9] aiming to entice "several state and federal agencies that provide funding for HSIs to support collaborations between undergraduate teaching and research-intensive institutions, research training grants, and graduate pathways initiatives."[10] Similarly, in September 2021, the University of Northern Colorado said it hoped to increase its Hispanic population from 23.5% to 25% of the student population. A university official said that "it's impossible to assign a dollar amount on what the HSI effort will cost," but that "[t]he way of being for an HSI is really about who we are enrolling and who we are serving."[11] It has already determined a date by which it will start applying for grant funding.[12] And when Texas A&M University's Hispanic population reached the 25% threshold in November 2021, a university official called it the "realiz[ation of] our commitment to increasing Hispanic and Mexican American representation in our student body."[13] The U.S. Department of Education

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https://www.fgcu.edu/equity/documentsandreports/files/2022EquityReport.pdf.

[6] HISPANIC ASS'N OF COLLEGES AND U., FEDERAL UNDERFUNDING AND INFRASTRUCTURE NEEDS OF HSIS IN THE AGE OF COVID-19 (2021), https://www.hacu.net/images/hacu/NewsRel/2021/2021_HSIsReport.pdf.

[7] *HACU Statement Recently Released Fiscal Year 2023 Appropriations*, HISPANIC ASS'N OF COLLEGES AND U. (Dec. 20, 2022), https://www.hacu.net/NewsBot.asp?MODE=VIEW&ID=3910.

[8] Letter from Gene D. Block, Chancellor, UCLA, & Emily A. Carter, Executive Vice Chancellor and Provost, UCLA, to Bruin Community (Dec. 7, 2020), *available at* https://chancellor.ucla.edu/messages/becoming-hispanic-serving-institution-2025/.

[9] *Id.*

[10] UCLA HSI Task Force, *Cultivating the Seeds of Change* 35 (2022), *available at* https://ucla.app.box.com/v/HispanicServingInstitution.

[11] Anne Delaney, *University of Northern Colorado Aims for Status as Hispanic Serving Institution*, GREELEY TRIBUNE (CO), Sept. 1, 2021, https://www.greeleytribune.com/2021/09/01/university-of-northern-colorado-aiming-for-status-as-hispanic-serving-institution/.

[12] *Hispanic Serving Institutions: Milestones*, UNIV. OF N. COLORADO, https://www.unco.edu/hsi/milestones/ (last visited Mar. 2, 2023).

[13] Lesley Henton, *Texas A&M Achieves Designation as HACU Hispanic Serving Institution*, TEXAS A&M TODAY (Nov. 30, 2021), https://today.tamu.edu/2021/11/30/texas-am-achieves-designation-as-hacu-hispanic-serving-institution/.

(ED) granted Texas A&M HSI status in March 2022, allowing the school "access to additional funding," including "awards for facilities, faculty, services to enhance recruitment efforts, improving course offerings, and educational resources."[14]

First created by Congress with the reauthorization of the Higher Education Act in 1992, the HSI designation is given by the Department of Education to degree-granting, accredited, public or private nonprofit higher-education institutions that:

1. have an "enrollment of needy students"; and
2. have an enrollment of at least 25% undergraduate full-time equivalent Hispanic student populations.[15]

HSIs seek exclusive funding through several federal award programs, including three from ED, one from the U.S. Department of Agriculture,[16] and one from the National Science Foundation.[17] Funding for HSIs from other federal agencies continues to grow.[18]

The HSI program is one of several federal grant programs that require an eligible institution to have a minimum percentage of a specific demographic group in addition to an "enrollment of needy students." Others include the Alaska Native-Serving and Native Hawaiian-Serving Institutions Program (at least 20% Alaska Native or at least 10% Native Hawaiian),[19] the Asian American and Native American Pacific Islander-Serving Institutions Program (at least 10% Asian American or Native American Pacific Islander),[20] the Native American-Serving Nontribal Institutions Program (at least 10% Native American),[21] and the Predominantly Black Institutions Program (at least 40% Black American).[22]

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[14] *Texas A&M University Achieves Federal Designation As Hispanic Serving Institution*, TEXAS A&M TODAY (Mar. 11, 2022), https://today.tamu.edu/2022/03/11/texas-am-university-achieves-federal-designation-as-hispanic-serving-institution/.

[15] 20 U.S.C. § 1101a.

[16] *See generally Hispanic-Serving Institutions Education Grants (HSI) Program*, NAT'L INST. OF FOOD AND AGRIC., https://nifa.usda.gov/program/hispanic-serving-institutions-education-grants-program.

[17] *See generally NSF's Hispanic-Serving Institution Program*, NAT'L SCI. FOUND., https://nsf.gov/ehr/HSIProgramPlan.jsp.

[18] *See infra* Section III.

[19] 20 U.S.C. § 1059d(b)(2); 20 U.S.C. § 1059d(b)(4).

[20] 20 U.S.C. § 1059g(b)(2).

[21] 20 U.S.C. § 1059f(b)(2).

[22] 20 U.S.C. § 1059e(b)(2). This is a distinct federal program from Historically Black Colleges

ED does not publish the entire list of institutions that apply for the HSI designation. But for purposes of membership in the Hispanic Association of Colleges and Universities (HACU)—the organization which has driven the HSI effort since the 1980s—any college, university, or district where total Hispanic enrollment constitutes a minimum of 25% of total enrollment qualifies as a Hispanic-Serving Institution. There is no "needy students" enrollment requirement for HACU membership.[23] And in 2021, HACU listed 559 total HSIs in 29 states, the District of Columbia, and Puerto Rico.[24] This included 226 two-year public institutions, 154 four-year public institutions, 8 two-year private institutions, and 171 four-year private institutions.[25] In addition to this list of HSIs, HACU counted 393 "emerging HSIs," which it defined as "nonprofit, degree-granting institutions with full-time equivalent . . . undergraduate Hispanic student enrollment of at least 15% but less than 25%."[26] This list, consisting of institutions in 39 states, included 106 two-year public institutions, 100 four-year public institutions, 10 two-year private institutions, and 177 four-year private institutions.[27] Included among these "emerging HSIs" were some of the nation's most prominent colleges and universities such as the California Institute of Technology, the University of Florida, Johns Hopkins University, Claremont McKenna College, Baylor University, UCLA, Texas A&M University, UC Berkeley, Rice University, the University of Southern California, the University of San Diego, the University of Miami, and New York University.[28] Many of these institutions have expressed interest in achieving HSI status.[29]

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and Universities. *See* 20 U.S.C. § 1061 (". . . historically Black college or university that was established prior to 1964, whose principal mission was, and is, the education of Black Americans, and that is accredited by a nationally recognized accrediting agency or association determined by the Secretary to be a reliable authority as to the quality of training offered or is, according to such an agency or association, making reasonable progress toward accreditation.").

[23] This list is still helpful to understand HSI eligibility as the "needy students" requirement is waivable by the Secretary of Education. *See infra* Section II.

[24] HISPANIC ASS'N OF COLLEGES AND U., HISPANIC-SERVING INSTITUTIONS (HSIs) 2020-21 (2021), *available at* https://www.hacu.net/images/hacu/conf/2022CapForum/Resources-Menu/2022_HSILists.pdf.

[25] *Id.*

[26] HISPANIC ASS'N OF COLLEGES AND U., Emerging Hispanic-Serving Institutions (HSIs) 2020-21 (2021), *available at* https://www.hacu.net/images/hacu/conf/2022CapForum/Resources-Menu/2022_EmergingHSILists.pdf.

[27] *Id.*

[28] *Id.*

[29] *See infra* Section IV.

In Part I, this Article discusses the HSI program's legislative history and HACU's intimate involvement with the legislation throughout that history. Part II of this Article briefly discusses 20 U.S.C. § 1101, the HSI program's legislative authority. Part III compiles the many sources of federal funding for HSIs. Part IV of this Article lists and discusses several exemplar institutions that have sought recognition as HSIs. Lastly, in Part V, the Article discusses some potential constitutional challenges the HSI program might face as it continues to expand. Now that the U.S. Supreme Court has held that universities and colleges may not use race as a factor in their admissions,[30] those institutions that may be engaging in race-balancing admission practices to gain access to funds only available to HSIs are likely at greater risk of litigation.

## I. LEGISLATIVE HISTORY

When HACU formed in May 1986, "[e]ach of the association's . . . member schools claim[ed] 25 percent or more Hispanic enrollment."[31] With eighteen founding institutions, the impetus for HACU's formation was "that, among Hispanics aged 18 to 24, the percentage of high school graduates going on to college had dropped from a peak of 35.8 percent in 1976 to 29.9 percent in 1984."[32] The organization's 25% threshold appears to have been determined arbitrarily.[33] Its founders notably chose a significantly lower threshold than previously introduced but not enacted federal legislation that defined a "Hispanic Institution" as one "which has an enrollment of which at least 40 percent are Mexican American, Puerto Rican, Cuban, or other Hispanic students, or combination thereof."[34] HACU's initial aim was to advocate for its members—who were "[f]or the most part, . . . not rich in capital

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[30] Students for Fair Admissions, Inc. v. President & Fellows of Harvard College, 600 U.S. __ (2023), *available at* https://www.supremecourt.gov/opinions/22pdf/20-1199_hgdj.pdf.

[31] Lorenzo Chavez, *Passports to Success*, VISTA: THE HISPANIC MAGAZINE (1986).

[32] Charlie Ericksen, *Branching Out*, VISTA: THE HISPANIC MAGAZINE 35 (1991).

[33] DEBORAH A. SANTIAGO, INVENTING HISPANIC-SERVING INSTITUTIONS (HSIS): THE BASICS 6 (2006). Santiago goes on:

> The leaders reviewed institutional data from the Chronicle of Higher Education's annual almanac and noted that a number of institutions had Latino student enrollments of 20 to 40 percent. After much discussion, the institutional leaders agreed that 25 percent Latino student enrollment represented a "critical mass" of students sufficient to signal the organizational change of the institutions themselves.

*Id.* (citing Telephone Interview with Antonio Rigual, Executive Director, HACU (June 26, 2004)).

[34] Higher Education Amendments of 1984, H.R. 5240, 98th Cong. (1984).

resources, nor . . . highly visible state flagships"—and its members' interests "to national educational policy makers or to foundations and businesses."[35]

Steve Altman, then-President of Texas A&I University (now Texas A&M University–Kingsville), told the Corpus Christi *Caller-Times* that

> . . . he has found a way to improve the university's research and graduate programs, a goal he has had since joining the school last September.
>
> Through the newly formed [HACU], Altman hopes to gain the extra dollars needed to achieve the objective.
>
> . . . .
>
> "Historically, institutions with large Hispanic enrollments have been underdeveloped," he said. "There is not the same range of degree programs at the graduate level as there are at other universities."[36]

In March 1989, Representative Albert Bustamante introduced the "Hispanic-Serving Institutions of Higher Education Act."[37] HACU had worked with Rep. Bustamante's staff during the bill's preparation.[38] The bill called for $70 million in aid to colleges and universities with a minimum of 25% Hispanic enrollment,[39] which reflected HACU's "institutional membership criterion."[40]

The bill was intended to establish "a federally supported network of institutions of higher education, which have a student body that has traditionally had a significant portion of Hispanic students."[41] It was referred to the Subcommittee on Postsecondary Education, but it was not included in that session's reauthorization of the Higher Education Act.

HACU's efforts to receive federal recognition for its members came to fruition with the enactment of Title III of the Higher Education Amendments of 1992.[42] This bill defined an HSI as a degree-granting, accredited, public or private nonprofit higher-education institution which:

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[35] Antonio Rigual, *Hispanic College Enrollment Must Rise*, EL PASO TIMES (TX), Aug. 20, 1989, at 2G.

[36] Suzy McAuliffe, *A&I Finds Answer to Funding Need*, CORPUS CHRISTI (TX) CALLER-TIMES, June 19, 1986, at 17.

[37] Hispanic-Serving Institutions of Higher Education Act of 1989, H.R. 1561, 101st Cong. (1989).

[38] Rigual, *supra* note 35.

[39] H.R. 1561.

[40] Rigual, *supra* note 35.

[41] H.R. 1561.

[42] Higher Education Amendments of 1992, Pub. L. No. 102-325, 106 Stat. 448.

1. has an enrollment of "needy students";
2. "has an enrollment of undergraduate full-time equivalent students that is at least 25 percent Hispanic students"; and
3. "provides assurances that not less than 50 percent of its Hispanic students are low-income individuals who are first generation college students and another 25 percent of its Hispanic students are either low-income individuals or first generation college students."[43]

The 1998 reauthorization of the Higher Education Amendments changed the program by eliminating the "first-generation" requirement and the additional requirement that 25% of an institution's Hispanic students be "either low-income individuals or first generation college students."[44] Representative Ruben Hinojosa, chairman of the Congressional Hispanic Caucus education task force, advocated for the elimination of both requirements because "there was too much bureaucracy in the process" and "although some schools may meet the criteria, they do not collect data on first-generation college students, preventing them from applying for the federal grants."[45] The 1998 Amendments defined an HSI as an institution which:

1. has an enrollment of "needy students";
2. "has an enrollment of undergraduate full-time equivalent students that is at least 25 percent Hispanic students"; and
3. "provides assurances that not less than 50 percent of the institution's Hispanic students are low-income individuals."

The 1998 reauthorization also moved the program from Title III to Title V, apparently "to emphasize the importance of the program and differentiate it from other institutional capacity-building programs."[46]

The most recent change to the qualifications of an HSI institution occurred with the Third Higher Education Act of 2006.[47] That bill eliminated one element of HSI-eligibility requirements: that the institution must "provide[] assurances that not less than 50 percent of the institution's Hispanic students are low-income individuals."

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[43] *Id.*

[44] Higher Education Amendments of 1998, Pub. L. No. 105-244, 112 Stat. 1581.

[45] *Texan's Bill Would Pay More to Colleges Serving Hispanics*, AUSTIN (TX) AMERICAN-STATESMAN, Sept. 22, 1997, at B5.

[46] SANTIAGO, *supra* note 33, at 7.

[47] Pub. L. No. 109-292, 120 Stat. 1340.

## II. 20 U.S.C. § 1101

The express purpose of the HSI program is to "(1) expand educational opportunities for, and improve the academic attainment of, Hispanic students; and (2) expand and enhance the academic offerings, program quality, and institutional stability of colleges and universities that are educating the majority of Hispanic college students and helping large numbers of Hispanic students and other low-income individuals complete postsecondary degrees."[48]

Defined by section 1101a of Title 20 of the U.S. Code, an HSI-eligible institution is a degree-granting, accredited, public or private nonprofit higher-education institution that:

1. "has an enrollment of needy students"[49]; and
2. "has an enrollment of . . . at least" 25% undergraduate full-time equivalent Hispanic students.[50]

Section 1101a further defines "enrollment of needy students" as:

1. at least 50% of enrolled students receive "need-based assistance under subchapter IV";[51] or
2. a "substantial percentage" of enrolled students receive Federal Pell Grants.

The "needy students" requirement is, however, waivable by the Secretary of Education if the institution meets one of several requirements,[52] including if "the Secretary determines that the waiver will substantially increase higher education opportunities appropriate to the needs of Hispanic Americans."[53] Every institution must apply for designation as an eligible institution "each year that [it] wish[es] to apply for a new grant award even if . . . [it has] a currently active grant."[54]

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[48] 20 U.S.C. § 1101(b).
[49] 20 U.S.C. § 1101a(a)(2).
[50] 20 U.S.C. § 1101a(a)(5).
[51] 20 U.S.C. § 1101a(b)(1).
[52] 20 U.S.C. § 1103a(a).
[53] 20 U.S.C. § 1103a(a)(5). The Secretary is required to "submit to Congress every other year a report concerning the institutions" that received waivers to the "needy student" requirement. 20 U.S.C. § 1103a(b)(2).
[54] DEP'T OF EDUC., ELIGIBILITY 2022 FOR FY22 GRANT APPLICATIONS 2 (2022).

## III. FEDERAL FUNDING

If certified by ED as an HSI—that is an institution with at least 25% Hispanic enrollment and "needy students" or a waiver—then an institution is eligible to apply for HSI-specific grants. ED offers three grants to HSIs:

1. *The Developing Hispanic-Serving Institutions Program (DHSI):* The flagship HSI program, it "provides grants to eligible institutions of higher education to (a) [e]xpand educational opportunities for, and improve the academic attainment of, Hispanic students; and (b) [e]xpand and enhance the academic offerings, program quality, and institutional stability of colleges and universities that are educating the majority of Hispanic college students and helping large numbers of Hispanic students and other low-income individuals complete postsecondary degrees."[55] The FY 2023 budget allocated $182.85 million for the DHSI program.[56]

2. *The Hispanic-Serving Institutions—Science, Technology, Engineering, or Mathematics and Articulation Program (HSI—STEM):* This program prioritizes applicants that propose (a) "to increase the number of Hispanic and other low income students attaining degrees in the fields of science, technology, engineering, or mathematics"; and (b) "to develop model transfer and articulation agreements between 2-year Hispanic-serving institutions and 4-year institutions in such fields."[57] The FY 2023 budget allocated $94.3 million for this program.[58]

3. *The Promoting Postbaccalaureate Opportunities for Hispanic Americans Program (PPOHA):* The smallest of the three ED programs, the PPOHA program provides funds (a) "to expand postbaccalaureate educational opportunities for, and improve the academic attainment of, Hispanic students"; and (b) "to expand the postbaccalaureate academic offerings and enhance the program quality in the institutions of higher education that are educating the majority of Hispanic college students and helping large numbers of Hispanic and low-income students complete postsecondary degrees."[59] In addition to obtaining HSI status, an institution must "offer[] a postbaccalaureate certificate or

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[55] 34 C.F.R. § 606.1 (2022).

[56] *Appropriations for HSIs*, HISPANIC ASS'N OF COLLEGES AND U., https://www.hacu.net/hacu/Appropriations1.asp (last visited Mar. 2, 2023).

[57] 20 U.S.C. § 1067q(b)(2)(B).

[58] *Appropriations for HSIs*, *supra* note 56.

[59] 20 U.S.C. § 1102.

> postbaccalaureate degree granting program" to be eligible for PPOHA funds.[60] The FY 2023 budget allocated $19.66 million for this program.[61]

ED provides an "eligibility matrix" with statistics from its 2021 programs. Listed in the matrix are institutions that received grants, institutions that were eligible but not grantees, institutions that were "[p]otentially eligible on minority grounds, but . . . needed to apply for a waiver of the core expenses and/or needy student criteria." [62]

| | Grantees | Eligible, But Not Grantee | Eligible, Waiver Needed |
|---|---|---|---|
| DHSI | 219 | 245 | 63 |
| HSI–STEM | 90 | 383 | 87 |
| PPOHA | 24 | 182 | 76 |

Beyond ED, other federal agencies have piggybacked off 20 U.S.C. § 1101a. The U.S. Department of Agriculture (USDA) follows 7 U.S.C. § 3103(10), which defines Hispanic-Serving Agricultural Colleges and Universities (HSACUs) as institutions which qualify as HSIs under 20 U.S.C. § 1101a and offer accredited agriculture-related degree programs,[63] but excludes 1862 Institutions.[64]

USDA's National Institute of Food and Agriculture has one grant program for HSIs called the Hispanic-Serving Institutions Education Grants Program. This program attempts to (a) "support the activities of Hispanic-serving institutions to enhance educational equity for underrepresented students"; (b) "strengthen institutional educational capacities"; (c) "attract and support undergraduate and graduate students from underrepresented groups in order to prepare them for careers related to the food, agricultural, and natural resource systems"; and (d) "to facilitate cooperative initiatives."[65] The FY 2023 budget allocated $14 million for this program.[66]

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[60] 20 U.S.C. § 1102a(b)(2).

[61] *Appropriations for HSIs*, *supra* note 56.

[62] DEP'T OF EDUC., ELIGIBILITY MATRICES FOR TITLES III AND TITLE V PROGRAMS: FY 2021, https://www2.ed.gov/about/offices/list/ope/idues/eligibility.html#el-inst (last visited Mar. 2, 2023).

[63] 7 U.S.C. § 3103(11).

[64] As defined by 7 U.S.C. § 7601(1).

[65] 7 U.S.C.A. § 3241.

[66] *Appropriations for HSIs*, *supra* note 56.

The National Science Foundation provides funding for HSIs through its signature HSI program: Improving Undergraduate STEM Education: Hispanic-Serving Institutions. Authorized by the American Innovation and Competitiveness Act,[67] the program aims "to incentivize institutional and community transformation; and to promote fundamental research (i) on engaged student learning, (ii) about what it takes to diversify and increase participation in STEM effectively, and (iii) that improves our understanding of how to build institutional capacity at HSIs."[68] The FY 2023 budget allocated $48.5 million for this program.[69]

Some federal agencies use the HSI designation as a criterion to qualify for funding for individual grants, like the U.S. Department of Housing and Urban Development's Hispanic Serving Institutions (HSI) Research Center of Excellence grant.[70] Other federal agencies provide funding for HSIs as a part of their respective minority-serving institution (MSI) programs, like National Aeronautics & Space Administration's Minority University Research and Education Project,[71] the U.S. Department of Defense's HBCU/MSI Research and Education Program,[72] the U.S. Department of Homeland Security's MSI Program, [73] and the U.S. Department of Energy's Reaching a New Energy Sciences Workforce initiative.[74] Finally, other federal agencies provide funding for individual faculty members at HSIs, including USDA's E. Kika De La

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[67] Pub. L. 114-329, 130 Stat. 3016.

[68] *Improving Undergraduate STEM Education: Hispanic-Serving Institutions (HSI Program)*, NAT'L SCI. FOUND., https://beta.nsf.gov/funding/opportunities/improving-undergraduate-stem-education-hispanic-serving-institutions-hsi (last visited Mar. 2, 2023).

[69] *Appropriations for HSIs*, *supra* note 56.

[70] *See generally FY 2022 for Hispanic Serving Institutions (HSI) Research Center of Excellence*, DEP'T OF HOUSING AND URB. DEV., https://www.hud.gov/program_offices/spm/gmomgmt/grantsinfo/fundingopps/fy22_hsi_roe (last visited Mar. 2, 2023).

[71] *See generally Minority University Research and Education Project*, NASA, https://www.nasa.gov/sites/default/files/atoms/files/edu_nasa_msi_list_aug_2021.pdf (last visited Mar. 2, 2023).

[72] *See generally Defense Department Announces Fiscal Year 2022 Research Equipment Awards to Minority-Serving Institutions*, U.S. DEP'T OF DEFENSE, https://www.defense.gov/News/Releases/Release/Article/3126186/defense-department-announces-fiscal-year-2022-research-equipment-awards-to-mino/ (last visited Mar. 2, 2023).

[73] *See generally Minority Serving Institutions Program*, U.S. DEP'T OF HOMELAND SECURITY, https://www.dhs.gov/science-and-technology/minority-serving-institutions-program (last visited Mar. 2, 2023).

[74] *See generally Reaching a New Energy Sciences Workforce (RENEW)*, U.S. DEP'T OF ENERGY, https://science.osti.gov/Initiatives/RENEW (last visited Mar. 2, 2023).

Garza Fellowship Program,[75] and the National Endowment for the Humanities' Awards for Faculty at Hispanic-Serving Institutions.[76]

## IV. SEEKING HSI STATUS

Recently, several colleges and universities that have publicly announced their plans to become HSI-eligible institutions and thus gain access to even more federal funding. Here are a few examples:

The University of California, Santa Barbara (UCSB) achieved HSI status in 2015, eager to take the "first step toward enabling [it] to be eligible for federal and private grants that aim to bolster the academic success of Latino students."[77] Several programs hosted by UCSB were funded as a result of that status, including Educational eXcellence and Inclusion Training Opportunities (ÉXITO)—which "places aspiring ethnic studies teachers in high school ethnic studies classes"—and Field-based Undergraduate Engagement through Research, Teaching, and Education (FUERTE)—which funds fieldwork for "students who are traditionally under-represented in environmental sciences, especially Latinx, Indigenous, Black, and first-generation undergraduates."[78]

When Florida Atlantic University became an HSI in 2017, the provost said, "our recent designation as a Hispanic-Serving Institution will help us to further our efforts to bring new programs and new grants that will allow us to truly serve this important and growing population in Florida."[79] The school's vice president for research noted that "[f]or faculty in all areas and specialties, this designation . . . means they have access to additional funding for research that was not previously available" and that "[t]his type of funding will enable our faculty to better train our students by engaging them in research projects and preparing them to effectively compete in our global economy."[80]

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[75] *See generally Hispanic Serving Institutions National Program*, U.S. DEP'T OF AGRIC., https://www.usda.gov/partnerships/hispanic-serving-institutions (last visited Mar. 2, 2023).

[76] *See generally Awards for Faculty at Hispanic-Serving Institutions*, NAT'L ENDOWMENT FOR THE HUMANITIES, neh.gov/grants/research/awards-faculty-hispanic-serving-institutions (last visited Mar. 2, 2023).

[77] Larry Gordon, *Universities Reap Diversity's Benefits*, LOS ANGELES TIMES, Jan. 29, 2015, B2.

[78] *Hispanic Serving Research Institution (HSRI) + CSI*, CHICANO STUD. INST., https://www.csi.ucsb.edu/hsri (last visited Mar. 2, 2023).

[79] Gisele Galoustian, *FAU Designated as a Hispanic-Serving Institution*, FAU NEWS DESK (Feb. 7, 2017), https://www.fau.edu/newsdesk/articles/FAU-hsi.php.

[80] *Id.*

In 2018, ED granted Georgia's Dalton State College HSI status. Located in a town that "[t]he recession hit . . . hard," administrators said that the status would open the college up to funding that "could build a new student center, hire more faculty and help students and faculty conduct research."[81] The college received a $4.2 million grant in 2021.[82]

The University of Texas at Austin launched an HSI Transition committee in 2019 to "establish the university's timeline for likelihood of HSI status and the timeline for application for the eligibility and associated grant funding," among other goals.[83] When the school "reached 26.1% undergraduate Hispanic enrollment" in September 2020,[84] its administration "announced the designation quietly . . . trying to avoid potential 'backlash' from those who might misinterpret it as some kind of a quota system."[85] But the university's Latino Studies Department lauded the "milestone moment":

> Once attained, full HSI status will eventually bring new opportunities for students, researchers, and faculty through grants by the Developing Hispanic-Serving Institutions (DHSI) Program. This could mean significant funding to expand and enhance educational opportunities for Latino students. In addition, faculty and researchers would be eligible to apply for grants funded by entities such as the National Science Foundation, the Department of Agriculture, the National Institutes of Health, the Department of Housing and Urban Development, and the National Endowment for the Humanities.[86]

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[81] Eric Stirgus, *Georgia College, Town Reflect Hispanic Growth and Prosperity*, MACON TELEGRAPH, June 10, 2018, at 5C.

[82] *Federal $4.2 Million Grant Increases STEM Experiences at Dalton State*, DALTON STATE, https://www.daltonstate.edu/about/news.cms/2021/600/federal--4-2-million-grant-increases-stem-experiences-at-dalton-state- (last visited Mar. 2, 2023).

[83] OFFICE OF THE EXECUTIVE VICE PRESIDENT & PROVOST, HISPANIC SERVING INSTITUTION TRANSITION COMMITTEE CHARGE FINAL REPORT 1 (2021), *available at* https://utexas.app.box.com/s/bdvnmnjr40tgw7cmnyfxz2mldkv2n9pa.

[84] *Four-Year Graduation Rate Tops 70% as UT Austin Admits One of its Largest First-Year Classes*, UT NEWS (Sept. 22, 2020), https://news.utexas.edu/2020/09/22/four-year-graduation-rate-tops-70-as-ut-austin-admits-one-of-its-largest-first-year-classes/.

[85] Joy Díaz & Caroline Covington, *As Its Latino Population Grows, UT-Austin Wary Of Backlash For Becoming A Hispanic-Serving Institution*, TEXAS STANDARD, May 24, 2021, https://www.texasstandard.org/stories/as-its-latino-population-grows-ut-austin-wary-of-backlash-for-becoming-a-hispanic-serving-institution/.

[86] UT and Latino Studies Coordinate Efforts to Achieve Hispanic Serving Eligibility, University of Texas at Austin College of Liberal Arts: Latino Studies, https://liberalarts.utexas.edu/latinostudies/news/ut-and-latino-studies-coordinate-efforts-to-achieve-hispanic-serving-eligibility (last visited Mar. 2, 2023).

When the College of Southern Idaho became the state's first HSI in 2021, the college celebrated with "speeches, mariachi, panels and the annual Hispanic Youth Leadership Summit."[87] In a speech before students, President Dean Fisher said that the college had reached an enrollment of 26% Hispanic, and that "[i]f we do this right, in 10 years, I suspect the college will be sitting at 50% Hispanic enrollment."[88] The college received its first significant grant shortly after.[89]

Arizona State University achieved HSI status in 2022, hoping to replicate the funding success achieved by other HSI public institutions in the state: the University of Arizona had received over $10 million in HSI-related federal grants from 2018 to 2022, Northern Arizona University had received nearly $11 million in HSI-related federal grants from 2021 to 2022, and the Maricopa County Community College District had received at least $22 million in HSI-related federal grants from 2005 to 2022.[90]

## V. Emerging Issues

As the HSI program expands, two possible separate and distinct levels of constitutional scrutiny may emerge if the program's constitutionality is challenged in court. First: Can the *federal* government constitutionally fund the HSI program, thus discriminating among institutions expressly based on the racial balances of their student bodies? Second: Are *state* universities which have sought, obtained, and annually maintain their HSI status through race-based decision-making complying with the 14th Amendment's Equal Protection Clause?

### *A. Federal Funding*

Firstly, a plaintiff who sought to challenge the constitutionality of the HSI program could argue that the federal government facially discriminates among institutions based on the racial and ethnic balances of their student bodies in funding the HSI program. Indirectly, through the HSI program,

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[87] Rachel Spacek, *College Named Idaho's First Hispanic-Serving Institution*, Idaho Statesman, Oct. 10, 2021, at A9.

[88] *Id.*

[89] *CSI Receives $2.5 Million Grant to Support College Enrollment and Success*, Coll. of S. Idaho (Oct. 11, 2022), https://www.csi.edu/news/press-releases/csi-receives-2.5-million-grant-to-support-college-enrollment-and-success.aspx.

[90] Alison Steinbach & Daniel Gonzalez, *ASU Reaches 'Major Milestone' for Latino Students*, Arizona Republic, July 6, 2022, at 3.

the federal government allocates or denies funds to the schools of students based on their races. Whether that plaintiff challenged the HSI program for indirectly discriminating against particular students because of race,[91] or for directly racially discriminating against schools based on their imputed institutional racial character,[92] the HSI program may be susceptible to an equal protection challenge on these grounds.

The U.S. Supreme Court has long held that the Constitution imposes such an equal protection limitation on the actions of the federal government. Most of its decisions have anchored this constraint in the Fifth Amendment's requirement that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law[.]" For example, in *Adarand Constructors, Inc. v. Peña*, the Court described the "general rule" that "this Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment[,]"[93] before holding that "Federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest."[94] In 2017, the Court noted in *Sessions v. Morales-Santana* that

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[91] Such an argument would presumably mirror that in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). There, the plaintiff argued that it violated the Constitution's equal protection requirement for a federal program to "giv[e] general contractors on Government projects a financial incentive to hire subcontractors controlled by 'socially and economically disadvantaged individuals,' and in particular, the Government's use of race-based presumptions in identifying such individuals[.]" *Id.* at 204. Here, students at or applicants to a school would assert that the HSI program (like *Adarand*'s contracting program) provides a financial incentive for recipient institutions (like *Adarand*'s general contractors) to discriminate based on race against them in admissions or in actions which drive student retention.

[92] Several lower court decisions have agreed that just as individuals may bring federal claims to enforce their federal rights against racial discrimination, so may legal entities, when their potentially violative treatment by a defendant was motivated by the race of the entities' personnel. *E.g.*, Brown v. J. Kaz, Inc., 581 F.3d 175, 181 (3d Cir. 2009) (reversing dismissal of a contractor's Section 1981 claim and clarifying that statute applies beyond employment scenarios); Village Green at Sayville, LLC v. Islip, 2019 U.S. Dist. LEXIS 167177, *22 (E.D.N.Y. 2019) (holding that a corporate plaintiff had standing to bring a Section 1981 claim against a town whose allegedly racially motivated inaction rendered plaintiff's contract unperformable); Annuity, Welfare & Apprenticeship Skill Improvement & Safety Funds of the Int'l Union of Operating Eng'rs, Local 15, 15A, 15C & 15D v. Tightseal Constr., Inc., 2018 U.S. Dist. LEXIS 138041, *16–*20 (S.D.N.Y. 2018) (denying motion to dismiss corporate plaintiff's Section 1981 claim for termination of contract allegedly because of race of corporate plaintiff's personnel); John and Vincent Arduini Inc. v. NYNEX, 129 F. Supp. 2d 162, 169 (N.D.N.Y. 2001) (holding that any "limitation on § 1981 standing for a corporation should not be construed as applying to situations where a corporation alleges that it was injured because of its relationship with a person of minority racial identity").

[93] 515 U.S. at 217–18.

[94] *Id.* at 235.

"[w]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is so unjustifiable as to be violative of due process. This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment."[95]

Courts police this constraint, as *Adarand* ruled, through the application of strict scrutiny. Thus, a plaintiff who seeks to challenge the constitutionality of the HSI program might claim it violates this equal protection-like requirement. Strict scrutiny requires a "compelling purpose" and "narrow tailoring."[96] As several decisions have reiterated, this is the Court's "most searching examination."[97]

Applying it, the Court has only ever held three interests to satisfy strict scrutiny as sufficiently "compelling" to even hypothetically justify racial discrimination: (1) national security, in the *Korematsu* anti-precedent; (2) remedying the government's own historical discrimination, when there is "a strong basis in evidence for its conclusion that remedial action [is] necessary"; and (3) in its higher education, race-based admissions cases, the purported educational benefits of enrolling a diverse student body.[98]

The HSI program serves none of these recognized interests: Congress has not tied HSI status to any role of any institution in preserving or advancing America's national security; the HSI program does not address the federal government's own historical discrimination; and any school that obtains a 25% Hispanic population qualifies, even if the school is demographically uniform.

Consider, for example, three colleges in Nevada: Great Basin College, the College of Southern Nevada, and Nevada State College. None has any history pre-dating the end of Jim Crow or the passage of the Civil Rights Act of 1964: Great Basin College was founded in 1967,[99] the College of Southern Nevada

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[95] 582 U.S. 47, 52, n.1 (2017) (quoting Weinberger v. Wiesenfeld, 420 U.S. 636, 638, n.2 (1975)).

[96] *See generally* Gail L. Heriot, *Strict Scrutiny, Public Opinion, and Affirmative Action on Campus: Should the Courts Find a Narrowly Tailored Solution to a Compelling Need in a Policy Most Americans Oppose?*, 40 HARV. J. LEGIS. 217 (2003).

[97] *E.g.*, *Adarand*, 515 U.S. at 223 (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273 (1984) (plurality opinion)).

[98] Fisher v. Univ. of Tex. (*Fisher I*), 570 U.S. 297, 316–17 (2013) (Thomas, J., concurring) (citing Korematsu v. U.S., 323 U.S. 214 (1944); Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989) (quoting *Wygant*, 476 U.S. at 277 (plurality opinion)); Grutter v. Bollinger, 539 U.S. 306 (2003), respectively).

[99] *About Great Basin College*, GREAT BASIN COLL., https://www.gbcnv.edu/about/ (last visited

was founded in 1971,[100] and Nevada State College was opened in 2002.[101] All three are HSIs.

Also consider the University of Texas Rio Grande Valley. Approximately 89% of its student population is Hispanic.[102] It, too, is an HSI, despite its demographic uniformity.

*B. State Universities*

Next, a plaintiff who seeks to challenge the constitutionality of the HSI program may argue that state universities which have sought, obtained, and annually maintained their HSI status through race-based decision-making are in violation of the 14th Amendment's Equal Protection Clause.

The applicable law for state universities is clear: The 14th Amendment limits how these institutions can use race as they are arms of the states.[103] Courts apply strict scrutiny to gauge the constitutionality of state-run schools' usage of race.[104] As already discussed, the only compelling interests thus far recognized as potentially satisfying strict scrutiny are national security, redressing the harm caused by an actor's own history of racial discrimination, and the purported educational benefits of a diverse student body.

A defendant in such a challenge would find it difficult to claim that race-based decisions undertaken to seek, obtain, and maintain HSI status were adopted to serve the compelling need of national security as many schools have clearly documented that their desire for additional funding drives their pursuit of that status. A defendant in such a challenge could try to show that it has a recent history of intentional racial discrimination sufficient to provide "a strong basis in evidence for its conclusion that remedial action [is] necessary."[105] Again, with several of these institutions having been founded in recent decades, this might prove to be an arduous task. Finally, a defendant in such a case would likely find it onerous to argue that the decision to seek,

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Mar. 2, 2023).

[100] *About Us*, COLL. OF SOUTHERN NEV., https://www.csn.edu/about-us (last visited Mar. 2, 2023).

[101] *Mission & History*, NEV. STATE COLL., https://nsc.edu/about/mission-history/ (last visited Mar. 2, 2023).

[102] UTRGV ENROLLMENT PROFILE FALL 2019, *available at* https://www.utrgv.edu/sair/_files/documents/fall-2019-student-profile.pdf.

[103] Fisher v. Univ. of Tex. (*Fisher II*), 136 S. Ct. 2198, 2208 (2016) (treating state university as arm of the state and applying strict scrutiny to gauge constitutionality of its policy of racial discrimination); *Fisher I*, 133 S. Ct. at 2418 (same); *Grutter*, 539 U.S. at 326 (same).

[104] *Id*.

[105] *Fisher I*, 570 U.S. at 317 (Thomas, J., concurring) (citations and punctuation omitted).

obtain, and maintain HSI status was based on the desire to obtain any purported benefits of diversity for their student bodies when so many of these universities documented that they were motivated to seek, obtain, and maintain that status for access to funding.

## VI. CONCLUSION

The HSI program is growing as more colleges and universities with growing Hispanic student populations seek the federal money available to HSIs. However, as the program grows, increased attention to it could invite constitutional challenges to its disparate treatment of schools and students based on race. Those challenges would have a plausible basis in existing law.

Other Views:

- David Moltz, *The Emerging Hispanic-Serving Institution*, INSIDE HIGHER ED, Feb. 4, 2010, https://www.insidehighered.com/news/2010/02/05/emerging-hispanic-serving-institution.
- *A Proclamation on National Hispanic-Serving Institutions Week, 2022*, THE WHITE HOUSE, Sept. 9, 2022, https://www.whitehouse.gov/briefing-room/presidential-actions/2022/09/09/a-proclamation-on-national-hispanic-serving-institutions-week-2022/.
- Rachel F. Moran, *Diversity's Distractions Revisited: the Case of Latinx in Higher Education*, 73 S.C. L. REV. 579 (2022), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4137816#.

# THE WAR ON INDEPENDENT WORK: WHY SOME REGULATORS WANT TO ABOLISH INDEPENDENT CONTRACTING, WHY THEY KEEP FAILING, & WHY WE SHOULD DECLARE PEACE[*]

TAMMY MCCUTCHEN & ALEX MACDONALD[**]

There is a war on independent contracting.

Martial metaphors are often overworked in the law. But in this case, the imagery is apt. Armies of academics, labor advocates, politicians, and regulators have mustered to roll back or restrict the ability of individuals to work as independent contractors.[1] These advocates march under the banner of "misclassification"—i.e., the treatment of a worker as an independent contractor when, under the law, he or she should be treated as an employee.[2] But paradoxically, rather than seeking enforcement of the law, they have tried to change it. They have pushed stricter classification laws and regulations aimed at abolishing contracting relationships that, under current law, are perfectly

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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.*, John Schmitt et al., *The Economic Costs of Misclassification*, ECON. POL'Y INST. (Jan. 25, 2023), https://www.epi.org/publication/cost-of-misclassification/ (advocating for stricter enforcement and broader classification tests); *SEIU 1021 Members Join App Workers Protesting Misclassification Outside Uber CEO's San Francisco Mansion*, SERV. EMPS. INT'L UNION LOCAL 1021 (June 24, 2020), https://www.seiu1021.org/post/seiu-1021-members-join-app-workers-protesting-misclassification-outside-uber-ceos-san-francisco (advocating for stricter classification rules for app-based workers); David J. Rodwin, *Independent Contractor Misclassification is Making Everything Worse: The Experience of Home Care Workers in Maryland*, 14 ST. LOUIS U. J. HEALTH L. & POL'Y 47, 69–72 (2020) (arguing for stricter classification rules in homecare industry).

[2] *See* Veena Dubal, *Winning the Battle, Losing the War? Assessing the Impact of Misclassification Litigation on Workers in the Gig Economy*, 2017 WIS. L. REV. 739, 740 (2017) (arguing that "misclassification" is pervasive in app-based work).

legal and appropriate.[3] To borrow a less bellicose metaphor, they haven't so much called foul as tried to change the rules at halftime.

Why are these combatants waging this war? The reasons are complex. They include dwindling state coffers, surging contracting figures, and sagging union memberships.[4] But mostly, the reasons are ideological. The opponents of independent work believe that everyone is entitled to a "good" job.[5] And in their minds, there is only one kind of good job: a "traditional" employment arrangement with a set schedule and fixed benefits.[6]

Not everyone agrees with that view. Contractors themselves report being happy with their arrangements.[7] Overwhelmingly, they say they choose to work independently because it better fits their lives. It allows them to work

[3] *See* Rachel Lerman, *Labor Department Moves to Make it Harder to Misclassify Gig Workers*, WASHINGTON POST (Oct. 11, 2022), https://www.washingtonpost.com/business/2022/10/11/labor-department-gig-work/ (arguing paradoxically that new DOL rule will make it harder to misclassify workers under current law by changing the law).

[4] *See* Jessica Looman, *Misclassification of Employees as Independent Contractors Under the Fair Labor Standards Act*, U.S. DEP'T OF LABOR (June 3, 2022), https://blog.dol.gov/2022/06/03/misclassification-of-employees-as-independent-contractors-under-the-fair-labor-standards-act (arguing that misclassification causes workers to lose "employment rights," including access to unemployment insurance and worker classification); *Misclassification of Employees as Independent Contractors*, DEP'T FOR PROFESSIONAL EMPLOYEES, AFL-CIO (June 15, 2016), https://www.dpeaflcio.org/factsheets/misclassification-of-employees-as-independent-contractors (arguing that misclassification deprives governments of revenue and prevents workers from exercising union rights). *Cf.* Mariana Lao, *Workers in the "Gig" Economy: The Case for Extending the Antitrust Labor Exemption*, 51 U.C. DAVIS L. REV. 1543, 1565 (2018) (explaining that because app-based workers are classified as employees, they cannot form unions and bargain collectively).

[5] *See* DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT 23 (2017) (arguing that misclassification has contributed to erosion of "tradition" of offering "secure" jobs with "generous benefit packages").

[6] *See* Jennifer Sherer & Margaret Poydock, *Flexible Work Without Exploitation*, ECON. POL'Y INST. (Feb. 23, 2023), https://www.epi.org/publication/state-misclassification-of-workers/.

[7] *See* U.S. Bureau of Labor Statistics, Contingent Worker Survey (2017), https://www.bls.gov/news.release/conemp.nr0.htm [hereinafter "BLS 2017 Survey"] (reporting that 79% of independent contractors preferred their arrangement over a "traditional job").

at their own pace on their own schedules.[8] They do not want a so-called traditional job.[9]

And yet, the war goes on. The opponents of independent work either do not believe or do not care that some workers want to be contractors.[10] They assume—sometimes explicitly, sometimes implicitly—that workers have been tricked into accepting suboptimal working arrangements.[11] And so they continue their attack, notwithstanding the workers' own expressed preferences.[12]

The attack has not been uniform. Some jurisdictions have moved to restrict contracting across the board, while others have taken a more piecemeal approach.[13] The result has been a confusing web of overlapping classification rules. Classification has always been complicated; different statutes have long

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[8] *See, e.g.*, *85% of Massachusetts App-Based Rideshare and Food Delivery Drivers Support Legislation That Protects Their Independent Contractor Status, and Includes New Benefits*, MASS. COALITION FOR INDEPENDENT WORK (Apr. 5, 2023), https://independentmass.org/news/driver-poll-2023/ (reporting on poll conducted by Beacon Economics showing that vast majority of app-based workers preferred to maintain their status as independent contractors); *New Morning Consult Poll Shows 77% of App-Based Workers Prefer to Remain Independent Contractors*, FLEX (Oct. 24, 2022), https://www.flexassociation.org/post/mcworkersurvey (reporting that 85% of app-based workers say they choose independent contracting because they prefer to have a flexible schedule); Kathryn Shaw, *Economics of Flexible Work Schedules in the App-Based Economy*, STANFORD INST. FOR ECON. POL'Y RESEARCH 1 (June 2022), https://independentmass.org/wp-content/uploads/2022/07/Shaw-Report-FINAL-1.pdf ("A range of evidence indicates that workers on [app-based] platforms place a significant value on scheduling flexibility and therefore, that reclassification as employees would lead to a loss in value to workers.").

[9] *See* McKenna Schueler, *Florida Uber and Lyft Drivers Launch Effort to Organize for Better Pay, Better App Policies*, ORLANDO WEEKLY (May 1, 2023), https://www.orlandoweekly.com/news/florida-uber-and-lyft-drivers-launch-effort-to-organize-for-better-pay-better-app-policies-34079800 (reporting that even the Independent Drivers Guild, a quasi-union of app-based drivers, does not support reclassification or employee status, even as it pushes for more transparency and better pay for drivers).

[10] *See* Sherer & Poydock, *supra* note 6 (attributing growing popularity of independent contracting to an "inherent imbalance of bargaining power" between workers and companies).

[11] *See id.* (arguing that independent workers are being exploited and tricked into trading security for flexibility); Dubal, *supra* note 2, at 749–50 (arguing that independent workers are being "exploited").

[12] *See* WEIL, *supra* note 5, at 204–05 (advocating for new legislation to restrict use of independent contracting and other forms of "outsourcing," and noting that 22 states have already passed such legislation); Katie J. Wells, *The Instant Delivery Workplace in D.C.*, GEORGETOWN UNIV. BEEK CTR. FOR SOC. IMPACT & INNOVATION 14 (2023), (arguing for stricter classification rules despite interviews with app-based workers who reported liking independent work) ("These responses complicate our picture of the instant delivery food workplace, but they do not negate the concerns expressed earlier [in the report].").

[13] *Compare* Cal. Labor Code § § 2750.5 (adopting strict ABC test for most purposes under state law), *with* D.C. Code § 32–1331.04 (adopting ABC test for construction services industry).

used different tests for different workers.[14] But the problem has accelerated in recent years, with states like California adopting some of the most confusing classification regimes in history.[15] Nor has the federal government helped matters. Classification rules have gyrated from administration to administration, leaving businesses and workers with no clear guidance.[16] Confusion doesn't even begin to describe the problem; a more fitting word would be chaos.

So what can be done? State-level solutions won't work. In fact, more state-level reform might even exacerbate the problem, adding yet more complexity to an already dizzying maze of competing tests. No, the answer must come from the top down: we need a federal law. And that law must offer certainty while sweeping aside competing state-law rules.

Your authors did not come to this proposal lightly. We are cognizant of the risks federal legislation can pose. Federal laws are battering rams: they impose uniform solutions at the expense of state-level autonomy and flexibility. But when it comes to classification, we know what a state-by-state approach produces. It leads to uncertainty and, worse, gives free rein to those who would end independent contracting as we know it.

For decades, classification has been a battleground. It has been fought state to state, city to city. And it has cost millions if not billions of dollars along the way.[17] The casualties can be counted in lost jobs, lost investment,

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[14] *See* Cong. Rsch. Serv., R46765 Worker Classification: Employee Status Under the NLRA, the FLSA, and the ABC Test 1 (2021) [hereinafter "CRS Worker Classification Report"] (noting that different statues use different tests, even at the federal level, and may result in varied outcomes).

[15] *See* Gabrielle Canon, *AB 5 in California: Amid Lawsuits, Ballot Measure Push and Confusion, Lawmakers Promise to Refine Law*, USA TODAY (Jan. 21, 2020), https://www.usatoday.com/story/news/politics/2020/01/21/california-lawmaker-promises-refine-ab-5-amid-lawsuits-confusion/4505702002/ (reporting on efforts by California lawmakers to clarify classification law after 2020 reform caused widespread confusion among workers and business community). *See also* section II, *infra*.

[16] *See* Rebecca Rainey, *Labor Department Moves to Change Worker Classification Rule*, BLOOMBERG LAW (Oct. 11, 2022), https://news.bloomberglaw.com/daily-labor-report/biden-administration-issues-proposed-independent-contractor-redo (reporting on DOL's efforts to adopt third classification standard in three years under FLSA). *See also* section III, *infra*.

[17] *See* ROBERT SHAPRIO & LUKE STUTTGEN, THE MANY WAYS AMERICANS WORK AND THE COSTS OF TREATING INDEPENDENT CONTRACTORS AS EMPLOYEES, SONECON 2 (2022), https://progresschamber.org/wp-content/uploads/2022/04/The-Many-Ways-Americans-Work-Chamber-of-Progress-Shapiro-Sonecon.pdf (estimating that overbroad classification rules would cost the economy 4.4 million jobs and $9.1 billion in earnings); TANER OSMAN, ET AL., HOW MANY APP-BASED JOBS WOULD BE LOST BY CONVERTING RIDESHARE AND FOOD DELIVERY DRIVERS FROM INDEPENDENT CONTRACTORS TO EMPLOYEES IN THE COMMONWEALTH OF MASSACHUSETTS? (2022), https://yesformassdrivers.org/wp-content/uploads/

and pervasive uncertainty. That uncertainty has pervaded for long enough. It is time to declare a truce. Let's end the war on independent work.

## I. THE INDEPENDENT WORKFORCE

Let's begin with some data on independent work. There are now 64.6 million independent workers in the United States, according to MBO Partners' 2022 State of Independence Report, a 69% increase over 2020 and a 26% increase over 2021.[18] Over a third of these (21.6 million) are full-time independent workers—an increase of 59% from 2020.[19]

The fastest growth over the last two years has been among so-called occasional independents, or "occasionals." Occasionals are people who work irregularly and periodically as an independent contractor.[20] The number of occasionals more than doubled from 2020 to 2022, from 15.8 million to 31.9 million.[21] MBO Partners attributes the increase to several factors. For example, many people were pushed out of full-time employment during the pandemic as businesses and schools closed.[22] And amid rising inflation, many Americans have found that their income hasn't kept up with rising costs.[23] So part-time independent work has become crucial to making ends meet: In 2022, 71% of occasionals cited the need for supplemental income as a reason for working independently.[24]

More broadly, who are these new independent workers? Men and women are represented almost equally in the independent workforce and almost half are Millennials (34%) or Gen Z (15%).[25] Between 2019 and 2022, the proportion of white independents fell while the proportion of minorities rose to

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2022/03/Massachusetts_Drivers_Design-Final.pdf (estimating that broad classification rules could cost 87% of app-based drivers in Massachusetts their jobs); Richard H. Gilliland III, *California and the Terrible, Horrible, No Good, Very Bad Statutory Employee Classification Scheme*, 79 WASH. & LEE L. REV. 899, 904–05, 940 (2022) (reporting that freelancers in a diverse set of industries, including freelance writing, translation, and music, lost their jobs after California adopted a new, broader classification standard).

[18] *See* MBO PARTNERS' 2022 STATE OF INDEPENDENCE REPORT (2022), https://www.mbopartners.com/state-of-independence/ [hereinafter "MBO Partners"].

[19] *Id.*

[20] *See id.* (observing that the number of "occasional independents" rose sharply from 2020 to 2022).

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.* ("Most [occasionals] do this work to supplement their income.").

[25] *Id.*

25%.[26] In fact, Black Americans now make up a greater proportion of the independent workforce (14%) than of the traditional workforce (13%, according to the BLS).[27] In short, the independent workforce is younger and growing more diverse.[28]

For most (64%), working independently is their choice entirely, not a necessity, according to MBO Partners.[29] Only 10% join the independent workforce because of factors beyond their control—job loss or the inability to find a traditional job.[30] Most (74%) are very satisfied with their choice to work independently; 84% are happier working on their own; 67% feel more secure working independently; and 80% say that working on their own is better for their health.[31]

There are challenges to working independently—it's not the right choice for everyone. But the most common challenges may not be those that first come to mind. In the MBO Partners' survey, workers cited unpredictable income (43%) and concerns about the next gig (32%).[32] And less than 30% of workers surveyed by McKinsey & Company in 2022 reported challenges such as access to affordable healthcare, housing, transportation, and childcare.[33] None of these studies cite lack of overtime pay as a problem.[34]

In sum, 64.6 million Americans take part in the independent workforce—full-time, part-time, or occasionally.[35] Most do it because they want to, not because they have no other choice.[36] Most also report being happier, healthier, more secure, and more optimistic about the future than they would be working for someone else.[37]

All this suggests that independent work is the right choice for many people. But many federal and state regulators want to take that choice off the

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[26] *Id.*

[27] *Id. See also Spotlight on Statistics: Contingent Workers*, U.S. BUREAU OF LABOR STATISTICS (Sept. 2018), https://www.bls.gov/spotlight/2018/contingent-workers/home.htm.

[28] MBO PARTNERS, *supra* note 18.

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Freelance, Side Hustles, and Gigs: Many More Americans Have Become Independent Workers*, MCKINSEY & CO. (Aug. 23, 2022), https://www.mckinsey.com/featured-insights/sustainable-inclusive-growth/future-of-america/freelance-side-hustles-and-gigs-many-more-americans-have-become-independent-workers [hereinafter "MCKINSEY & CO."].

[34] *See id.*; MBO PARTNERS, *supra* note 18.

[35] *See* MBO PARTNERS, *supra* note 18.

[36] *See id.*; BLS STATISTICS, *supra* note 27; MCKINSEY & CO., *supra* note 33.

[37] MCKINSEY & CO., *supra* note 33.

table.[38] As the independent workforce grows, some regulators seem determined to force workers into traditional jobs by broadening the definition of "employee" and restricting standards for working as an independent contractor.[39]

Why are they doing this? Three explanations seem likely:

*First*, some policymakers hold deep misconceptions about independent contractors. They think independent contractors are exploited because they are not eligible for overtime pay, don't have access to employer-provided health care, and are not covered by workers' compensation and other employment laws.[40] Of course, this perspective assumes that independent workers are somehow unaware of their situation and have been bamboozled into working independently.[41] But it is not irrational for workers to choose the freedom and flexibility of independent work. As noted, many of them prefer independence to being controlled by an employer.[42] They choose to work independently even if it means giving up some predictability.[43]

*Second*, as always, follow the money. Some policymakers think that independent contracting costs them tax revenue.[44] Indeed, some older studies back that assumption up.[45] They estimate that independent contracting costs

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[38] *See, e.g.*, Lorena Gonzales, *The Gig Economy Has Costs. We Can No Longer Ignore Them*, WASHINGTON POST (Sept. 11, 2019), https://www.washingtonpost.com/opinions/2019/09/11/gig-economy-has-costs-we-can-no-longer-ignore-them/ (arguing that definition of employment should be expanded to capture more independent contractors); David McGarry, *New York Floats a Crackdown on Independent Workers*, REASON (Feb. 17, 2023), https://reason.com/2023/02/17/new-york-floats-a-crackdown-on-independent-workers/ (reporting on New York S.B. 2052, a bill to implement an ABC classification test under New York law).

[39] *See* Gonzales, *supra* note 38; McGarry, *supra* note 38.

[40] *See* Gonzales, *supra* note 38 (arguing that employment expansion is necessary because independent contractors lack access to employment benefits and protections).

[41] *See id.* (arguing that independent contracting allows companies to "exploit working people").

[42] *See* MCKINSEY & CO., *supra* note 33 (reporting high levels of satisfaction among independent workers); BLS 2017 Survey, *supra* note 7 (reporting that 79% of independent contractors preferred their arrangement over a "traditional job").

[43] *See* MCKINSEY & CO., *supra* note 33 (reporting strong desire for flexible work arrangements).

[44] *See* Gonzales, *supra* note 38 (arguing that contracting practices "leave taxpayers holding the bag").

[45] *See, e.g.*, NAT'L EMP. L. PROJECT, INDEPENDENT CONTRACTOR MISCLASSIFICATION IMPOSES HUGE COSTS ON WORKERS AND FEDERAL AND STATE TREASURIES (2020), https://s27147.pcdn.co/wp-content/uploads/Independent-Contractor-Misclassification-Imposes-Huge-Costs-Workers-Federal-State-Treasuries-Update-October-2020.pdf (citing 2010 Congressional Research Survey and arguing that misclassification reduces tax revenue by $8.71 billion annually); AM. RIGHTS AT WORK, BILLIONS IN REVENUE LOST DUE TO MISCLASSIFICATION AND PAYROLL FRAUD 2 (2010), https://www.jwj.org/wp-content/uploads/2010/08/100809misclassificationfactsheetfinal_logo.pdf [hereinafter "AM. RIGHTS AT WORK"] (citing state-level studies from

the federal government and some states tens of millions, even billions, of dollars each year.[46] The reason is simple: collecting taxes from independent workers is more difficult without payroll deductions.[47]

Again, these studies are old and potentially out of date. They may not reflect the current state of tax collection. But even if they're still accurate, the solution should not be to force workers into an employment relationship. Policymakers should be looking to preserve work options, not funnel people into arrangements that may not fit their lives.[48]

*Third*, labor unions have tried to limit independent contracting.[49] The reason, again, is simple: independent contractors cannot bargain collectively, and so do not join unions.[50] That means unions lose potential members, and thus potential membership dues.[51] Unions play a powerful political role in many blue states, where their campaign contributions give them a seat at the

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1997 to 2006 and arguing that misclassification costs state and local governments "hundreds of millions, and often billions" each year).

[46] *See* AM. RIGHTS AT WORK, *supra* note 45, at 2.

[47] *See id.* (attributing lost revenue to "payroll fraud").

[48] *Cf.* MCKINSEY & CO., *supra* note 33 (reporting that most independent workers choose independent arrangements over employment to fit their unique personal and professional circumstances); Ike Brannon & Samuel Wolf, *An Empirical Snapshot of the Gig Economy*, 44 REGULATION 4, 5 (2021), https://www.cato.org/sites/cato.org/files/2021-09/regulation-v44n3-2.pdf (reporting results of survey of 1,100 independent contractors) ("Our data suggest that most people who do gig assignments do not place a high priority on job security or fringe benefits, but instead desire a gig that has maximum flexibility to enter and exit to provide them a straightforward way to earn additional money when necessary."); McGarry, *supra* note 38 ("Anti-freelance politicians, backed by unions, tout the benefits of 'employee' status, but such benefits accrue to a few at the expense many others.").

[49] *See* McGarry, *supra* note 38 (reporting that anti-contractor bills have often been backed by labor unions).

[50] *See.* 29 U.S.C. § 152(3) (excluding independent contractors from definition of "employee" under federal labor law); Columbia River Packers Ass'n v. Hinton, 315 U.S. 143, 145–46 (1942) (holding that antitrust exemption for labor unions did not apply to collection of independent contractors, and therefore collective bargaining by contractors amounted to an unlawful restraint of trade); Alexander T. MacDonald, *The FTC's Indefensible Position on Collective Bargaining*, FEDSOC BLOG (Apr. 17, 2023), https://fedsoc.org/commentary/fedsoc-blog/the-ftc-s-indefensible-position-on-collective-bargaining (explaining that even if contractor unions were exempted from antitrust, they would still lack coverage and protection under federal labor laws). *But see Independent Contractor vs. Employee*, COMM'CN WORKERS OF AM., https://cwa-union.org/about/rights-on-job/legal-toolkit/my-employer-says-i-am-independent-contractor-what-does-mean (last visited May 2, 2023) (urging independent contractors to join a union even though they are not protected by federal labor law).

[51] *See* authorities cited in note 50, *supra*.

policymaking table.[52] So in those states, policy has trended away from allowing independent work and toward restrictive classification rules.[53]

## II. THE LEGAL CHAOS

This struggle over independent work has produced a kaleidoscope of classification rules. By our last count,[54] there are no fewer than 100 different federal and state statutes regulating worker classification under at least six different types of employment and tax laws: wage-and-hour, workers' compensation, equal employment opportunity, workplace safety, unemployment tax, and income tax.[55] Not all the laws are totally different, but most have some differences, small or large. Also, both the federal government and many state governments have different standards in different statutes.[56]

Yes, a single person can be an employee under wage-and-hour law but an independent contractor under workers'-compensation law.[57] A single person

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[52] *See* Samuel Estreicher, *Trade Unionism Under Globalization: The Demise of Voluntarism?*, 54 ST. LOUIS U. L.J. 415, 423–25 (2010) (surveying union contributions to Democratic candidates and tracking unions' increasing involvement and influence in Democratic policymaking).

[53] *See, e.g.*, Cal. A.B. 5 (2019) (adopting restrictive ABC classification test for most purposes under California law); Mass. Gen. L. ch. 149 § 148B (adopting ABC test under Massachusetts law); Hargrove v. Sleepy's, *LLC*, 106 A.3d 449, 458 (N.J. 2015) (interpreting New Jersey wage-and-hour law to incorporate ABC test); 820 ILL. COMP. STAT. ANN. 185/10 (adopting modified ABC test for construction contractors in Illinois); N.Y. City Int. No. 0134-2022 (for purpose of wage-transparency law, defining *employee* to include an independent contractor); N.Y. City Admin. Code § 8-102 (for purposes of city human-rights law, defining *employee* to include an independent contractor); Wash. Rev. Code § 51.08.180 (covering independent contractors alongside employees under state workers'-compensation scheme).

[54] *See* TAMMY MCCUTCHEN & ALEXANDER MACDONALD, READY, FIRE, AIM: HOW STATE REGULATORS ARE THREATENING THE GIG ECONOMY AND MILLIONS OF WORKERS AND CONSUMERS 42–44 (Jan. 2020), www.uschamber.com/assets/archived/images/ready_fire_aim_report_on_the_gig_economy.pdf.

[55] *See id.* (surveying state classification tests).

[56] *Compare* FedEx Home Delivery v. NLRB, 849 F.3d 1123, 1124 (D.C. Cir. 2017) (describing common-law test under NLRA), *with* Murcia v. A Cap. Elec. Contractors, Inc., 270 F. Supp. 3d 39, 44 (D.D.C. 2017) (describing economic-realities test under FLSA).

[57] *See* Robert T. Franklin, Michael Kota, & Robert M. Milane, *Classifying Workers As "Independent Contractors" or "Employees": Observations from the Transportation Industry*, BRIEF, at 24, 27 (Fall 2011) ("At the very heart of the issue of worker classification—and the difficulties in grappling with it—is the fact that there is no one definitive test or standard for classifying workers as either employees or independent contractors. The 'standard' varies in the substantive legal context in which it is encountered.").

doing the same work can be an employee in one state and an independent contractor in another.[58]

This chaos opens the door to arbitrary enforcement—even abuse.[59] Regulators can choose at will from a menu of different definitions, some broad, some narrow.[60] This reduces predictability and opens the door to favoritism, ideological enmity, or even whimsy.[61]

Let's start by reviewing independent contractor standards under the federal Fair Labor Standards Act. The FLSA only covers employees, not independent contractors. Thus, identifying whether a worker is an employee is the essential preliminary question for all FLSA protections. Yet, the FLSA's definitions, unchanged since the Act was passed in 1938, are circular at best. "Employee" is defined as "any individual employed by an employer."[62] "Employer" is defined as "any person acting directly or indirectly in the interest of an employer in relation to an employee."[63] And "employ" means "to suffer or permit to work."[64] Well, that is helpful. Not.

Less than a decade after the FLSA was enacted, the Supreme Court had to step in to cobble together some sort of functional definition. In a series of cases from 1944 to 1947,[65] the Court found that the definitions of "employee" under the Social Security Act, the National Labor Relations Act, and the FLSA were broader than the common law definition, which determined employee status "solely by the idea of control which an alleged employer may or could exercise over the details of the service rendered to his business by the worker."[66] But the Supreme Court also recognized that these laws were "not intended to stamp all persons as employees."[67] Even a broad definition of

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[58] *Id.* ("The 'standard' varies in the substantive legal context in which it is encountered. For example, the test for the classification of workers as employees is different for tax, unemployment, workers' compensation, and tort liability purposes.").

[59] *See id.* (noting that the result in any given case depends on circumstance, standard, procedural posture, and the decisionmaker applying the test).

[60] *See id.* (lamenting the absence of a single clear standard).

[61] *See id.* (observing that regulators and enforcement authorities can "seize on" differences in statutory language to achieve desired litigation results).

[62] 29 U.S.C. § 203(e).

[63] 29 U.S.C. § 203(d).

[64] 29 U.S.C. § 203(g).

[65] Bartels v. Birmingham, 332 U.S. 126 (1947) (SSA); Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947) (FLSA); United States v. Silk, 331 U.S. 704 (1947) (SSA); Walling v. Portland Terminal Co., 330 U.S. 148 (1947) (FLSA); NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944).

[66] *Bartels,* 332 U.S. at 130.

[67] *Walling*, 330 U.S. at 152.

employee "does not mean that all who render service to an industry are employees."[68]

The Court thus acknowledged that independent contractors are not employees protected by the FLSA.[69] To distinguish between employees and independent contractors, the Court developed what is known today as the "economic reality" test: Employees are "those who as a matter of economic reality are dependent upon the business to which they render service."[70] The Supreme Court cases discussed the types of facts that would be relevant to determine economic dependence in addition to the common-law control factor: permanency of the relationship, the skill required for the work, the investment in facilities for work, the opportunities for profit or loss, and whether the worker was part of an integrated unit of production. The Court cautioned, however, that no single factor is determinative. Rather, the totality of the situation controls.[71]

Following these Supreme Court decisions, Congress responded quickly to amend the definitions of "employee" in the NLRA and the SSA. Those amendments brought back the common-law control test. The Supreme Court interpreted both amendments to "apply general agency principles in distinguishing between employees and independent contractors."[72] Congress did not, however, similarly amend the FLSA, and the Supreme Court later affirmed that economic-reality remained the test for employment under the FLSA.[73]

Current federal law, then, applies the common-law control test to all federal statutes except the FLSA. But that doesn't mean the test is applied uniformly. Each of these statutes is administered and enforced by a different agency.[74] And the different agencies have adopted different multi-factor tests under the common law.[75]

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[68] *Silk*, 331 U.S. at 712.

[69] *Rutherford Food*, 331 U.S. at 729.

[70] *Bartels*, 332 U.S. at 130.

[71] *Id.*; *Rutherford Food*, 331 U.S. at 730; *Silk,* 331 U.S. at 716.

[72] NLRB v. United Ins. Co. of Am., 390 U.S. 254, 256 (1968).

[73] Goldberg v. Whitaker House Co-op., Inc., 366 U.S. 28, 33 (1961).

[74] *See, e.g.*, 29 U.S.C. § 153 (delegating enforcement authority under NLRA to the National Labor Relations Board); 29 U.S.C. § 204 (delegating enforcement authority under FLSA to the Wage and Hour Administration); 29 U.S.C. § 2000e–4 (delegating enforcement authority under Title VII of the Civil Rights Act to the Equal Employment Opportunity Commission).

[75] *See* CRS Worker Classification Report, *supra* note 14, at 1 (surveying the varying standards that apply under different classification laws) ("Because labor and employment laws often define

For example, the Internal Revenue Service acknowledges the general common-law rule that a person is an independent contractor if "the payer has the right to control or direct only the result of the work and not what will be done and how it will be done."[76] The IRS used to apply a twenty-factor test to determine control, and many state tax laws still use that test.[77] But in its "Topic No. 762" publication, the agency now groups most of its twenty factors under three categories: behavioral control, financial control, and relationship of the parties.[78] And each of these categories breaks down into sub-factors.[79] The resulting test isn't less complicated; it's only more layered.[80]

The revised standard also adds a controversial element: "The business does not have to actually direct or control the way the work is done—as long as the employer has the *right* to direct and control the work."[81] This approach is often called "reserved control"; it means that a company could be considered a worker's employer simply because it has a contractual right to exercise control—a right it may never invoke.[82] That approach has been controversial and in flux at many federal agencies.[83] Whether it's the *right* approach is beside the point. The point is that it adds another layer of complexity. It makes it even harder to know how to classify a worker under competing tests.[84]

Similar complexity plagues our equal-employment laws. Those laws are largely enforced by the EEOC.[85] The EEOC addresses independent

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who may be considered an 'employee' in a vague or circular fashion, courts and administrative bodies have adopted various tests for making classification determinations.").

[76] *Independent Contractor Defined*, INTERNAL REVENUE SERV., https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-defined (last visited May 3, 2023). *See also Employee*, INTERNAL REVENUE SERV., https://www.irs.gov/businesses/small-businesses-self-employed/employee-common-law-employee (last visited May 3, 2023).

[77] *See* Alexandre Zucco, *Independent Contractors and the Internal Revenue Service's "Twenty Factor" Test: Perspective on the Problems of Today and the Solutions for Tomorrow*, 57 WAYNE L. REV. 599, 601 (2011) (describing former twenty-factor test).

[78] *See Topic No. 762, Independent Contractor vs. Employee*, INTERNAL REVENUE SERV., https://www.irs.gov/taxtopics/tc762 (last visited May 3, 2023).

[79] *Id.*

[80] *See id.*

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

[82] *See id.*

[83] *See, e.g.*, Jim Paretti, Michael Lotito, & Maury Baskin, *NLRB Proposes New Joint Employer Standard That Would Dramatically Expand Scope of "Joint Employment" Under the National Labor Relations Act*, LITTLER INSIGHT (Sept. 6, 2022), https://www.littler.com/publication-press/publication/nlrb-proposes-new-joint-employer-standard-would-dramatically-expand (describing new joint-employment standard including controversial reserved-control element).

[84] *See id.* (criticizing reserved-control standard for lack of clarity).

[85] *See* 29 U.S.C. § 2000e–4.

contracting in its enforcement guidance on "Application of EEO Laws to Contingent Workers."[86] The EEOC, like the IRS, begins with the common law control test: "The worker is a covered employee under the anti-discrimination statutes if the right to control the means and manner of her work performance rests with the firm and/or its client rather than with the worker herself."[87] It then launches into a list of sixteen factors, including the worker's level of expertise, who furnishes the tools and equipment, where the work is performed, who sets the hours, and, of course, who controls the work.[88] None of these factors has more weight than any other.[89] The test, like so many others, is a freewheeling hodgepodge of weighing, balancing, and, ultimately, guessing.[90]

The National Labor Relations Board is no better. The Board applies a ten-factor test as articulated in the Restatement (Second) of Agency § 220 when determining independent contractor status.[91] Like the EEOC, the Board throws these factors into an undifferentiated bucket and asks regulated parties to "balance" them.[92] The Restatement factors at least have the benefit of decades of caselaw; employers and workers can look to prior decisions to figure out what the factors mean.[93] But even that benefit has been weakened by recent events. In December 2021, the Board issued a Notice and Invitation

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[86] U.S. EQUAL EMP'T OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE: APPLICATION OF EEO LAWS TO CONTINGENT WORKERS PLACED BY TEMPORARY EMPLOYMENT AGENCIES AND OTHER STAFFING FIRMS (1997), https://www.eeoc.gov/laws/guidance/enforcement-guidance-application-eeo-laws-contingent-workers-placed-temporary.

[87] *Id.*

[88] *Id.*

[89] *See id.*

[90] *See id.* ("This list is not exhaustive. Other aspects of the relationship between the parties may affect the determination of whether an employer–employee relationship exists."). *Cf. also* Samuel Gregg & James R. Stoner, *Natural Law and Property Rights*, in NATURAL LAW, ECONOMICS & THE COMMON GOOD loc. 88 (Samuel Gregg & Harold James eds. 2012) (ebook) (explaining the difficulty of "weighing" abstract concepts against one another) ("We cannot, for example, weigh pleasures and pains, because they have no common denominator.").

[91] *See* SuperShuttle DFW, Inc., 367 N.L.R.B. No. 75, slip op. at 1 (Jan. 25, 2019) (applying Restatement (Second) of Agency § 220 (Am. L. Inst. 1958)).

[92] *See id.*

[93] *See, e.g.*, Diana J. Simon, *The Scope of Employment Test Under the Work-Made-for-Hire Doctrine Revisited: How Covid-19, Remote Working, and the Restatement (Third) of Agency Could Change It*, 20 UIC REV. INTELL. PROP. L. 232, 233 (2021) (describing how courts have applied Restatement factors in various contexts, including intellectual-property law); Frank J. Menetrez, *Employee Status and the Concept of Control in Federal Employment Discrimination Law*, 63 SMU L. REV. 137, 180 (2010) (describing how courts have applied restatement factors in employment-discrimination context).

to File Briefs in the case *The Atlanta Opera Inc.*,[94] requesting amicus briefs on whether it should continue to apply the current independent contractor standard from *SuperShuttle DFW, Inc.*,[95] or apply the prior standard announced in *FedEx Home Delivery*.[96] The difference between the two cases seems to be how much weight to give the "control" factor and a new "entrepreneurial opportunity" factor. Forty-two amicus briefs were filed, some endorsing *SuperShuttle,* others seeking a return to *FedEx*, and some seeming to ask the Board to abandon the common law altogether and move towards a broad ABC test (more on that later).[97] As of this writing, the Board has not issued a decision.[98] The confusion continues.[99]

State law is even worse, starting with California's Assembly Bill 5. AB 5 uses a relatively simple three-factor test.[100] It governs classification for most purposes under California law.[101] For that reason, it is often held up as an example for how to cut through the classification confusion.[102] Some have even suggested that Congress could use it as a model for federal law.[103] But in our view, any such attempt would be misguided and destructive. For AB 5 is not as simple as it seems.

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[94] 371 N.L.R.B. No. 45 (2021).

[95] 367 N.L.R.B. No. 75 (2019).

[96] 361 N.L.R.B. 610 (2014).

[97] *See* Atlanta Opera, Inc., Case No. 10-RC-276292 (N.L.R.B.), https://www.nlrb.gov/case/10-RC-276292 (docket).

[98] *See id.*

[99] *See* Daniel Wiessner, *NLRB Eyes Overhaul of Trump-era Independent Contractor Test*, REUTERS (Dec. 28, 2021), https://www.reuters.com/legal/government/nlrb-eyes-overhaul-trump-era-independent-contractor-test-2021-12-28/ (reviewing prior litigation over the NLRB's standard and noting that new standard would mark third shift in last ten years).

[100] *See* A.B. 5, 2019–20 Leg. Sess. (Cal) (codified as Cal. Labor Code § 2750.5).

[101] *See* Cal. Labor Code § 2750.5 (dictating use of ABC test for purposes of labor code, unemployment, and certain state wage orders).

[102] *See* Lynn Rhinehart, et al., *Misclassification, the ABC Test, and Employee Status*, ECON. POL'Y INST. (June 16, 2021) (describing AB 5's test as a "strong, protective test" and urging policymakers to adopt it at the federal level). *But see* Jim Manley, *California Has a Terrible Labor Law. Now the Biden Administration Wants to Take It National*, THE HILL (Oct. 10, 2022), https://thehill.com/opinion/finance/3677431-california-has-a-terrible-labor-law-the-biden-administration-wants-to-take-it-national/ (arguing that AB 5 has been one of "the most ill-conceived state labor policies in recent memory" and criticizing the Biden administration for supporting a similar approach under federal labor law); Sean Higgins, *With PRO Act, Congress Readies National Version of California's AB 5 Fiasco*, COMPETITIVE ENTER. INST. (July 22, 2021), https://cei.org/blog/with-pro-act-congress-readies-national-version-of-californias-ab5-fiasco/ (arguing that importing AB 5's standard into federal law would destroy thousands of independent contracting opportunities) ("In short, the PRO Act would eliminate most workers' side hustles.").

[103] *See id.*

The history is worth reviewing. Before 2018, independent contractor status under California's wage orders was determined using a 13-factor test balancing test. That test was established in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*.[104] Like many balancing tests, the *Borello* test was malleable and often unpredictable.[105] It considered familiar factors such as who supplied the services and whether the worker had special skills.[106] But it also looked at whether the worker had an independent business, whether the worker's services were "integral" to the hiring entity's business, and whether the parties thought they were creating an employment relationship.[107] None of these factors had more weight than the others; if workers wanted real guidance, they had to read the caselaw.[108] Good luck.

But bad as *Borello* was, it at least preserved traditional independent contracting opportunities.[109] What came next threatened to abolish them. In 2018, the California Supreme Court handed down *Dynamex v. Superior Court*.[110] *Dynamex* abolished the *Borello* test for certain wage-and-hour purposes. In its place, it adopted three mandatory factors, sometimes known as an ABC test. Under the *Dynamex* test, a person is considered an independent contractor only if:

> (A) The worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;
>
> (B) The worker performs work that is outside the usual course of the hiring entity's business; and

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[104] 769 P.2d 399, 404 (Cal. 1989).

[105] *See* Peter Tran, *The Misclassification of Employees and California's Latest Confusion Regarding Who Is an Employee or an Independent Contractor*, 56 SANTA CLARA L. REV. 677, 700 (2016) (observing that *Borello* had "its downsides," including that applying its "fourteen factors appeared to be a long and time-consuming process"); Harvey Gelb, *Defining Employee: California Style*, 55 LOY. L.A. L. REV. 1, 25–26 (2022) ("Also, *Borello* requires the use of a multi-factor test, which complicates matters.").

[106] *Borello*, 769 P.2d at 404.

[107] *Id.*

[108] *See* Tran, *supra* note 105, at 695 (surveying cases applying *Borello* and concluding that the analysis was manageable because of its focus on control, which had a shared basis in the common-law standard).

[109] *See id.* (arguing that *Borello*, combined with other clarifying decisions from the California Supreme Court, "can reach the audiences it was designed to reach while remaining reasonable").

[110] 416 P.3d 1, 34 (Cal. 2018).

> (C) The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.[111]

The *Borello* test remained in effect for other California laws such as workers' compensation and unemployment insurance.[112] Only Massachusetts had adopted a similarly restrictive rule.[113]

To say *Dynamex* was controversial is understatement. The business community reacted with alarm.[114] Many complained that key features of the test, such as the "usual course of business," were underdefined.[115] They also worried that the decision would upset existing business models.[116] So they called on the California Legislature to step in.[117]

Legislators responded with AB 5.[118] But as a legislative fix, AB 5 was a failure. Rather than restoring *Borello*, AB 5 adopted the *Dynamex* ABC test for the entire California Labor Code, the Unemployment Code, and California wage orders.[119] It did not define any of the key terms or answer any of the regulated community's questions.[120] Instead, it added to the confusion by adopting "exceptions" for about forty industries and professions.[121] Those professions included insurance agents, podiatrists, investment advisors, direct salespeople, and licensed repossession agents.[122]

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[111] *Id.*

[112] *See id.* (adopting ABC test only for state wage orders).

[113] *See* Mass. Gen. L. ch. 149 § 148B.

[114] *See* Michael J. Lotito, Bruce Sarchet, & Jim Paretti, *AB 5: The Aftermath of California's Experiment to Eliminate Independent Contractors Offers a Cautionary Tale for Other States*, LITTLER INSIGHT (Mar. 10, 2020), https://www.littler.com/publication-press/publication/ab-5-aftermath-californias-experiment-eliminate-independent (describing history of *Dynamex*, AB 5, and the subsequent reaction among the business community).

[115] *See, e.g.*, Cynthia Flynn, *B is for Beware: Companies Should Heed Factor "B" of the New* Dynamex *"ABC" Test*, 2 VERDICT MAG. (2018), *available at* https://hacklerflynnlaw.com/new-dynamex-abc-test-for-independent-contractors/ (examining ambiguity of prong B and risks it posed to businesses); *Employee or Independent Contractor: How the* Dynamex *Decision Affects Your Business*, STRAGGAS L. GRP. (Nov. 2018), https://straggaslaw.com/employee-or-independent-contractor-how-the-dynamex-decision-affects-your-business/ (same).

[116] *See* sources cited in notes 114-15, *supra*.

[117] *See* Lotito et al., *supra* note 114 (reviewing history of efforts to "fix" *Dynamex* through AB 5).

[118] *Id.*

[119] *See* Cal. Labor Code § 2750.5.

[120] *See* Lotito et al., *supra* note 114 (criticizing AB 5 for, among other things, lack of clarity).

[121] *See* Cal. Labor Code §§ 2750.6–2755 (setting out exceptions to ABC test).

[122] *See id.*

Similarly, AB 5 included an exception for "professional services."[123] To meet that exception, a person had to satisfy a separate six-factor test.[124] That test included yet more ill-defined considerations. For example, the worker had to set her own hours outside "reasonable business hours."[125] She also had to exercise "discretion and independent judgment in the performance of the services."[126] The law offered no further definition or detail about what any of this meant.

What's more, a separate seven-factor test governed construction contractors.[127] And these factors were no better defined than the others. They included factors such as whether the worker was "customarily engaged in an independently established business of the same nature as that involved in the work performed."[128] What "customarily engaged" and "independently established" meant was left unsaid.[129]

There's more. AB 5 also provided an exception for "referral services."[130] To qualify for that exception, a worker had to satisfy an additional ten criteria.[131] And yet another exception covered business-to-business relationships.[132] To qualify for that exception, a worker had to meet yet another twelve required elements.[133] The exceptions truly swallowed the rule.

That all would have been confusing enough on its own. But there was more. Even if a worker qualified for one of these multi-factor exceptions, she wasn't automatically deemed independent. Instead, she was subject to the old thirteen-factor *Borello* test.[134] So she had to run through a second set of factors—and check her work against the caselaw—to make an educated guess

[123] Cal. Labor Code § 2778.
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] Cal. Labor Code § 2781.
[128] *Id.*
[129] *See id.*
[130] Cal. Labor Code § 2777.
[131] *Id.*
[132] Cal. Labor Code § 2776.
[133] *Id.*
[134] *See* Gilliand, *supra* note 17, at 904–05 (surveying resulting confusion) ("Those excepted occupations continue to receive treatment under the *Borello* test.").

about her status.[135] The result was complexity and befuddlement.[136] Test had been layered on top of test; confusion stacked upon confusion.[137]

But legislators weren't content to leave it there. Just a few days after AB 5 went into effect, they began introducing amendments. By early 2020, there were 31 different bills seeking to modify or repeal AB 5.[138] Those bills ultimately coalesced in AB 2257.[139] AB 2257 made nine different changes to the "business-to-business" exception.[140] It also made changes for freelance writers and photographers, including dropping a much-criticized limit on annual submissions.[141] Finally, it added twenty-six new exceptions, some with additional required elements.[142] These exceptions included carveouts for songwriters, radio promoters, landscape artists, home inspectors, registered professional foresters, and dog walkers.[143] Together, AB 5 and AB 2257 created special rules for about sixty-six different industries and professions.[144]

What a mess.

To call California's regime for regulating independent contractors Byzantine is an insult to the Byzantine Empire: It's more intricate, more confusing, more convoluted than even the federal law. Anyone who thinks this is a model to emulate has been consuming too much of one of California's agricultural products—and not grapes or almonds. California does nothing to create clear and certain rules.[145] It is a model to avoid, not emulate.

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[135] *See id.* at 904–05 (explaining the nesting tests).

[136] *Id.* at 939 (observing that AB 5 had an outsized impact on "less sophisticated" and "fragmented" industries such as "non-profit theater, wine-tasting, tourism, independent video game development, translation and interpretation services, freelance writing, and music").

[137] *See id.* at 938–39 ("The passage of AB 5 engendered immediate confusion, outrage, and litigation from industries seeking to clarify or change their excepted status.").

[138] Bruce Sarchet, Jim Paretti, & Michael Lotito, *Independent Contractor Issues in California: Summer 2020 Update*, LITTLER WPI REPORT (Sept. 1, 2020), https://www.littler.com/publication-press/publication/independent-contractor-issues-california-summer-2020-update.

[139] A.B. 2257 2020–21 Leg. (Cal.).

[140] *See id.*

[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] *Id. See also* Bruce Sarchet, James Paretti, & Michael J. Lotito, *AB 5 Update: AB 2257 Would Amend California Independent Contractor Law*, LITTLER ASAP (Aug. 26, 2020), https://www.littler.com/publication-press/publication/ab-5-update-ab-2257-would-amend-california-independent-contractor-law (summarizing changes and exceptions added by AB 2257). *See also* Samantha J. Prince, *The AB5 Experiment—Should States Adopt California's Worker Classification Law?*, 11 AM. U. BUS. L. REV. 43, 94 (2022) (listing 109 existing exceptions from AB 5's ABC test).

[145] *See* Gilliand, *supra* note 17, at 940 ("California attorneys who specialize in labor and nonprofit business have decried AB 5's complexity . . . .").

California is probably the worst offender: few jurisdictions can match its complexity. But it is hardly unique. Many states have more than one test: A multifactor balancing test under the tax law, for example, an economic-reality test for wage-hour laws, and an ABC test for unemployment.[146] Some states, like Maine and Wisconsin, also have complex standards that combine required criteria with a balancing test.[147] A single state can have four or five different tests under different laws, adding to the chaos that is independent contracting law.[148] At the state level, then, there is little end in sight, and little hope that an individual worker could possibly know her status under the law.

## III. THE FEDERAL FAILURE

There is little prospect of reform from the top. In the fall of 2022, the Department of Labor proposed yet another regulation adopting yet another new test.[149] This regulation was ostensibly aimed at helping workers understand when a worker would be considered an employee under the FLSA.[150] But it did nothing to reduce the chaos. Instead, it only added yet another strand to the increasingly dense classification web.[151]

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[146] *Compare* Fla. Stat. §§ 443.1216 (defining *employment* for purposes of coverage under state reemployment insurance), *with* 448.095 (defining *employee* for purposes of coverage under state wage-and-hour laws), *and* 440.02 (defining *employee* for purposes of coverage under state workers'-compensation system). *See also* MCCUTCHEN & MACDONALD, *supra* note 54 (surveying and cataloguing state classification tests); CRS Worker Classification Report, *supra* note 14, at 4 ("Notably, different laws may require the use of different tests, with some tests possibly emphasizing certain factors over others.").

[147] *See Employment Standard Defining Employee vs. Independent Contractor*, MAINE DEP'T OF LABOR, https://www.maine.gov/labor/misclass/employmentstandard/index.shtml (last visited May 5, 2023) (setting out multi-factor balancing test); *Is a Worker an "Employee" or an "Independent Contractor"?*, WIS. DEP'T OF WORKFORCE DEV., https://dwd.wisconsin.gov/worker-classification/er/laborstandards/ (last visited May 5, 2023) (setting out three different classification tests under three different statutory schemes).

[148] *See* sources cited in notes 146-47, *supra.*

[149] *See* Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 87 Fed. Reg. 62218 (Oct. 13, 2022), https://www.federalregister.gov/documents/2022/10/13/2022-21454/employee-or-independent-contractor-classification-under-the-fair-labor-standards-act [hereinafter "2022 Proposed Rule"].

[150] *See id.* at 62220 (asserting that rule will "provide more consistent guidance to employers as they determine whether workers are economically dependent on the employer for work or are in business for themselves, as well as useful guidance to workers on whether they are correctly classified as employees or independent contractors").

[151] *See, e.g.*, U.S. Chamber of Commerce, Comments on DOL Proposed Rulemaking Regarding Employee or Independent Contractor Classification (Dec. 13, 2022), https://www.uschamber.com/workforce/independent-contractors/u-s-chamber-comments-to-dol-proposed-rulemaking-regarding-employee-or-independent-contractor-classification (criticizing proposed rule for

To understand the new regulation, we need a little more context. Under existing Supreme Court precedent, the DOL must work within the economic-reality test.[152] But the analysis to determine whether an individual is "economically dependent" is not set.[153] The analysis requires balancing of some number of factors, and no one factor is determinative.[154] But different courts have adopted different factors—some use five factors, others six, others four. What's worse, though some of the factors are similar, they are not balanced in quite the same way from court to court.[155]

One might think that the DOL—the agency responsible for administering federal wage-and-hour law nationwide—would do something to clarify the inconsistency. But even the DOL's guidance has been inconsistent. For example, in Fact Sheet 13, it lists seven factors:

1. The extent to which the services rendered are an integral part of the principal's business.
2. The permanency of the relationship.
3. The amount of the alleged contractor's investment in facilities and equipment.
4. The nature and degree of control by the principal.
5. The alleged contractor's opportunities for profit and loss.

creating confusion about proper test and undermining certainty offered by existing regulations); Liya Palagashvili, *Labor Department Ignores the Costs of Its New Rule for Independent Contractors*, THE HILL (Dec. 23, 2022), https://thehill.com/opinion/finance/3784283-labor-department-ignores-the-costs-of-its-new-rule-for-contractors/ (criticizing DOL for ignoring the compliance costs businesses will incur in analyzing the new rules and adjusting business practices to conform to them).

[152] *See Rutherford Food*, 331 U.S. at 727 (adopting economic-realities test under FLSA).

[153] *See* Dawson v. Nat'l Collegiate Athletic Ass'n, 932 F.3d 905, 909 (9th Cir. 2019) ("Economic reality accounts for 'the circumstances of the whole activity' rather than considering 'isolated factors' determinative.") (quoting *Rutherford Food*, 331 U.S. at 730).

[154] *See id. See also* Fact Sheet No. 13: Employment Relationship Under the Fair Labor Standards Act (FLSA), U.S. Dep't of Labor, Wage & Hour Div., https://www.dol.gov/agencies/whd/fact-sheets/13-flsa-employment-relationship (last visited May 5, 2023) [hereinafter "Fact Sheet No. 13"] ("The U.S. Supreme Court has on a number of occasions indicated that there is no single rule or test for determining whether an individual is an independent contractor or an employee for purposes of the FLSA. The Court has held that it is the total activity or situation which controls.").

[155] *See, e.g.,* Hargrave v. AIM Directional Servs., No. 21-40496 (5th Cir. May 11, 2022) (five factors); Keller v. Miri Microsystems LLC, 781 F.3d 799, 807 (6th Cir. 2015) (six factors); Brock v. Superior Care, Inc., 840 F.2d 1054, 1058 (2d Cir. 1988) (five factors); Donovan v. Dial America Marketing Inc., 757 F.2d 1376, 1381 (3d Cir. 1985) (six factors).

6. The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor.

7. The degree of independent business organization and operation.[156]

But the now-withdrawn Administrator's Interpretation No. 2015-1 listed only six.[157] It dropped the "independent business organization" factor, ostensibly to broaden the test and cover more workers.[158] But it achieved no additional clarity. Indeed, the "independent business organization" factor was one of the easiest to apply: one simply had to ask whether the worker provided services through a formally established business entity. Every remaining factor required some degree of judgment and guesswork.[159]

Indeed, the DOL itself seemed confused about how the factors should play out. It sometimes recognized that many workers were not employees. At other times, the DOL stated that "most workers are employees under the FLSA's broad definitions."[160] If the DOL can't consistently articulate a standard, how can the public comply with whatever standard is the flavor of the day?

That was the sorry state of FLSA law for 75 years—inconsistent case law and inconsistent guidance from the DOL leading to inconsistent results for business and workers alike.[161]

Finally, on January 7, 2021, after notice and comment rulemaking, the DOL published its first regulations on independent contracting setting forth the analysis it would apply to determine economic dependence.[162] Under the regulations, DOL looks at two core factors:

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[156] Fact Sheet No. 13, *supra* note 154.

[157] U.S. Dep't of Labor, Wage & Hour Div., Admin. Interpretation 2015-01 (July 15, 2015), https://www.blr.com/html_email/ai2015-1.pdf [hereinafter AI 2015-01].

[158] *Id.*

[159] *See* Andrea J. Bernard & Kevin M. McCarthy, *DOL Continues Efforts to Expand Wage/Hour Protections*, WARNER, NORCROSS & JUDD (July 15, 2015), https://casetext.com/analysis/dol-continues-efforts-to-expand-wagehour-protections (criticizing DOL for stretching the economic-realities test by "cherry-picking" factors and case law).

[160] AI 2015-01, *supra* note 157.

[161] *Cf.* Maggie Santen, *Independent Contractor or Employee: DOL's Latest Guidance on Employee Status*, OGLETREE DEAKINS (July 16, 2015), https://ogletree.com/insights/independent-contractor-or-employee-dols-latest-guidance-on-employee-status/ (cautioning employers in certain industries, including construction, housekeeping, and homecare, as the 2015 Administrator's Interpretation suggested they might be targeted for enforcement).

[162] Independent Contractor Status Under the Fair Labor Standards Act, 86 Fed. Reg. 1168-01, 2021 WL 51656 (Jan. 7, 2021), https://www.regulations.gov/document/WHD-2020-0007-1801 [hereinafter "2021 Proposed Rule"].

1. The nature and degree of control over the work; and
2. The worker's opportunity for profit or loss.[163]

If those factors point in opposite directions, one showing independent contractor status and the other employment, then DOL would look at the three additional factors:

1. The amount of skill required;
2. The degree of permanence of the relationship; and
3. Whether the work is part of an integrated unit of production.[164]

Without changes to the FLSA definitions, DOL could go no further within the "broader than the common law" economic-reality framework established by the Supreme Court 75 years ago.[165]

These regulations were set to go into effect on March 8, 2021.[166] But between publication of the final rule and the effective date, President Biden was inaugurated. On March 4, 2021, the DOL formally delayed the effective date of the regulations,[167] and on May 5, 2021, it rescinded them.[168] The DOL went through the motions of following the procedures required by the Administrative Procedure Act by first publishing a notice to delay and a final rule to delay the effective date, and then publishing a proposal to rescind and a final rule to rescind the regulations.[169] But strangely, the DOL only accepted comments on whether the regulations should be retained or rescinded—an up or down vote.[170] The agency did not allow the public to

[163] *Id.* at 1171.

[164] *Id.*

[165] *Id.* at 1201.

[166] *See id.* at 1168 (specifying effective date).

[167] Independent Contractor Status Under the Fair Labor Standards Act (FLSA): Delay of Effective Date, 86 Fed. Reg. 12535-01, 2021 WL 808948 (Mar. 4, 2021) [hereinafter "Delay Rule"].

[168] Independent Contractor Status Under the Fair Labor Standards Act; Withdrawal, 86 Fed. Reg. 14027-01, 2021 WL 929346 (Mar. 12, 2021) [hereinafter "Withdrawal Rule"].

[169] *See* Delay Rule, *supra* note 167; Withdrawal Rule, *supra* note 168.

[170] *See* Delay Rule, *supra* note 167, at 12537 (noting that many commenters "critiqued the Department's statement in the NPRM that 'WHD will consider only comments about its proposal to delay the rule's effective date'"). *See also* Independent Contractor Status Under the Fair Labor Standards Act: Delay of Effective Date, 86 Fed. Reg. 8326-01, 2021 WL 394739 (Feb. 5, 2021) [hereinafter "Delay Proposal"] (proposing delay and accepting comments only on decision to delay effective date).

suggest any alternatives—different factors, different weights for the factors.[171] The Trump regulations or no regulations; that was the only choice.[172]

The DOL's rescission of the regulations was challenged, and on March 14, 2022, a federal district court in Texas found that the DOL's up-or-down-vote process violated federal law.[173] The DOL had been arbitrary and capricious in withdrawing the regulations, the court held, because it refused to consider any alternatives to total withdrawal of the regulations and "left regulated parties without consistence guidance."[174] The court held that the rule "became effective on March 8, 2021, the rule's original effective date, and remains in effect."[175]

Thus, the 2021 regulations have been and continue to be binding on the DOL when investigating and enforcing the FLSA.[176] But it seems unlikely that the DOL has been applying those regulations. Through at least April 2023, the DOL's misclassification website included a notice of the court's decision.[177] But the 2021 regulations were almost impossible to find. Instead, the page had a link to Fact Sheet 13 and its list of seven factors—which had not been the law for over two years. The DOL's website was providing erroneous information and misleading the public.

One of this paper's authors highlighted the misleading information in an April 19, 2023, hearing before the House Subcommittee on Workforce Protections.[178] Following that hearing, Chair of the House Committee on Education and the Workforce Virginia Foxx and Subcommittee Chair Kevin Kiley, on May 4, 2023, sent an oversight letter to Acting Secretary Julie A. Su requesting documents showing that the DOL is applying the 2021

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[171] *See* Delay Proposal, *supra* note 170, at 8327 (seeking comment only on delay); Delay Rule, *supra* note 167, at 12357 (recounting criticism of narrow scope of public comment).

[172] *See* Withdrawal Rule, *supra* note 168, at 14031 (seeking comments only on decision to withdraw).

[173] Coal. for Workforce Innovation v. Walsh, No. 1:21-CV-130, 2022 WL 1073346, at *1 (E.D. Tex. Mar. 14, 2022).

[174] *Id.* at *19.

[175] *Id.* at *20.

[176] *See id. See also* Maury Baskin et al., *Federal Court Decision Protects Independent Contractor Status*, LITTLER ASAP (Mar. 15, 2022), https://www.littler.com/publication-press/publication/federal-court-decision-protects-independent-contractor-status (observing that the practical effect of the court's decision was to restore the 2021 rule).

[177] *Misclassification of Employees as Independent Contractors*, Wage & Hour Div., U.S. Dep't of Labor, https://www.dol.gov/agencies/whd/flsa/misclassification (visited Apr. 26, 2023).

[178] *Examining Biden's War on Independent Contractors: Hearing Before the Subcomm. on Workforce Protections of the H. Comm. on Educ. and the Workforce*, 118th Cong. (Apr. 19, 2023), *available at* https://edworkforce.house.gov/calendar/eventsingle.aspx?EventID=409050.

regulations.[179] Sometime thereafter, the DOL changed its misclassification page: it deleted the link to Fact Sheet #13, provided a link to the 2021 regulations, and stated, "The Department is applying the law in accordance with the district court's decision."[180]

We are skeptical. Fact Sheet #13 with its seven-factor test, invalidated by the 2021 regulations, is still posted at dol.gov, though with a note about the court decision that rendered the 2021 rule effective as of March 8, 2021.[181]

The inconsistency between the 2021 regulations and materials posted on the DOL's website likely has something to do with the DOL's regulatory plans. Again, the DOL has now proposed to replace the Trump regulations.[182] Its latest regulatory agenda lists August 2023 for publication of a final rule.[183] As it must,[184] the proposed regulation retains the economic-reality test for employment status: "The Act's definitions are meant to encompass as employees all workers who, as a matter of economic reality, are economically dependent on an employer for work."[185] Next, the DOL proposes to assess six factors to determine economic dependence.[186] These factors resemble the six factors listed in Administrator's Interpretation 2015-01.[187] But the regulation adds even more obscurity and detail. For example, when discussing the worker's investments, it explains that the investments weigh in favor of independence only if they are "entrepreneurial."[188] Similarly, it

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[179] Letter from Virginia Foxx, Chairwoman, House Committee on Education and the Workforce, and Kevin Kiley, Chairman, Subcommittee on Workforce Protections, to Julie A. Su, Acting Secretary, U.S. Dep't of Labor (May 4, 2023), *available at* https://edworkforce.house.gov/uploadedfiles/05.04.23_letter_to_dol.pdf.

[180] *Misclassification of Employees as Independent Contractors*, U.S. Dep't of Labor, Wage & Hour Div., https://www.dol.gov/agencies/whd/flsa/misclassification (last visited July 24, 2023).

[181] *See Fact Sheet 13: Employment Relationship Under the Fair Labor Standards Act (FLSA)*, Wage & Hour Div., U.S. Dep't of Labor, https://www.dol.gov/agencies/whd/fact-sheets/13-flsa-employment-relationship.

[182] Employee or Independent Contractor Classification under the Fair Labor Standards Act, 87 Fed. Reg. 62218-01, 2022 WL 7046857 (Oct. 13, 2022) [hereinafter "2022 Proposed Rule"], *available at* https://www.regulations.gov/document/WHD-2022-0003-0001.

[183] *Id.*

[184] *See Rutherford Food*, 331 U.S. at 227–30 (adopting economic-realities test under FLSA); *see also* 2022 Proposed Rule, *supra* note 182, at 62273 (acknowledging that the DOL has no authority to adopt a different test, such as the common-law or ABC tests).

[185] 2022 Proposed Rule, *supra* note 182, at 62274 (setting out proposed revisions to 29 C.F.R. § 795.105).

[186] *Id.*

[187] *Compare id.*, *with* AI 2015-01, *supra* note 157 (employing the same factors).

[188] 2022 Proposed Rule, *supra* note 182, at 62274.

explains that work is "integral" to a hiring entity's business when it is "critical, necessary, or central."[189]

One wonders why anyone would contract for services that were not "necessary." But logic aside, the proposed regulation will do little to cut through the obscurity. If anything, they make the rules even harder to understand, even for experienced practitioners.[190]

Adding to the uncertainty is the DOL's discretion. The proposed regulation makes clear that DOL is retaining the right to consider additional factors as it sees fit: "Consistent with a totality-of-the-circumstances analysis, no one factor or subset of factors is necessarily dispositive, and the weight to give each factor may depend on the facts and circumstances of the particular case. Moreover, these six factors are not exhaustive."[191] In other words, as proposed, the DOL can consider any facts it wants and give those facts whatever weight it wants.[192] The DOL can decide never to give any weight to the common-law control factor ever again.[193] Under such a rule—which isn't really a rule at all—the DOL can use any criteria, including California's AB 5 test, or for that matter a ouija board.[194]

The lack of clarity is profound.

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[189] *Id.*

[190] *See, e.g.*, *ABC Opposes DOL's Independent Contractor Proposed Rule*, ASSOC. BUILDERS & CONTRACTORS(Dec. 14, 2022), https://www.abc.org/News-Media/Newsline/entryid/19729/abc-opposes-dols-independent-contractor-proposed-rule (noting opposition to proposed rule among construction industry on grounds that rule would cause "confusion" and would rescind the "commonsense" approach taken under the 2021 rule); Jessica Jewell & Christopher Moro, *DOL Proposes New Rule for Determining Independent Contractor Status Under the FLSA*, NIXON PEABODY (Oct. 13, 2022), https://www.nixonpeabody.com/insights/alerts/2022/10/13/dol-proposes-new-rule-for-determining-independent-contractor-status-under-the-flsa (noting "confusion" in the wake of the proposed rule about which standard applies).

[191] 2022 Proposed Rule, *supra* note 182, at 62274 (setting out proposed §§ 795.105(a)(2) and 795.105(b)(7)).

[192] *See* Tammy McCutchen, *Biden's Labor Department Nominee Would Kill the Independent Workforce*, WASHINGTON EXAMINER (Apr. 26, 2023), https://www.washingtonexaminer.com/restoring-america/faith-freedom-self-reliance/bidens-labor-department-nominee-would-kill-independent-workforce (arguing that vagueness in DOL's proposed rule would allow the agency to impose a broader test, such as the ABC test, in fact if not in name).

[193] *Id.* ("In other words, as proposed, the DOL can consider (or refuse to consider) any fact and define independent contracting however it so chooses.").

[194] *Cf. Grayned*, 408 U.S. at 108–09 ("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.").

## IV. THE PROPOSED SOLUTION

> It is comforting to know that "economic reality" is the touchstone. One cringes to think that courts might decide these cases on the basis of economic fantasy. But "reality" encompasses millions of facts, and unless we have a legal rule with which to sift the material from the immaterial, we might as well examine the facts through a kaleidoscope. Which facts matter, and why? A legal approach calling on judges to examine all of the facts, and balance them, avoids formulating a rule of decision.[195]

More than 100 tests under different statutes in different states.[196] The common-law control test, other multi-factor balancing tests, the economic-reality test, ABC-style tests like AB 5 with two, three, and more mandatory requirements.[197] Six factors, seven factors, ten factors, sixteen factors, twenty factors, more. Under this opaque, complex, and chaotic morass, how can any normal human have any idea who is an employee and who is an independent contractor?[198]

Your authors have thought about this problem for years—one of us for more than two decades. And this is the conclusion we have reached: the country needs a single, clear, and simple rule—using objective criteria to the extent possible—that applies to all laws, nationwide.

Employees are best protected when they understand what the law requires and are paid correctly in the first instance. Receiving back wages after months or years of a DOL investigation or litigation is cold comfort, especially to the vulnerable low-wage worker. Most employers want to comply with the law and pay their employees correctly.[199] But doing so is exceedingly difficult—even impossible—if the law is complicated or unclear, or if you need to hire an expert attorney to tell you what the law is.[200]

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[195] U.S. Sec'y of Labor v. Lauritzen, 835 F.2d 1529, 1539 (7th Cir. 1987) (Easterbrook, J., concurring).

[196] *See* MCCUTCHEN & MACDONALD, *supra* note 54, at 46 (cataloguing state-law tests).

[197] *See* Phillip R. Maltin, *By Any Other Name: No Matter What Workers Are Called, Their Status and Treatment as Employees Are Subject to a Variety of Fact-Based Tests*, L.A. LAW., at 53, 54 (Sept. 2001) (surveying various classification tests and concluding that the most common unifying factor is control).

[198] *See, e.g.*, Robert W. Wood, *Defining Employees and Independent Contractors Don't Try This at Home!*, BUS. L. TODAY, at 45 (May/June 2008) (observing that under existing web of tests, it is "often difficult to determine into which category a particular worker or class of worker falls").

[199] *See* Rainey, *supra* note 16 (quoting management-side attorney Carolyn Pellegrini) ("What employers are really looking for right now is certainty . . . .").

[200] *See* Wood, *supra* note 198, at 45 (noting the difficulty of applying complex classification tests).

Now some would say: "Okay, so change the law so nearly everyone is an employee. Let's adopt California's approach to severely limit the circumstances in which workers can be classified as independent contractors. It will give us a black-and-white rule that only the most highly skilled, highly compensated professionals can be independent workers."[201]

But that won't work for two reasons. First, California did not succeed in ensuring that only highly skilled, highly compensated individuals qualify as independent contractors.[202] Among the workers carved out from the law were app-based dog walkers, handymen, and newspaper delivery people—positions rarely described as highly skilled.[203] Besides, the concept of a "highly skilled" job is itself laden with value judgments. Why should some workers have access to independence, but not others? Why should your flexibility and choice depend on the color of your collar?

That leads us to the second point. The California approach would deprive millions of Americans of their chosen way of life.[204] Those millions are both high income and low, 50% are women, 49% are Millennials or Gen Z, and 25% are minorities.[205] These people have chosen to work independently for reasons personal to them.[206] When access to traditional employment remains widely available, why should we deny them that choice?

So however clear California's law might be, it is too restrictive for the national workforce. What, then, should a national rule look like? We suggest that policymakers abandon the multi-factor balancing approach. That approach has been tried in many forms, none of them easy or straightforward to apply.

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[201] *Cf. Labor and Employment Law—Worker Status—California Adopts the ABC Test to Distinguish Between Employees and Independent Contractors.—Assemb. B. 5, 2019-2020 Leg., Reg. Sess. (Cal. 2019) (enacted) (codified at Cal. Lab. Code §§ 2750.3, 3351 and Cal. Unemp. Ins. Code §§ 606.5, 621)*, 133 HARV. L. REV. 2435, 2438–39 (2020) [hereinafter "Harvard AB 5 Note"] (arguing that the ABC test is "clearer and broader" than other tests).

[202] *See* Lotito et al., *supra* note 114 (pointing out that AB 5's lack of clarity and breadth forced even its sponsor to offer post hac amendments exempting additional professions). *See also* Harvard AB 5 Note, *supra* note 201, at 2438 (noting that "A.B. 5's shift away from subjective multifactor inquiries does not on its own guarantee interpretive consistency and predictability").

[203] *See* Olson et al. v. California, No. 21-55757, slip op. at 25–26 (9th Cir. Mar. 17, 2023) (finding that plaintiffs stated a cognizable Equal Protection Clause claim against AB 5 in part because the law exempted some app-based service workers but not others).

[204] *See* Harvard AB 5 Note, *supra* note 201, at 2438 ("A.B. 5 carries the risk that employers will restrict—or, at least, threaten to restrict—worker flexibility in response to the classification of their workers as employees.").

[205] *See* MBO PARTNERS, *supra* note 18.

[206] *Id.*

Instead, policymakers should look to objective criteria—such as a contract stating that the worker is an independent contractor and has the right to work for multiple businesses—and the common-law control test. Control is the factor that most distinguishes an employee from an independent contractor. An independent worker is just that, *independent*—in control of how her own work is performed. It is this flexibility that millions of independent workers value most.[207] This change of focus could be accomplished by replacing every definition of "employee" and "employer" in every federal statute with the following:

> The term "employee" means a person who provides services to an employer for compensation but does not include an independent contractor.
>
> The term "employer" means a person who pays an employee for services but does not include a person who contracts with an independent contractor.
>
> An "independent contractor" is a person who has entered into a written agreement to provide services as an independent contractor, is not prohibited from providing services to multiple businesses, and controls the manner of his or her work. The contract to provide services may allow control over the results of the work or require the parties to comply with state or federal laws or regulations.

These definitions would need to preempt state law definitions, or the chaos that has resulted from state independent contractor laws would continue. Such broad preemption might strike some readers as radical. But it would hardly be unprecedented—or indeed particularly controversial from a legal standpoint. Congress has the power to preempt state employment laws.[208] Rightly or wrongly, the Supreme Court has interpreted Congress's Article I Commerce Clause powers expansively. Congress can regulate any activity with a substantial effect on interstate commerce,[209] as employment

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[207] *See id.* (reporting that flexibility is among the most commonly reported reasons for choosing independent work).

[208] *See* Richard Primus, *State Policymaking Doesn't Require a Congress Limited by Enumerated Powers*, BALKANIZATION (Apr. 10, 2023), https://balkin.blogspot.com/2023/04/state-policymaking-doesnt-require.html (explaining that under current doctrine, "Congress has the authority to preempt enormous swaths of local and state law," including all "contract law" and "employment law").

[209] Gonzales v. Raich, 545 U.S. 1, 17 (2000) ("Our case law firmly establishes Congress' power to regulate purely local activities that are part of an economic "class of activities" that have a substantial effect on interstate commerce.").

classification surely does.[210] And if Congress has the power to regulate, it also has the power to preempt.[211] The Supremacy Clause elevates federal law over any conflicting state law, policy, or rule.[212] The constitutional question is therefore simple; the trick is getting the policy right.[213]

In fact, Congress has often preempted state law to advance federal workplace policy. As early as 1935, it displaced state labor law with the National Labor Relations Act.[214] And it did the same thing with the Occupational Safety and Health Act[215] and the Employee Retirement Income Security Act[216]—both of which displace a great deal of state law.[217] In each of these cases, Congress decided that the question at hand need a national, uniform solution. Conflicting state policies would create chaos, complicate compliance, and interfere with national markets.[218] Our proposal follows the same logic.

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[210] *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 31–32 (1937) (upholding NLRA as a proper exercise of Congress's commerce powers) ("It is a familiar principle that acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of the congressional power. Acts having that effect are not rendered immune because they grow out of labor disputes."); Schmitt et al., *supra* note 1 (arguing that improper classification costs individual workers thousands of dollars each year and urging federal policymakers to adopt a clear, uniform solution at the national level).

[211] *See* New York v. FERC, 535 U.S. 1, 18 (2002) (observing that federal agency may preempt state law by regulation when the agency is acting under authority delegated from Congress). *Cf.* Alexander T. MacDonald, *The Department of Labor's Independent Contractor Rule: A Quiet Threat to Federalism?*, FEDSOC BLOG (Mar. 30, 2023), https://fedsoc.org/commentary/fedsoc-blog/the-department-of-labor-s-independent-contractor-rule-a-quiet-threat-to-federalism (observing that DOL's proposed independent-contractor rule would effectively displace contrary state laws even without an express preemption provision).

[212] *See* U.S. CONST. art. VI cl. 2 ("This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land . . . .").

[213] *See* Primus, *supra* note 208 (explaining that Congress has long had the power to displace much of state employment law; what stops Congress is not legal power, but political will).

[214] Pub. L. 74-198, 49 Stat. 449 (1935) (codified at 29 U.S.C. §§ 151–69). *See also* San Diego Bldg. Trades Council, Millmen's Union, Loc. 2020 v. Garmon, 359 U.S. 236, 242 (1959) (inferring that Congress meant to preempt state labor laws broadly to ensure uniform national administration).

[215] Pub. L. 91-596, 84 Stat. 1590 (1970) (codified at 29 U.S.C. §§ 651–78).

[216] Pub. L. 93-406, 88 Stat. 829 (1974) (codified at 29 U.S.C. §§ 1001–1193c).

[217] *See, e.g.*, John J. Manna, Jr., *The Extent of OSHA Preemption of State Hazard Reporting Requirements*, 88 COLUM. L. REV. 630, 630–32 (1988) (describing OSHA preemption as applied to certain state reporting requirements); N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655 (1995) (describing preemption language of ERISA as "clearly expansive").

[218] *See Garmon*, 359 U.S. at 242 (explaining that Congress delegated primary jurisdiction to NLRB to avoid conflicting state rules, which would interfere with uniform national labor policy).

Our proposal would draw simplicity from the chaos. It would give clear guidance to workers, businesses, and regulators. It would help them understand, in advance, what they needed to do to comply with the law. And it would allow them to make deliberate, intelligent choices about how to order their working lives.

But there is another benefit to consider—one perhaps even more important than certainty. For generations, Americans have had a complicated relationship with work. Industrialization, globalization, and so-called scientific management have driven them into increasingly rigid and stratified work arrangements. They have clocked in, clocked out, and counted their time like accountants. And in that time, they have devoted themselves to increasingly narrow and sometimes unfulfilling tasks. But it doesn't have to be that way. New technologies have made it easier than ever for them to start their own businesses, find their own clients, and pursue their own callings. They have a better chance now than ever to find real purpose at work. The law should recognize and facilitate that impulse. Our proposal would take a big step toward doing that.

The proposal would, of course, hurt at least one group: employment-law experts like your authors. We would be among the law's biggest losers. No longer could we charge exorbitant rates to guide businesses through the brambles.[219] But that's a price we're willing to pay. All of us—employment lawyers included—will benefit in the long run. Millions of Americans will finally be able to choose how they work without worrying about overeager regulators. That's a goal worth pursuing. Let's declare peace in the war on contracting.

Other Views:

- Jennifer Sherer & Margaret Poydock, *Flexible Work Without Exploitation*, ECON. POL'Y INST. (Feb. 23, 2023), https://www.epi.org/publication/state-misclassification-of-workers/.
- David J. Rodwin, *Independent Contractor Misclassification is Making Everything Worse: The Experience of Home Care Workers in Maryland*, 14 ST. LOUIS U. J. HEALTH L. & POL'Y 47 (2020), *available at* https://scholarship.law.slu.edu/cgi/viewcontent.cgi?article=1249&context=jhlp.

[219] *Cf. How Much Does it Cost to Defend an Employment Lawsuit?*, WORKFORCE.COM (May 14, 2013), https://workforce.com/news/how-much-does-it-cost-to-defend-an-employment-lawsuit (estimating that it costs a company as much as $250,000 to defend a single employment lawsuit).

• Veena Dubal, *Winning the Battle, Losing the War? Assessing the Impact of Misclassification Litigation on Workers in the Gig Economy*, 2017 WIS. L. REV. 739 (2017), *available at* https://wlr.law.wisc.edu/wp-content/uploads/sites/1263/2017/11/Dubal-Final.pdf.

# WHAT IS CONSERVATIVE CONSTITUTIONALISM? A FRACTURED HISTORY REVEALS AN UNCERTAIN PATH FORWARD*

BRADLEY C. S. WATSON**

A review of JOHNATHAN O'NEILL, CONSERVATIVE THOUGHT AND AMERICAN CONSTITUTIONALISM SINCE THE NEW DEAL (Johns Hopkins University Press 2023)

## I. CONSERVATIVE SCHOOLS OF THOUGHT

Conservative thought is vexed. The debates that animated the birth of modern American conservatism in the 1950s, and gave it enormous intellectual energy through the 1980s, often seem like quaint anachronisms. Whatever their divisions, the schools of thought that constituted the early conservative intellectual movement shared a healthy suspicion of the domestic power and competence of the national state. They all sought to re-ground America in principles or practices that antedated the progressive intellectual revolution and the New Deal.

Nowadays, "new conservatives" are drawn to discussions and advocacy of the vigorous use of state power for non-progressive ends. Their rejection of the liberal reconfigurations of politics, law, and morality over the last several decades has a tone of exasperation, and it evinces impatience with conservative efforts that have gone before. They have become convinced that American

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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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constitutionalism, even properly understood, is no prophylactic against policy and moral outcomes they deplore. In fact, some go so far as to claim that the American constitutional order, with its purported attachment to a radical Enlightenment liberalism, was front-loaded to guarantee those outcomes. Hence, their disposition is to reject the framers' Constitution and seize the tools that progressives forged, hoping they can somehow keep them in the right hands.

A new book by historian Johnathan O'Neill directly addresses the manner in which various American conservative thinkers brought to bear their understandings of American constitutionalism as a response to the New Deal and its progeny. As such, it serves not only as a valuable intellectual history, but as a vital aid to understanding our own intellectual and constitutional moment.

O'Neill's book is a major intellectual achievement. It is the first to offer a systematic account of the influence of the main strains of modern American conservative thought—traditionalist, libertarian, neoconservative, and Straussian—on the most important constitutional questions and controversies that arose from the triumph of progressive thought in the 20th century. These include the theory and growth of the administrative state, the erosion of federalism, the rise of the imperial presidency, and the status of judicial review.

Unlike so many intellectual historians, O'Neill is fully conversant with constitutional matters. As he notes, "Historians have been preoccupied with social and cultural modes of analysis and have mostly ceded constitutional questions to political scientists and law professors."[1] He therefore understands his task as a historian to include retrieving "the neglected subject of constitutional history and combin[ing] it with the examination of distinctly conservative ideas."[2] But the scope and ambition of his work is even greater than that. He is a more than competent scholar of American political thought, continually evincing deep familiarity with the works of countless intellectual conservatives. It is difficult, in a review, to do justice to the breadth of his argumentation.

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[1] JOHNATHAN O'NEILL, CONSERVATIVE THOUGHT AND AMERICAN CONSTITUTIONALISM SINCE THE NEW DEAL 2 (2022).

[2] *Id*. When historians have directed their minds to constitutional history, for the most part they have cleanly missed progressivism's profound assaults on the framers' Constitution. For a detailed account of this phenomenon, see BRADLEY C. S. WATSON, PROGRESSIVISM: THE STRANGE HISTORY OF A RADICAL IDEA (2022/2020).

Broadly speaking, traditionalist conservatives in the post-New Deal era saw the American constitutional order as an outgrowth of what had gone before, rather than a modern innovation. In their view, it developed the rights of Englishmen in an American context. The American Revolution was therefore a profoundly conservative moment, to the extent a revolution can be such a thing. While the Revolution effected structural changes to the modes of American governance, not to mention a shift of sovereignty, the Constitution itself in no way dedicated the new nation to the pursuit of natural rights or the recognition of natural human equality. From the traditionalist point of view, it was the unmoored pursuit of rights and equality that largely accounted for the post-New Deal massification of government, which was so profoundly disconsonant with American political and cultural traditions, not to mention the dignity of the human person.

Libertarians, by contrast, wished to maximize individual liberty, understood as the absence of coercion. They saw the growth of government as the primary enemy of that liberty. While traditionalists were willing to embrace the marketplace within certain moral limits, libertarians embraced it simply, as the best means to human flourishing. They could make peace with the Constitution to the extent it could be understood to be a minimalist document, demanding little more than the rule of law as against arbitrariness and coercion, as well as decentralization of power conducive to voluntary exchange.

A small but influential number of conservatives took their bearings from the German-American philosopher Leo Strauss (1899-1973). In doing so, they rejected modern philosophical developments that too casually foreclosed the search for truth. Straussians engaged, questioned, and in some cases outright rejected historicist dogmas that insist all truth claims are just that—mere representations of the "values" of those asserting them, or epiphenomena of their time and place.[3] Straussianism is a notoriously riven intellectual movement, but Straussians in general were far more sympathetic to the American constitutional order than their colleagues on the philosophical left. Some Straussians embraced the American regime as the political expression of natural rights that transcend historical relativity. Others were at least circumspect in their criticisms of the regime, due to deep familiarity with alternative regime types that were—for philosophers and ordinary citizens alike—far more likely to be vile. On the whole, "Straussians were thus conservative defenders

[3] *See, e.g.*, LEO STRAUSS, NATURAL RIGHT AND HISTORY (1953).

of American constitutionalism who nevertheless thought it had weaknesses or blind spots that must be actively addressed."[4]

Neoconservatism arose less from deep cultural attachments or philosophical study and more from a suspicion of communism abroad, and a disenchantment with the workings of Great Society programs at home. Neoconservatives reflected on the inherent limitations of national domestic policies that seemed to misunderstand human nature, not to mention local conditions. They launched withering critiques of the extra-constitutional "new class" of educated professionals who increasingly designed, defended, and perpetuated manifestly failing policies, yet enjoyed various forms of insulation from both feedback and pushback. Neoconservatives were less directly concerned with constitutional questions than were members of other schools of conservative thought, yet their rejection of the pieties and practices of the intellectual left often led them to consideration of the forgotten virtues of the framers' Constitution.

## II. THE ADMINISTRATIVE STATE

Bureaucracy—"rule from the desk," literally—became a central feature of American life as a consequence of the New Deal. For the better part of a century, Congress has seen fit to delegate vast amounts of governing authority to thousands of faceless actors spread over myriad politically unaccountable departments and agencies. These entities sometimes go so far as to combine functionally legislative, executive, and judicial powers. This large-scale shadow regime, often referred to as the "administrative state," remains in obvious tension with the framers' Constitution, which was premised on the consent of the governed and dedicated to protecting the natural rights of all. The Constitution therefore limited and enumerated the powers of the national government, and it vested each of them in one of the three constitutional branches. As O'Neill notes:

> conservative critiques of the administrative state proceeded from several angles. These critiques were theoretical, considering the progressive liberal regulatory-bureaucratic state as a form of social and political order; historical, assessing how and why that order managed to displace much of the old

[4] O'Neill, *supra* note 1, at 12. *See* LEO STRAUSS, LIBERALISM, ANCIENT AND MODERN (1968).

> constitutionalism; and legal, attempting to legitimate, constrain, and direct it within the terms of post-New Deal constitutional law.[5]

For traditionalists, the administrative state crowded out the realm of the private and destroyed civil society, thereby undermining the old constitutional order. O'Neill rightly observes that Russell Kirk, in his seminal book *The Conservative Mind*, "identified the administrative state with more clarity than he is usually credited."[6] He was joined by Robert A. Nisbet and others in seeing the centralized bureaucratic state as an enervating enemy of community. By bulldozing local and sub-political communities, it cleared a path for its own expansion. Neoconservatives including the likes of Daniel Patrick Moynihan, James Q. Wilson, and Irving Kristol offered complementary critiques that emphasized the growth and power of the "new class" of managerial elites, while also launching theoretical and empirical attacks aimed at the hubris of social-scientific pretensions. O'Neill notes that both traditionalists and neoconservatives tended to eschew technical legal analysis.[7]

Libertarians built an economistic critique of the administrative state, relying on the work of thinkers such as Friedrich Hayek.[8] In substituting the planning of political elites for the cues of the marketplace, bureaucratic rule suffered from massive information deficits. Libertarians also insisted that rule from the desk was not only inefficient and self-interested, but was a direct challenge to the rule of law. Later thinkers like Richard Epstein would go so far as to defend a different kind of elite rule—judicial supremacy—as a check on administrative discretion and a guarantor of classical liberalism.[9]

Straussians launched particularly deep and sustained attacks on the administrative state, which continue to animate much conservative thinking today. Early critiques, such as Herbert J. Storing's, revealed the impossibility of a "value neutral" social science or managerial expertise, and they argued that bureaucrats should be educated in constitutional norms as well as the nature

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[5] O'Neill, *supra* note 1, at 20.

[6] *Id*. at 24. *See* RUSSELL KIRK, THE CONSERVATIVE MIND: FROM BURKE TO SANTAYANA (1953).

[7] O'Neill, *supra* note 1, at 23.

[8] FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM (1944).

[9] RICHARD EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT (2014). For a critique of this argument, see Bradley C. S. Watson, *Limiting Government, But Not Judges*, XIV CLAREMONT REV. OF BOOKS, No. 4, Fall 2014, *available at* https://claremontreviewofbooks.com/limiting-government-but-not-judges/, and my extended exchange with Epstein in *A CRB Discussion of Classical Liberalism and the Constitution*, CLAREMONT REV. OF BOOKS, Jan. 12, 2015, https://claremontreviewofbooks.com/digital/a-crb-discussion-of-classical-liberalism-and-the-constitution/.

and necessity of prudential judgment in pursuit of the public good. Other Straussians, coming especially from the "West Coast" or "Claremont" school of thought, concluded that the administrative state—with its positivism and historical relativism—was ineradicably hostile to the theory and practice of natural rights constitutionalism, and that it could not be redeemed through education. This line of Straussian critique, launched by John Marini and others, has now more or less completely supplanted earlier Straussian efforts to make peace with the administrative state within the confines of American constitutionalism.

Broadly consonant with Straussian concerns as to the legitimacy of the administrative state were conservative legal efforts in support of a "unitary executive." These efforts grew in earnest during the Reagan years. If Congress delegates to an unelected, self-interested, partisan, and captured bureaucracy, the most effective source of control will be a coherent executive directing the discretion of administrative decision-makers for the public good. Conservative presidents since Reagan have, with varying degrees of emphasis and success, tried to claim and effectuate this constitutional populism. But as O'Neill notes, "the unitary executive made policy victories somewhat hostage to the next election" and "undercut the traditional conservative preference for political stability."[10] It also put at risk "the orthodox constitutionalist concern with limits on all official power."[11]

In the end, "conservatives' diagnoses and emphases varied in accord with their own ideas, but all saw in the administrative state challenges to the elements of American constitutionalism they most valorized."[12]

## III. FEDERALISM

With respect to federalism, what O'Neill calls the New Deal constitutional settlement has never been upended. This settlement has effectively guaranteed congressional power to regulate vast swaths of the economy and fund large-scale social programs whose efficacy is widely contested. Conservative criticism of this settlement has been loud and persistent, but largely feckless. And despite concerted efforts on the part of conservatives to bend the judiciary in a constitutionalist direction, O'Neill accurately observes that on

[10] O'Neill, *supra* note 1, at 71.
[11] *Id.*
[12] *Id.* at 50.

"the long historical view, the Court was drawing lines only at the margins—contestable to be sure—in an era of centralized, positive government."[13]

He is also correct to point out that none of the various shades of traditionalism—whether segregationist in the manner of the Southern Manifesto of 1956, Southern Agrarian in the manner of Richard Weaver or M.E. Bradford, or communitarian in the manner of Kirk or Nisbet—was well equipped to be a serious challenge to the nationalization of politics, economics, and culture. This remains true even though localist concerns are still an important undercurrent of contemporary conservative thought.

Neoconservatives, for their part, were hardly effective allies of localism, "having accepted the New Deal expansion of national power as quite properly settled and irreversible."[14] O'Neill shows that he understands well some of the tensions that continue to permeate the conservative movement: "As a viewpoint born primarily of eastern urban intellectuals, neoconservatism simply did not register federalism as a pressing issue."[15] More interested in questions of policy design and implementation, many neoconservatives found federalism and localism to be of relatively minor concern.

The most serious intellectual engagements with the federal principle were left to the libertarians and Straussians. The libertarian goal of maximizing individual freedom, minimizing coercion, and incentivizing efficiency fit well in principle with the idea of a republic of states competing for the affections and dollars of citizens who were free to move as they saw fit. "Competitive federalism" became a locus of research for economists such as James M. Buchanan, although libertarians often argued the success of this idea would require assertive judicial enforcement of economic rights in the face of the post-New Deal reality of state governments having been co-opted by federal largesse. Because of the ideological character of libertarian arguments, their exponents often "struggled to root them in the historical experience and political theory of American constitutionalism."[16] As a result, the political purchase of those arguments has been far less than libertarians think it should be.

Straussians such as Martin Diamond, Herbert Storing, Walter Berns, and Harry V. Jaffa tended to defend a strong national government as being in accordance with the framers' intentions. The Constitution was designed to tame the injustices and instabilities of a loose union of sovereign states. Such

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[13] *Id.* at 81.
[14] *Id.* at 102.
[15] *Id.*
[16] *Id.* at 120.

a theoretical emphasis, aside from its grounding in the framers' constitutional design, proved, practically speaking, to be useful and ultimately necessary in the mid-20th century for the purpose of supporting the struggles for civil rights at home and against communism abroad.

But they did not think such an emphasis should be understood to license Leviathan. Jaffa in particular spent his long career emphasizing that a proper account of both limited government and the Constitution itself depended first and foremost on recognizing the equal natural rights of all—which could not legitimately be infringed by any level of government. "Jaffa's arguments helped reorient much conservative opinion away from the traditional emphasis on hierarchy and prescriptive liberty," even as "[f]ederalism as such garnered little attention in Jaffa's subsequent scholarship or his frequent quarrels with other conservatives."[17]

O'Neill emphasizes that "Straussians' generally nationalist posture did not make them mere apologists for post-New Deal centralization."[18] The Great Society and the growth of the administrative state prompted many Straussians to consider seriously the federalist elements of the framers' Constitution, not to mention the Antifederalist arguments against it. By the end of the 20th century, it was clear that Straussian scholarship betrayed a "robust appreciation of federalism."[19]

## IV. THE PRESIDENCY

Theoretical and practical debates over the modern presidency were another field onto which conservatives poured their fire. But as in other areas of constitutional development, they were hardly firing in unison or even aiming at the same targets. Traditionalists tended to maintain an oppositional stance toward the modern presidency, with respect to both domestic and foreign affairs. By contrast, Straussians and neoconservatives (though O'Neill is careful to maintain the distinction between the two) often supported the robust exercise of executive power for foreign policy purposes. Straussians in particular maintained a healthy skepticism of the domestic exercise of presidential power, stemming from their philosophical reflections on tyranny and demagoguery. Libertarians for the most part paid scant attention to the presidency as such, at least until 9/11 and its aftermath.

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[17] *Id.* at 128.
[18] *Id.* at 129.
[19] *Id.* at 135.

The New Deal and the Cold War virtually assured the steady growth of the executive branch—if not always executive power per se—for the better part of a century. In retrospect, early post-World War II efforts by traditionalists, including Senator Robert A. Taft, to pare back the presidency in relation to the other branches seem doomed from the outset. At a scholarly level, concerns about the managerial-bureaucratic revolution, the plebiscitary presidency, centralized administration, and liberal ideological dominance never disappeared—but neither did these ideas gain the traction needed to resist the whirlwinds of modernity. Punctuating the quixotic nature of the traditionalists' quest were the muting of their doubts in the face Reaganism and the theory of the unitary executive.

Straussians, including the likes of Harvey C. Mansfield Jr., meditated on the teachings of modern philosophers such as Machiavelli and Locke.[20] Each of them highlighted the role of necessity in politics—a necessity that law can never fully tame or overcome. Straussians therefore saw that there was an ineradicable tension between executive power and the rule of law. Constitutionalism must somehow take account of this tension, walking a fine line between limiting the dangers of demagoguery and encouraging bold statesmanship to do good in a dangerous world. We might wish to deny prerogative and force in the name of "the rule of law," but they can never be wrung out of politics, and a workable constitutional order must allow for them prudentially to be brought to bear. Straussians were convinced the framers created such an order.

The Straussians' philosophical awareness was quite different, and ultimately more restrained, than the neoconservative disposition to support wide-ranging international interventions. Seeking purpose after the Cold War, thinkers such as William Kristol ofttimes appeared more invested in the affairs and interests of other nations than their own. Libertarians, for their part, differed radically from both Straussians and neoconservatives. For them, the modern presidency had become an imperial executive in toto, far removed from both the abstract principles of limited government and the old republican order of America. Some libertarians such as Murray Rothbard and Llewellyn H. Rockwell Jr. saw the Constitution itself as a grand failure and aligned themselves with traditionalist isolationists—to very little effect.

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[20] HARVEY C. MANSFIELD JR., TAMING THE PRINCE: THE AMBIVALENCE OF MODERN EXECUTIVE POWER (1989).

## V. JUDICIAL REVIEW

Conservatives were confronted by a Supreme Court that chose to ratify rather than challenge the New Deal constitutional settlement. "Together, pragmatism, Progressive political science, and legal realism redefined how law, interpretation, and the Constitution itself were understood."[21] Under the influence of progressive intellectual categories, the New Deal Court turned its back on judicial review when it came to the infringement of economic liberties and instead began to devote its energies to the explication and invention of new so-called civil rights. This turn accelerated rapidly under the Warren Court and has never been decisively halted. O'Neill accurately notes that while "the Rehnquist Court marked an end to judicial review as a thoroughly reliable adjunct to New Deal-Great Society liberalism," it is fair to say that "progressive liberalism still set the boundaries within which the Court operated."[22] And this remains true today, despite the concerns—bordering on moral panic—of many progressive legal analysts.

Conservative criticisms of the judiciary came to sight as a criticism of power simply—power concentrated in the hands of men who could not be held to account through the normal give-and-take of politics. Whether by usurping properly legislative functions, furthering the reach of the administrative state, undermining the federal principle, or proclaiming liberal platitudes in support of newly-minted "rights" that conservatives found to be, at a minimum, morally suspect, the post-New Deal Court seemed to go out of its way to attract conservative ire. By the 1980s, this ire was given additional intellectual foundation through the growing prominence and rigorous development of a new "constitutional originalism." But as O'Neill sagaciously points out, "[o]riginalism was always latent in American political discourse and Supreme Court decision making in the eighteenth and nineteenth centuries, though it was usually untheorized because it was so thoroughly accepted."[23] In other words, explicating the precise meaning of constitutional words as they were written was simply what judges did. It took the hubris of progressive "living constitutionalism" to alter this basic judicial orientation and infuse judges with the sense that it was their task—rather than that of

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[21] O'Neill, *supra* note 1, at 199. For an account of the influence of these and other strains of progressive thought on contemporary constitutional jurisprudence, see BRADLEY C. S. WATSON, LIVING CONSTITUTION, DYING FAITH: PROGRESSIVISM AND THE NEW SCIENCE OF JURISPRUDENCE (2022/2009).

[22] O'Neill, *supra* note 1, at 205.

[23] *Id*. at 205.

the people and their legislators—to update constitutional meanings. The new originalism developed in such a way as to emphasize the "original public meaning" of words, rather than any idiosyncratic subjective interpretation of them.

A version of originalism informed some early traditionalist opposition to the Court's decision in *Brown v. Board of Education*. James J. Kilpatrick and others argued that the Fourteenth Amendment clearly did not forbid segregated schools. And indeed, the reasoning in *Brown* was hardly a model of analytical rigor, and it seemed to rely more on the Justices' reading of contemporary social science than on the words of the Constitution. Commencing with this case, the Court had decisively "transformed constitutional interpretation into amendment," according to Kilpatrick.[24] Conservative opponents of segregation, such as L. Brent Bozell Jr., emphasized the extent to which the deliberative character of the Constitution, including both its capacity for legislative compromise and its devolution of decision-making to local authorities, were being destroyed by judicial supremacy.[25] Other traditionalists, including Kirk, Bradford, and Nisbet, did not deal with judicial review in a systematic way, but saw the Court as a profound threat to custom and community, which they associated with the older republican form.

In short, well before there was a doctrine of originalism with all its contemporary legal-professoriate significations, intellectual conservatives were making legal arguments in defense of the original Constitution, largely as a response to the Warren Court's transgressions. Unfortunately for traditionalists—and for the conservative movement generally—some, though by no means all, early criticisms of judicial power got off on the wrong foot by seeming to oppose legitimate demands for the protection of both civil and natural rights.

Neoconservatives too had their qualms about the direction of modern judicial review, but their embrace of originalism was less clear. Much of the neoconservatives' disquiet stemmed from their sense of the limits to judicial capacity. Courts from *Brown* onward had become far too confident in both the power of social science and their own ability to understand it and implement its findings. According to Nathan Glazer, judges brought to the bench the peculiarities and predilections of the "new class," confidently intervening

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[24] *Id.* at 212. *See* JAMES J. KILPATRICK, THE SOVEREIGN STATES: NOTES OF A CITIZEN OF VIRGINIA (1957).

[25] L. BRENT BOZELL JR., THE WARREN REVOLUTION: REFLECTIONS ON THE CONSENSUS SOCIETY (1966).

in matters of social policy only to make outcomes demonstrably worse. Putting questions of constitutional propriety aside, "[a]n important element of the new class dynamic, said Glazer, was that judges often yearned for the approval of the right-thinking educated public opinion represented by this class."[26] There was much on which both traditionalists and neoconservatives could agree: "the policy results of numerous unpersuasive judicial decisions were disastrous," and "[t]he judiciary had become a major force in disrupting self-government and the religiously informed culture of community and moral self-restraint that America had historically sustained at the local level."[27]

In keeping with Strauss's emphasis on understanding political things in light of the high rather than the low, and in light of acts of statesmanship rather than petty politics—as well as his insistence that we must understand writers as they understood themselves—Straussians had long evinced an interest in grasping the framers' Constitution on its own terms. Though not primarily legal philosophers or analysts, early Straussians "anticipated originalist thinking by inquiring into the true meaning of the Constitution (and its limits)."[28]

Storing insisted that the intent of the framers was key to a full and honest account of American constitutionalism. Diamond had rescued the Constitution from the reductionism of progressives who saw it as protecting the material interests of its framers. "Walter Berns was the first Straussian to study the Court extensively. He argued that First Amendment jurisprudence had strayed from the founders' sounder understanding of speech and public morality. . . "[29] Berns argued that libertarians as much as liberals were trapped within the corrosive horizon of free speech absolutism, without regard to virtue.[30] Meanwhile, Jaffa insistently criticized constitutional originalists as much as liberals, claiming that both camps were ultimately beholden to legal positivism, and therefore were equally nihilistic. "Positivist originalism was philosophically impoverished because, despite its majoritarianism, it lacked an account of what originally made consent, and with it limits on majority

[26] O'Neill, *supra* note 1, at 222.
[27] *Id*. at 235.
[28] *Id*. at 236.
[29] *Id*. at 238. *See* WALTER BERNS, FREEDOM, VIRTUE, AND THE FIRST AMENDMENT (1957).
[30] O'Neill, *supra* note 1, at 238.

rule, the basis of legitimate government."[31] For Jaffa, the Constitution is grounded in the natural right of consent, which is in turn derivative from the observable natural truth of human political equality. Mere majoritarianism, absent an understanding of natural rights, cannot place limits on the consent principle.

Straussians have continued to argue over whether judicial review, and constitutional limitations thereon, is best grounded in the legal positivism of a fundamentally majoritarian Constitution, or on a full understanding of natural rights and natural law—which might, on occasion, support a vigorous judicial activism in defense of those rights. O'Neill does not dilate on the West Coast Straussian account of how progressive philosophy merged with New Deal liberalism to make "living constitutionalism"—which is at odds with both conservative legal positivism and natural rights theory—dominant in constitutional adjudication.[32]

Despite the tensions within Straussian thought, O'Neill rightly concludes that "Straussians consistently understood themselves as originalists of one kind or another, even as they argued among themselves."[33] Furthermore, the "definitive Straussian focus on political founding and regime principles ensured that claims about the proper role and extent of judicial authority would necessarily be expressed in terms of original constitutional meaning."[34]

As mentioned earlier, in the discussion of the administrative state, libertarians often defended a form of judicial supremacy in pursuit of libertarian or classical liberal governance. For example, Bernard H. Siegan insisted that "the Framers' generation viewed the judiciary as another means for achieving libertarian objectives of government. The Framers surely never would have accepted judicial review if they thought it would have been used in an antilibertarian fashion."[35] The problem with this libertarian claim, of course, is that the framers did not accept judicial review—or if they did, it was in very attenuated form and certainly not in pursuit of "libertarian" objectives.[36]

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[31] *Id*. at 256. *See* HARRY V. JAFFA, ORIGINAL INTENT AND THE FRAMERS OF THE CONSTITUTION: A DISPUTED QUESTION (1994); HARRY V. JAFFA, STORM OVER THE CONSTITUTION (1999).

[32] *See* Watson, *supra* note 21.

[33] O'Neill, *supra* note 1, at 259.

[34] *Id*. at 259-60.

[35] *Id*. at 266 (quoting BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION (1980)).

[36] *See* Watson, *supra* note 9.

Nonetheless, O'Neill writes, "[l]ike Siegan, Epstein rejected the traditional conservative presumption of judicial restraint and called for more active judicial intervention on behalf of property and economic rights: it should be 'far greater than we now have, and indeed far greater than we have ever had.'"[37] It is undoubtedly true that within the conservative movement, "libertarians stood apart in consistently seeing courts as the institution best able to advance their basic political philosophy. This view abided from libertarians' first foothold in law schools in the 1980s to their growing presence in constitutional theory and Supreme Court litigation in the twenty-first century."[38] In doing this, libertarians ran the risk of becoming living constitutionalists by another name. As non-libertarian conservatives argued,

> Judicial engagement elevated the libertarian beau ideal of the unencumbered sovereign individual against the menacing state, but the theory had no real place for self-governing communities that wanted to safeguard their principle in law. As all public questions were increasingly distorted into a conflict between individual rights and state power and were left to judges to resolve, eventually political deliberation about the common would become impossible.[39]

Despite quite fundamental disagreements within the conservative camp on the nature, extent, and ultimate grounding of rights—not mention to role of the judiciary in articulating and enforcing them—"[c]onservative and libertarian public interest litigation now appears to be a permanent feature of the constitutional landscape."[40] And while conservatives have failed to roll back the rights revolution, they continue to attempt to develop and expand their own catalog of rights.[41]

## VI. CONGRESS AND CONSTITUTIONAL REFORMATION

O'Neill ends his book by noting an obvious lacuna in conservative thought: serious attention to Congress. His concluding chapter is a combination of observation and plea: "American conservatives, and citizens in general, must again see that their ability to be a self-governing people is tied to the fate of Congress. Its shortcomings are real, as all major schools of

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[37] O'Neill, *supra* note 1, at 268-269. *See* RICHARD EPSTEIN, TAKINGS (1985).
[38] O'Neill, *supra* note 1, at 274.
[39] *Id*. at 279.
[40] *Id*. at 280.
[41] *Id*.

conservatism accept, but it must be re-engaged and reinvigorated if the republic is to endure."[42] How this might happen, when everything has failed, is unclear.

So at the end of his impressive account of conservative thought, O'Neill seems to come back to a pessimism, if not fatalism, that he introduced at the beginning. It is surely the case that "irresponsible bureaucracy, centralized governance that destroys federalism, a plebiscitary and imperial presidency, and modern judicial review cannot sustain republican self-governance."[43] But as he suggested in his introduction, conservatism was doomed to failure in opposing these things, both because of the extent of the New Deal's reconfiguration of American constitutionalism, and because of the principled disagreements among conservatives themselves, which prevented the adoption of a unified posture.[44]

All this of course points to cracks in the constitutional order that are not likely to be fixable. Nor is the old conservatism likely to sit well with the new. As O'Neill notes, some conservatives "now think that the constitutional system may be at—or beyond—a tipping point at which basic reform is necessary if a recognizably constitutional regime is to endure."[45] Along with this, "notable liberal and Progressive theorists increasingly pronounce the Constitution a failure that should be changed wholesale, or disobeyed, or radically democratized."[46]

His book ultimately points to the need for conservatives to take the hard-won lessons—including lessons in failure—of earlier generations and apply them to fundamental reform of our institutions, including amendment of the Constitution itself. Only a formally amended charter is likely to be conducive to encouraging the virtues necessary to sustain republican government in the face of the evils that earlier generations of conservatives confronted, but failed to halt. As the centralized bureaucratic state melds with the security state, and thought itself is increasingly cabined along progressive lines, the time for action is short. Conservatives might once again unite, and republican

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[42] *Id*. at 298.

[43] *Id*.

[44] *Id*. at 15.

[45] *Id*. at 284. In this camp he places Peter Augustine Lawler and Charles R. Kesler, among others. *See* PETER AUGUSTINE LAWLER & RICHARD M. REINSCH II, A CONSTITUTION IN FULL: RECOVERING THE UNWRITTEN FOUNDATION OF AMERICAN LIBERTY (2019); CHARLES R. KESLER, CRISIS OF THE TWO CONSTITUTIONS: THE RISE, DECLINE, AND RECOVERY OF AMERICAN GREATNESS (2021).

[46] O'Neill, *supra* note 1, at 284.

government be saved, if they can concentrate their minds on how our governing institutions can be redirected to republican ends. This would include innovations to make our national legislature both representative and effective—which would also require attention to the accountability and powers, formal and implied, of the other branches and the states.

America began in revolution, but it need not end that way if conservatives honestly and openly lead the charge in demanding attention to the full range of legal solutions to large and enduring constitutional problems. In the meantime, O'Neill's erudite book is unlikely to be surpassed as the definitive guide to conservative thought and American constitutionalism.

Other Views:

- J. Joel Alicea, *Liberalism and Disagreement in American Constitutional Theory*, 107 VA. L. REV. 1171 (2021), *available at* https://virginialawreview.org/articles/liberalism-and-disagreement-in-american-constitutional-theory/.
- Adrian Vermeule, *Beyond Originalism*, THE ATLANTIC (Mar. 31, 2020), https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/.
- Richard Epstein & Bradley C.S. Watson, *A CRB discussion of Classical Liberalism and the Constitution*, CLAREMONT REV. OF BOOKS (Jan. 12, 2015), https://claremontreviewofbooks.com/digital/a-crb-discussion-of-classical-liberalism-and-the-constitution/.
- Bruce P. Frohnen, *Our Republic and How We Lost It: Philip Hamburger on the Structure of Self-Government*, UNIV. BOOKMAN (Aug. 6, 2023), https://kirkcenter.org/reviews/our-republic-and-how-we-lost-it-philip-hamburger-on-the-structure-of-self-government/.

# THE PECULIAR CASE OF THE ISRAELI LEGAL SYSTEM*

YONATAN GREEN**

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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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The Israeli legal system often draws a great deal of confused and excited attention from outsiders—critics and well-wishers alike. It is a constant subject of adoring praise, scornful derision, and genuine curiosity. Due to the way in which the line between the legal and non-legal has been entirely obscured, almost any issue in Israeli politics, culture, security, economics, and society will have a dominant legal element. Events and controversies directly involving the legal system itself seem to generate an exceptionally high degree of interest and concern. This was true over the years even before the current efforts at reforming Israel's judiciary, and recent events have brought this interest to a peak.

Yet despite its similar language and trappings, the Israeli legal system sharply diverges from many established and accepted norms in Western, democratic, liberal countries, and its familiar appearance can be deceiving. As Judge Richard Posner observed in his insightful 2007 essay on Israeli jurisprudence, "some foreign legal systems, even the legal system of a democratic nation that is a close ally of the United States, are so alien to our own system that their decisions ought to be given no weight by our courts."[1]

Understanding some of these fundamental differences is critical for anyone trying to make sense of Israeli current affairs, and of developments in the Israeli legal world in particular. Those who support Israel and who wish to see its continued prosperity and stability ought to be especially conscious of such flaws (as they can only be called) and of their cumulative and detrimental effects on Israeli government and society.

What follows is a list of ten key points in which the Israel legal system stands out as singularly unconventional. Each characteristic—each flaw—alone illustrates the extent to which Israel deviates from conventional legal norms in a democratic society. But these flaws are naturally interrelated and often overlap, and indeed the aggregated sum of their effects is larger than its parts. This essay deliberately does not directly address recent efforts at reforming Israel's judiciary. Any serious evaluation of current reforms requires an impartial and dispassionate understanding of Israel's underlying legal challenges, which are best presented and discussed without the polarizing and muddying effects of current affairs and preconceived opinions.

Needless to say, the discussion of each issue will be unavoidably generic and brief. This essay focuses on public law and avoids private law

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[1] Richard A. Posner, *Enlightened Despot*, THE NEW REPUBLIC (Apr. 23, 2007), https://newrepublic.com/article/60919/enlightened-despot.

altogether. Such a list is not exhaustive and is not intended as a comprehensive introduction to the Israeli legal system.[2] Furthermore, some of the details and descriptions here could quickly become obsolete or outdated, due the bewildering pace of change within the rapidly shifting Israeli legal landscape.

The object of this essay is to alert the reader to some of the Israeli system's most severe flaws—perhaps highlighting the areas which require urgent rectification—as things stand at the time of this writing. Those interested in the current initiative for legal reform in Israel—regardless of one's position on the matter and whatever becomes of it—will benefit from a deeper and broader understanding of the legal reality forming the background for efforts at legal change. This list may even serve as a warning to legal systems elsewhere, as to some pitfalls and risks about which responsible citizens and policymakers ought to be vigilant. At the very least, this essay may demonstrate the limited capacity of a reader in evaluating Israeli legal current events, and may encourage non-expert observers or critics to reserve judgment when considering many law-related Israeli issues.

And indeed, such cautious skepticism is generally warranted. Unlike most other developed democracies, very few foreigners will find it easy to follow—let alone fully comprehend or effectively scrutinize—Israeli legal events and developments. Even the most earnest efforts of an outside observer at understanding Israeli jurisprudence may be easily frustrated by significant geographical, cultural, and linguistic obstacles. The relative isolation of Israel has most likely contributed to the widening gap between Israeli legal thought and that of most Western democracies.

The coming years may well bring much-needed dramatic change to our legal system (perhaps sooner than expected), some of which will likely be decried by detractors as "democratic backsliding" or as acts of a sinister nature. This essay might provide a sobering perspective to counter such alarmism.[3] This essay will also hopefully illustrate the necessity of (and challenges to) individuals and organizations that seek to repair

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[2] For a modern and readable English-language introduction, see DANIEL FRIEDMANN, THE PURSE AND THE SWORD: THE TRIALS OF ISRAEL'S LEGAL REVOLUTION (2016); GIDEON SAPIR, THE ISRAELI CONSTITUTION: FROM EVOLUTION TO REVOLUTION (2018).

[3] *See* Yonatan Green, *The Judicial Apocalypse is not upon us*, THE TIMES OF ISRAEL (Jan. 8, 2023), https://blogs.timesofisrael.com/the-judicial-apocalypse-is-not-upon-us/.

the Israeli legal system, such as the Israel Law & Liberty Forum (of which the author is a co-founder).[4]

## I. EXTREME UNREASONABLENESS: THE COURT AS CHIEF EXECUTIVE

The Israeli Supreme Court has developed a unique and innovative standard for review of any government action by the executive, radically diverging from the causes for administrative review established in Western and common law jurisdictions. The Court may analyze whether and to what degree a particular decision by the executive was "reasonable," even when such decision was within the discretion explicitly afforded by statute. If such action is deemed to have been outside the "range of reasonability," defined on an ad hoc basis from case to case, it may be invalidated by the Court.[5] In other words, the Court directly scrutinizes discretionary decisions by the executive *on their merits* and nullifies the decisions it finds "unreasonable."

This requires some background and elaboration. The traditional approach of administrative judicial review contains a limited set of causes which may justify judicial intervention in government action. One primary example is where a government action is alleged to be illegal or "ultra vires"—that an action was taken without legal authorization, that an official or agency (an "authority") has exercised powers not granted to it by law.[6] The underlying principle of all causes for administrative review is the Court's assessment of whether an action was taken within the sphere of authority granted to the body taking the action, and whether that authority was properly exercised.

The concept of "extreme unreasonableness" as grounds for judicial intervention indeed exists in many jurisdictions. Yet the unreasonableness cause in other countries still adheres to the basic question of legality, and it still essentially considers whether a decision exceeded the authority originally granted. Usually called "*Wednesbury*

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[4] ISRAEL LAW & LIBERTY FORUM, https://lawforum.org.il/?lang=en (last visited Aug. 1, 2023).

[5] HCJ 389/80 Dapei Zahav LTD. v. Broadcasting Authority, PD 35(1) 421, at § 8 of Justice Barak's opinion [1980] (Hebrew) (henceforth, *Dapei Zahav* case). For a general description of the Israeli unreasonableness doctrine, see Yoav Dotan, *Judicial Conservatism and Intellectual Courage: A Homage to President (ret.) Asher Grunis*, VERSA (2015), https://versa.cardozo.yu.edu/viewpoints/judicial-conservatism-and-intellectual-courage-homage-president-ret-asher-grunis.

[6] The original description of ultra vires as an administrative law doctrine, together with reasonableness, is credited to Lord Russell in Kruse v. Johnson [1898] 2 QB 91 (UK).

Unreasonableness" after the leading UK case on the issue,[7] the underlying rationale is that an act may conceivably be outside the bounds of legal authority even when technically seeming to follow the letter of the law. A decision may be unreasonable, and therefore illegal, if authority is exercised in a manner clearly never imagined or intended by the original source of that authority (usually, the legislature).

The standard for judicial intervention on such grounds is very high, and one might call it "radical" or "extreme" unreasonableness. The court in the *Wednesbury* case indeed did *not* interfere with the particular decision being challenged, and it presented the "unreasonableness" cause as a far-fetched and unlikely scenario in which the court could properly intervene without a clear violation of the law. The *Wednesbury* case deemed judicial interference justified only where a decision was "so unreasonable that no reasonable authority could ever have come to it."[8] A subsequent and oft-cited case, *Council of Civil Service Unions v Minister for the Civil Service*, defined the *Wednesbury* test more clearly, as applying to a decision "so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."[9] This is a high bar indeed. A common example is that of a Prime Minister appointing his horse as a cabinet member—while an authorizing statue may not have explicitly mandated ministers be human beings, the decision could be considered outrageous, never intended by the original statute, and therefore legally unreasonable. To this day, in the U.S., the UK, and many other jurisdictions, the "unreasonableness" challenge (and others like it) against government action is the least likely to succeed in court.

Back to Israel. Through a series of cases and with the symbiotic assistance of the government legal counsel corps, the Supreme Court has established "unreasonableness" as the key and primary cause for challenging executive action of any kind, and today it is the most common basis for lawsuits against the government. While ostensibly relying on the *Wednesbury* Unreasonableness doctrine, the Court has warped the concept so thoroughly that it would now be beyond recognition to any Western jurist.

First, the Court defines a narrow "range of reasonability" delineating precisely which decisions could be considered reasonable under given circumstances. Thus, decisions not within the prescribed range become

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[7] Associated Provincial Picture Houses Ltd v. Wednesbury Corp [1948] 1 KB 223.

[8] *Wednesbury* [1948] 1 KB 223, at 230.

[9] Council of Civil Service Unions v. Minister for the Civil Service [1984] UKHL 9, at 45, [1985] 1 AC 374, at 410.

"unreasonable," even where they in no way resemble the outrageous or extreme type of unreasonableness envisioned in the *Wednesbury* doctrine. In other words, the Court has massively expanded the definition of what can be considered unreasonable, while at the same time severely restricting the scope of discretion originally granted by law.[10]

Second, the Court analyzes whether the *conclusion* reached by the deciding body was "reasonable," even when all the necessary and correct considerations were taken into account.[11] That is to say, the Court may determine that a government act was "unreasonable" because the government actor "incorrectly weighed" the various conflicting interests and considerations. This is the core of the Israeli unreasonableness doctrine—judicially "balancing" executive policy decisions on their merits, even when all appropriate aspects were considered, and thus directly circumventing the authority granted to the executive to perform precisely this evaluation.

Israel's foremost administrative law expert Prof. Yoav Dotan has usefully dubbed this novel type of review as "on-balance unreasonableness," contrasting it with the traditional "outrageous unreasonableness" of *Wednesbury* fame.[12] While the Israeli Court professes to merely apply an extended version of the latter by employing the same term, the two doctrines share nothing in common. As Dotan points out, *Wednesbury* requires that a governmental action be so "outrageous"—so clearly beyond the pale—that the original grant of authority could not have possibly meant to include such an action. The Israeli doctrine reviews the governmental decision on its merits, supposedly weighs the various factors against each other, and either agrees or disagrees with the final outcome.

It is critical to emphasize that the analysis described here takes place with respect to decisions taken *within* the scope of formal legal authority. The unreasonableness doctrine is not needed if the challenged executive action was ultra vires or procedurally flawed, or when other traditional causes for judicial review may apply (such as arbitrariness, discrimination, undisclosed conflict of interest, etc.). Rather, it only applies where the Court has concluded the government has acted within the formal authority granted by law. This cannot be stressed enough.

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[10] *Dapei Zahav* case, *supra* note 5.

[11] HCJ 8397/06 Eduardo Wasser v. Minister of Defense (May 29, 2007), Cardozo Law School Versa Database, https://versa.cardozo.yu.edu/opinions/wasser-v-minister-defense.

[12] Yoav Dotan, *Two Concepts of Deference—and Reasonableness*, 51 MISHPATIM 673 (2022) (Hebrew). For an English summary, see Yoav Dotan, *Two Concepts of Deference—and Reasonableness*, 51 MISHPATIM (Booklet 3, 2022), *available at* https://bit.ly/3Qr3QTS.

The rationale consistently offered by the Court runs along the following lines: While a statute may grant *authority* to make or apply a certain decision, any subsequent governmental action entails an exercise of *discretion* in determining how to use that authority. Such exercise must be performed "reasonably" (as defined above) and is thus subject to judicial oversight under the ostensibly legal standard of "reasonableness."[13] This distinction between authority and discretion is at the core of the Court's unreasonableness doctrine.

Over the years, the Court has generally refused to recognize—let alone, cope with—the obvious objection to this rationale: that interfering with duly-granted governmental discretion based on the vague and inscrutable standard of "reasonableness" simply transfers the same discretionary power to the Court itself. UK Supreme Court Justice Lord Jonathan Sumption observed that a technique of this nature

> puts great power into the hands of judges. Judges decide what are the norms by which to identify particular actions as illegitimate. Judges decide what language is clear enough. These are elastic concepts. There are usually no clear legal principles to shape them. The answer depends on a subjective judgment in which a judge's personal opinion is always influential and often decisive. Yet the assertion by judges of a power to give legal effect to their own opinions and values, *what is that if not a claim to political power?*"[14]

Critics of the Israeli unreasonableness doctrine have observed that the Court seems to supplant the executive's policymaking prerogative, despite judges being democratically unaccountable. This is undoubtedly true. The very essence of governing and creating policy is the balancing of various valid interests and considerations, and selecting a specific policy which reflects an elected government's preferred priorities and values, and those of the electorate which put the government in power. The Court's interference with this final outcome on the basis of "unreasonableness" replaces the executive's judgement with that of the bench.

However, it should be noted that this doctrine undermines the *legislature* as much as it does the executive. The legislature decides to delegate certain authority and to grant certain powers to various parts of the executive government, in a manner and with a scope defined by statute and through the formal democratic and legislative process. But under the pretense of examining a decision's "reasonableness," the Court in

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[13] *Dapei Zahav* case, *supra* note 5.

[14] Jonathan Sumption, *The Reith Lectures 2019: Law and the Decline of Politics*, BBC RADIO 4 (May 21, 2019), *available at* https://lawforum.org.il/wp-content/uploads/2020/05/Sumption-full.pdf (henceforth, Lord Sumption lecture) (emphasis added).

fact challenges the original grant of authority and claims to restrict, define, and otherwise limit the powers conferred by statute. All this without ever explicitly challenging the constitutionality of the original statute and without offering any reason to consider the initial granting statute unlawful. In sum, the Israeli unreasonableness doctrine can often be best described as constitutional legislative intervention in the guise of mere administrative review.[15]

An exhaustive review of the use of the unreasonableness doctrine by the Court would be an enormous undertaking due to its sheer scope; virtually any lawful governmental decision, action, or policy of consequence is susceptible to review and is indeed often litigated, despite the absence of any sound legal grounds for such challenges. Some general categories in which the Court has used the doctrine include the review of virtually any appointment of senior government officials (which it holds "unreasonable" if the appointee is perceived to have ethical flaws),[16] including the military Chief of Staff, the National Police Commissioner, elected representatives such as municipal mayors, and, ultimately, cabinet ministers;[17] review of immigration policy down to individual discretionary actions,[18] including the Minister of Interior's decision to deny entry to a non-citizen in accordance with law;[19] judicially-imposed limitations on the authority and policies of "caretaker" (pre-elections) governments with no statutory basis;[20] review of multiple

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[15] The ambiguous existence of an Israeli constitution is explained in section VIII, *infra*. Despite the absence of a typical (or codified) constitution, this essay will employ the term "constitutional" in a broader sense—to mean either the basic governmental arrangements, structure, and institutions of a given state, or to mean strong judicial review capable of striking down primary legislation. *See generally* Daphne Barak-Erez, *Israeli Administrative Law at the Crossroads: Between the English Model and the American Model*, 40 ISR. L. REV. 56, 63 (2007).

[16] *See e.g.*, HCJ 6163/92 Eisenberg v. Minister of Building and Housing (Mar. 23, 1993), Cardozo Law School Versa Database, https://versa.cardozo.yu.edu/opinions/eisenberg-v-minister-building-and-housing (henceforth, *Eisenberg* case); HCJ 1284/99 Doe v. IDF Chief of Staff, PD 53(2) 62 (1999) (Hebrew).

[17] *See infra* section II.

[18] HCJ 11437/05 Line for the Worker v. Ministry of Interior (Apr. 13, 2011), Israel Supreme Court Database, https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts%5C05%5C370%5C114%5Cr27&fileName=05114370_r27.txt&type=2 (Hebrew).

[19] HCJ 1765/22 Varsha v. Minister of Interior (July 3, 2022), Israel Supreme Court Database, https://www.gov.il/BlobFolder/dynamiccollectorresultitem/decision1765-22/he/1765-22.docx (Hebrew); LAA 7216/18 Alqasem v. Ministry of Interior (Oct. 18, 2018), Cardozo Law School Versa Database, https://versa.cardozo.yu.edu/opinions/alqasem-v-ministry-interior-and-hebrew-university.

[20] *See e.g.*, HCJ 5167/00 Weiss v. Prime Minister, Cardozo Law School Versa Database (Jan. 25, 2001), https://versa.cardozo.yu.edu/opinions/weiss-v-prime-minister; HCJ 2144/20

aspects of military policy, including rules of engagement, minute operational tactics, and discharge of commanders for improper conduct (recently the Court has even entertained a suit against the military's haircut policy);[21] review of prosecutorial decisions, including decisions to close criminal investigations and cases (when no illicit motives are suspected on the decider's part); review of ministerial decisions granting or refusing discretionary national honorary awards;[22] and many more.

Among the many bizarre examples, the following two are instructive and will suffice for present purposes. In 2017, a private grammar school of the "Waldorf" (known in Israel as the "Anthroposophical") education method filed a petition against the Tel Aviv municipality due to the latter's refusal to provide the school with funding equal to that received by traditional public schools. The district court ruled for the plaintiff. While the municipality did not exceed its authority and did not run afoul of other established causes for judicial review, the Court held that the decision not to fund the Waldorf school was "unreasonable."[23]

In 2019, the State Prosecutor stepped down from his position, with the existing "caretaker" government (during an elections cycle) yet to nominate his successor. Acting Minister of Justice Amir Ohana exercised his statutory authority to appoint an interim State Prosecutor, naming seasoned and widely-respected prosecutor Orly Ben-Ari to the post. This raised the ire of the Legal Counsel to the Government, Avichai Mandelblit, who issued a haughty legal memo claiming that Ohana's choice was unreasonable, despite the law in question implicitly allowing for wide executive discretion. More amazing still, Mandelblit claimed that there was in fact only one possible "reasonable" appointee Minister Ohana could choose—he was obligated to appoint Shlomo Lemberger, the serving Deputy State Prosecutor. In this manner, Mandelblit wielded the unreasonableness doctrine to dictate to the Minister of Justice the exact identity of the interim State Prosecutor,

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Movement for Quality Government in Israel v. Speaker of the Knesset (Mar. 25, 2020), Cardozo Law School Versa Database, https://versa.cardozo.yu.edu/opinions/movement-quality-government-israel-v-speaker-knesset.

[21] HCJ 6798/22 Cohen v. Israel Defense Forces (Jan. 22, 2023), Israel Supreme Court Database, https://shorturl.at/wJL28 (Hebrew).

[22] HCJ 8076/21 Judges Committee of the Israel Prize v. Minister of Education (Mar. 29, 2022), Israel Supreme Court Database, https://www.gov.il/BlobFolder/dynamiccollectorresultitem/decision8076-21/he/8076-21.docx (Hebrew).

[23] HCJ 4500/17 Tel Aviv-Jaffa City Government v. Aviv Foundation (Feb. 20, 2019), Israel Supreme Court Database, https://supremedecisions.court.gov.il/ Home/Download?path=HebrewVerdicts%5C17%5C000%5C045%5Co12&fileName=17045000.O12&type=2 (Hebrew). A rare panel of conservative judges on the Supreme Court eventually overturned this decision.

despite black-letter law placing such a decision squarely in the hands of the politically-accountable Minister. In the opening minutes of Orly Ben-Ari's commencement ceremony, the Supreme Court issued a temporary injunction against her appointment by Ohana,[24] on the basis of a petition mirroring Mandelblit's unreasonableness argument. The injunction led to chaos and disarray, and ultimately to Orly Ben-Ari withdrawing her own nomination.

In 2023, rampant use of the unreasonableness doctrine as de novo judicial review of the merits of executive policy decisions, entirely divorced from traditional questions of administrative authority and capacity, is a fixed feature of the Israeli legal system.[25]

## II. THE PINHASI-DERI DOCTRINE: IMPEACHMENT BY JUDICIAL REVIEW

The Court may effectively impeach and dismiss senior public officials and elected representatives on the grounds that they have been indicted (or even investigated) for a criminal offense.

While this doctrine might seem at first glance trivial and esoteric, some scholars have characterized it as the overarching and defining feature of the Israeli legal system, which casts its shadow on all other issues. According to Professor Yoav Dotan, this doctrine is the key to understanding the entire relationship between the judiciary (along with its "forward outposts" in public service) and the elected branches of government, and to recognizing the way this relationship has enabled the massive expansion of judicial power over the last three decades. Dotan characterizes the doctrine as "impeachment by judicial review."[26]

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[24] *Justice minister's appointee for state attorney turns down job after backlash*, THE TIMES OF ISRAEL (Dec. 20, 2019), https://www.timesofisrael.com/justice-ministers-appointee-for-state-attorney-turns-down-job-after-backlash/; *Mandelblit assails justice minister for seeking to subvert legal system*, THE TIMES OF ISRAEL (Mar. 5, 2020), https://www.timesofisrael.com/mandelblit-assails-justice-minister-for-seeking-to-subvert-legal-system/.

[25] The Israeli Knesset recently passed controversial legislation aimed at limiting the use of "extreme unreasonableness" to invalidate decisions and policies enacted by elected officials, such as government ministers and the cabinet itself (the executive branch). The legislation is consistent with suggestions previously made by leading scholars, including Prof. Yoav Dotan and Justice Noam Sohlberg. *See* Noam Sohlberg, *On Subjective Values and Objective Judges*, 18 HASHILOACH (2020), *available at* https://shorturl.at/elpL7 (Hebrew). The longevity, effectiveness, and fate of the legislation remains to be seen. (The legislation, passed as an amendment to a Basic Law, has been challenged in court, and a hearing has been set for the fall of 2023.)

[26] Yoav Dotan, *Impeachment by Judicial Review: Israel's Odd System of Checks and Balances*, 19 THEORETICAL INQUIRIES IN L. 705 (2018), *available at* https://www7.tau.ac.il/ojs/index.php/til/article/view/1587.

The controlling precedent remains the dual Pinhasi-Deri rulings from the early 1990s, which were in turn based on the aforementioned unreasonableness doctrine. The Supreme Court ruled that the Prime Minister (then Labor's Yitzhak Rabin) was obligated to dismiss two senior cabinet ministers from his government due to their implication in an ongoing criminal investigation. The Court held that when an alleged crime is severe enough, the refusal to dismiss an indicted minister or senior official would damage public trust in government institutions and was therefore "unreasonable."[27]

At the time and to this day, there has been no statutory rule which explicitly requires such action. On the contrary, the controlling statute mandates the termination of a minister's tenure only where he or she has been convicted of a crime involving "moral turpitude."[28] However, the Court reasoned that while the black-letter law indeed mandated dismissal of a minister only upon conviction of certain charges, the discretion of the Prime Minister *not* to dismiss the indicted minister at an earlier stage is limited by the Court's evaluation of how "reasonable" such a decision might be.

While these rulings employed the unreasonableness grounds discussed above, they are almost universally regarded as creating a unique and independent doctrine.[29] The resulting "Pinhasi-Deri doctrine" can be thus summarized: If a government minister is suspected of committing a crime, the Court may order that the minister be removed (or not appointed in the first place) by the Prime Minister; and it is assumed and understood that any Prime Minister is expected to do so preemptively without the need for an explicit court order.

This doctrine suffers from a number of irredeemable flaws. The Court's decision (and the entire doctrine) purports to be about ordinary administrative judicial review. That is, the Court analyzes the "legality" and "reasonableness" of a decision by the head of the executive on whether to dismiss senior ministers under indictment as if it were the decision of a local township clerk on whether to grant a business license. By framing the cases this way, the Court ignores the gravity and

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[27] HCJ 3094/93 The Movement for Quality Government in Israel v. State of Israel (Sept. 8, 1993), Cardozo Law School Versa Database, https://versa.cardozo.yu.edu/opinions/movement-quality-government-v-state-israel (henceforth, *Pinhasi-Deri* case).

[28] § 23(b), Basic Law: The Government (Isr.), *available at* https://main.knesset.gov.il/EN/activity/Documents/BasicLawsPDF/BasicLawTheGovernment.pdf.

[29] *See, e.g.*, Noam Sohlberg, *Pinhasi-Deri Doctrine Through the Prism of the Reasonableness Cause*, RESHUT HARABBIM BLOG (Jan. 13, 2022), *available at* https://lawforum.org.il/wp-content/uploads/2022/01/ILLF-Solberg-Deri.pdf (Hebrew). *But see Pinhasi-Deri* case, *supra* note 27, at § 20(h) of Chief Justice Shamgar's opinion.

delicacy of what is actually being done: judicial impeachment of elected officials.

Prof. Dotan has pointed out that in most democratic states, impeachment of senior elected officials is a sensitive and complex process, usually directly addressed in constitutional instruments, for obvious reasons including core notions of the separation of powers.[30] In Israel however, the Court has assumed for itself the authority to cause the dismissal of any high-ranking official (elected or appointed), as well as to prevent officials from attaining high-ranking positions in the first place, as a result of criminal charges filed against them. By extension, this doctrine grants de facto impeachment power to a handful of senior civil servants in the government investigation-prosecution apparatus,[31] who are largely insulated from the electorate as well as from meaningful legislative or executive oversight. Thus, a small clique of democratically unaccountable officials has the authority to cause the dismissal of almost any high-ranking member of government, a state of affairs which would seem to be odious to those with strong democratic sensibilities.

The doctrine also violates basic norms of criminal law, such as the presumption of innocence and procedural due process. As criminal law experts such as Prof. Rinat Kitai-Sangero have pointed out, the Court-mandated dismissal amounts to a severe de facto legal sanction for an offense which has not yet been proven in court (and indeed before the defendant has ever appeared before a judge).[32] Notably, such indictments need the approval of only a handful of people with vested institutional interests—there is no grand jury or similar public participation in making such decisions.

Perhaps the most jarring feature of this doctrine is its disregard for the fundamental democratic value of elected representation, which is the main reason impeachment proceedings are usually handled with delicacy in the first place. The Pinhasi-Deri doctrine essentially robs senior Israeli politicians of their most important value-proposition to voters: that they can serve in ministerial positions. At the same time, it subverts voters' intentions and expectations and undermines one of the core factors on which they base their electoral decision-making.

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[30] Dotan 2018, *supra* note 26, at 711.

[31] For example, a senior investigator in one of various branches of the Israel National Police, the Chief Prosecutor or other senior criminal prosecutor, the Legal Counsel to the Government, or, in some instances, a judge.

[32] Rinat Kitai-Sangero, *The Israeli Case for the Applicability of the Presumption of Innocence to Indicted Public Officeholders*, 52 CAL. W. INT'L L.J. 175 (2021), *available at* https://scholarlycommons.law.cwsl.edu/cwilj/vol52/iss1/6/.

It is worth pointing out that the Israeli system of government is roughly based on the Westminster parliamentary model (albeit with proportional representation, wherein voters choose between fixed party "lists" of candidates). Senior government members are not merely appointed at the discretion of an elected executive. Rather, their positions reflect their relative electoral success, the clout of their political parties within a coalition government, and their own popularity among their party voters. Voters consider this when choosing parties, as they are effectively also choosing candidates for senior leadership positions in government. A vote for a given party is also a tacit vote for that party's top-ranking members to be instated in positions of governmental power, usually in the executive branch (e.g., a voter may choose the Shas party so that party leader Aryeh Deri may be a cabinet member or Minister of the Interior, just as much as for their desire for Shas to advance a certain legislative agenda).

While this doctrine seems to violate basic norms of constitutional, administrative, and criminal law, the Court rarely recognizes or even addresses these violations as such.[33] The key ruling and subsequent decisions have refused to acknowledge the legal and political ramifications of this judge-made rule, and have preferred skirting these issues or ignoring them entirely.

Consider one glaring example of the doctrine being tactically employed. Yaakov Neeman was a leading attorney (a founder and named partner of Israel's preeminent law firm) when he was appointed as Justice Minister in 1996, in the first Netanyahu government. Neeman was known for his critical stance towards the Israeli Supreme Court and for his objection to its judicial activism that prevailed at the time. A day after Neeman was appointed to office, the attorney general announced an investigation into alleged crimes. Within months, Neeman had been indicted for obstruction of justice in a case in which he had acted as counsel—a grossly inflated charge which was based on a minor and inconsequential clerical error in an affidavit filed by Neeman. Neeman

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[33] On the contrary, in several cases, the Court uses the democratic process as a justification for *applying* the Pinhasi-Deri doctrine. *See* HCJ 5261/04 Fuchs v. Prime Minister, at § 17 of Chief Justice Barak's opinion (Oct. 26, 2004), Cardozo Law School Versa Database, https://versa.cardozo.yu.edu/opinions/fuchs-v-prime-minister. *But see* HCJ 3997/14 Movement for Quality Government in Israel v. Minister of Foreign Affairs, at § 24 of Chief Justice Grunis' opinion (Apr. 12, 2015), Nevo Legal Database, https://www.nevo.co.il/psika_html/elyon/14039970-s09.htm (Hebrew) (questioning the viability—and the legitimacy—of the Pinhasi-Deri doctrine with regard to the impeachment of elected officials in a rare dissenting opinion).

had no choice but to resign in light of the Pinhasi-Deri doctrine.[34] In his stead, the much more amicable and pro-Court Tzahi Hanegbi became Justice Minister.

Almost a year later, Neeman was fully acquitted of all charges by the Court, which severely criticized the Legal Counsel to the Government's decision to indict Neeman in the first place. The so-called error, the Court said, was a minor mistake by a junior lawyer who had drafted an edition of the affidavit and, amazingly, this lawyer was never even questioned by the prosecution, though his testimony could have voided the entire investigation.[35] Here, then, is one example of how every politician and senior official in Israel must be wary lest they raise the ire of the judiciary or the closely-aligned government prosecution services.

The effect of this doctrine on the entire legal system cannot be overstated. One need not be an expert in game theory and power dynamics (or indeed a conspiracy theorist) to understand that the doctrine has established an incentive structure encouraging the initiation of criminal proceedings against unruly or bothersome politicians—effectively inhibiting almost any action by the elected branches against the courts and legal elite. Any effort to effect change or to advance reform in the legal and judicial world—especially if such effort is seen as a way to curb judicial authority—may lead to the derailment of one's public career, or worse. As Prof. Dotan wrote, "one cannot understand the relationships between the courts and politics in Israel without taking this component into account."[36]

## III. NO STANDING REQUIREMENT: FROM DISPUTE RESOLUTION TO ABSTRACT SUPERVISION

As Judge Posner observed in his aforementioned essay, "The judicial power of the United States can be exercised only in suits brought by persons who have standing to sue in the sense of having a tangible grievance that can be remedied by the court."[37] The very concept of

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[34] *See* Yir'on Festinger, *The Judicial Conservative Persecuted by the System: In Memoriam of Ya'akov Ne'eman*, MIDA (Jan. 3, 2017), *available at* https://bit.ly/47gA6ic (Hebrew). *But see* Gidi Weitz, *Signed, Sealed, Deposed: The Letter That Nearly Did in Yaakov Neeman*, HAARETZ (Jan. 8, 2012), https://www.haaretz.com/2012-01-08/ty-article/signed-sealed-deposed-the-letter-that-nearly-did-in-yaakov-neeman/0000017f-deba-d3a5-af7f-febe82bc0000.

[35] *Former Justice Minister Neeman Acquitted on All Counts; Coalition Demands His Reinstatement*, GLOBES (May 15, 1997), https://en.globes.co.il/en/article.aspx?did=359279.

[36] Dotan 2018, *supra* note 26, at 708.

[37] Posner 2007, *supra* note 1.

standing reflects the fundamental idea that a court's role is to settle and resolve actual conflicts, including those between individuals and the state, not to adjudicate ideological disagreements over policy questions. The court is not tasked with resolving hypothetical or potential conflicts ex ante. Therefore, to get her case into court, a claimant is required to show a tangible harm caused to her and an enforceable legal right as a cause of action; merely disliking or disagreeing with government policy does not grant standing to sue.

In this sense, standing is not a mere procedural technicality, nor does it deny any individual citizen a right to initiate legal proceedings. Rather, a firm standing requirement is a critical check on judicial power, ensuring that a court's fast and binding decision-making procedures and privileges are limited to settling disputes and are not directed towards abstract legal or political controversies. Justice Antonin Scalia made this case persuasively in his essay describing standing as "an essential element of the separation of powers."[38] Standing thus serves as a threshold condition which exists separately from the substantive legal disagreement at issue in a case, and it defines the permitted parties to legal proceedings challenging government action. It's about *who* gets to avail themselves of a court's formidable authority.

Not so in Israel. Over a gradual process spanning two decades, the Israeli Supreme Court has abolished the traditional standing requirement for petitioners challenging government action or policy.[39] Thus, any citizen in Israel may ask that the Court block allegedly illegal government action, even when that citizen is not personally affected by the challenged action. This essentially abandons the notion that a court settles controversies and recasts the Court as an omnipotent policy supervisor and overseer. Without the limiting condition of standing, the Court has become an appellate tribunal reviewing any and all duly enacted government policy, merely on the basis that someone objects to it.[40]

Some other jurisdictions have also loosened standing requirements, especially with the ascendancy of human rights litigation. While indeed

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[38] Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U.L. REV. 881 (1983), *available at* https://bpb-us-e1.wpmucdn.com/sites.suffolk.edu/dist/3/1172/files/2015/11/Scalia_17SuffolkULRev881.pdf.

[39] *See* Joshua Segev, *The Standing Doctrine: What Went Wrong?*, *in* OXFORD HANDBOOK OF THE ISRAELI CONSTITUTION (Aharon Barak, Barak Medina, & Yaniv Roznai eds., forthcoming), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4010860.

[40] *See* Segev, *supra* note 39. *See also* Joshua Hoyt, *Standing, Still? The Evolution of the Doctrine of Standing in the American and Israeli Judiciaries: A Comparative Perspective*, 53 VAND. J. TRANSNAT'L L. 645, 664 (2020), *available at* https://scholarship.law.vanderbilt.edu/vjtl/vol53/iss2/5/.

some courts and legislatures have chosen to expand standing to allow for easier access to judicial remedies, there is a stark difference between such tweaks and the fundamental changes made by the Israeli Supreme Court. Other jurisdictions have maintained the basic conception of standing as a desirable limit on judicial power, even while making borderline cases easier to file or creating various exceptions. The Israeli case represents an explicit rejection of the very core of standing itself, as the Court positioned itself as the ultimate supervisor of all government.[41]

The Israeli example also demonstrates the secondary ramifications of abandoning any standing requirement. While standing is indeed about *who* gets to go to court, it also often yields a natural limit on *what cases* can be brought before the court. Certain categories of governmental decisions and policies are just less likely to produce aggrieved parties with a tangible, actionable harm, and are thus less likely to produce potential plaintiffs. One such category is governmental appointments, where the only plaintiff who conceivably has standing might be a close runner-up who was overlooked. The population at large would usually not have standing to challenge the appointment of, say, the National Police Commissioner. Thus, governmental appointments are usually shielded from litigation by their very nature, as the standing requirement drastically reduces the likelihood of bona fide plaintiffs. In this sense, limits on standing are inherently also limits on justiciability.

This development must be seen within the context of the Supreme Court's broader revolution in Israeli public law throughout the 1980s. The standing requirement was steadily abolished just as the unreasonableness doctrine was conceived and cultivated. These two changes combined were sufficient to effect an explosion of judicial power virtually unparalleled in any Western legal system. Without the limitations imposed by the standing requirement, anyone could bring any issue before the courts; with the unreasonableness doctrine, any government action became subject to judicial scrutiny, and any policy decision could be evaluated in quasi-legal terms.

The 1993 Pinhasi-Deri rulings, along with many others before and since, serve to demonstrate this point. Due to the lack of any standing requirement, the motions against Prime Minister Rabin were filed by public interest NGOs, with no discernable plaintiff showing a grievance

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[41] *See, e.g.*, HCJ 910/86 Ressler v. Minister of Defense (June 12, 1988), Cardozo Law School Versa Database, https://versa.cardozo.yu.edu/opinions/ressler-v-minister-defence (henceforth, HCJ 910/86 *Ressler*); HCJ 1308/17 Silwad City Government v. Knesset (June 9, 2020), Nevo Legal Database, https://www.nevo.co.il/psika_html/elyon/17013080-V48.htm (Hebrew).

requiring judicial resolution. The unreasonableness doctrine provided the Court with a quasi-legal framework to review Rabin's refusal to dismiss his cabinet ministers, and ultimately with the tools to spawn the Pinhasi-Deri doctrine.

## IV. JUSTICIABILITY AND THE POLITICAL QUESTION DOCTRINE: "EVERYTHING IS JUSTICIABLE"

The Israeli Supreme Court has systematically abolished any justiciability requirement, such that any government decision of any kind may be challenged, adjudicated, and overruled, even on contentious policy issues at the heart of public disagreement and debate.

The twin concepts of justiciability and the "political question doctrine" will be familiar to most Western jurists, and they together reflect the widely accepted and established notion that some issues cannot and should not be resolved by a court of law. Asking whether an issue is justiciable is an admission of the limits inherent in the court's function as a neutral adjudicator of legal disputes. A key principle of the separation of powers is that some decisions can only be made by the people's representatives in the elected branches. These decisions are out of bounds to courts due to considerations of expertise, democratic legitimacy, and their inherently non-legal character. Similarly, the political question doctrine in the U.S. holds that any question of a fundamentally political nature ought to be resolved in the political realm, by the political process designed for collective democratic decision-making.[42] Such decisions must take into account core values, the prioritization of equally valid but competing interests, the distribution of public goods, and so on.

At least on some level, justiciability is a meta-legal notion which exceeds legalistic arguments. Rather, it is about the wisdom, propriety, and sustainability of judicial decision-making with regard to contentious public issues, the resolution of which belongs to the elected branches of government. In this sense, it is not to be confused with whether a court can identify some legal hook to justify its intervention in a case. Justiciability reflects the notion that courts should avoid adjudicating certain types of issues, even if judges can concoct some far-fetched or convoluted legal argument to justify doing so.

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[42] *See e.g.*, Baker v. Carr, 369 U.S. 186 (1962) (explaining when an issue is a political question and therefore not justiciable); Nixon v. United States, 506 U.S. 224 (1993) (clarifying that if an issue is not given to the courts by the Constitution, it is not justiciable).

After Israel's founding, the Supreme Court often refused to hear cases due to their political nature, including one that sought to invalidate the government's decision to initiate diplomatic relations with post-WWII Germany.[43] However, the justiciability requirement has since been gradually yet summarily rejected by the Israeli Supreme Court. Justice Aharon Barak has held that any conceivable government decision has a legal element to it, and thus is subject to judicial review. This even includes, according to Barak, decisions on whether to go to war or to make peace.[44] Cases deemed justiciable and heard by the Court have included challenges to agreements between political parties, to the legislature's appointment of the Prime Minister, to intra-parliamentary proceedings, to a law for being too deliberately "personal," and to primary legislation of any kind.

One of the most common quotations associated with Justice Barak—and the Supreme Court he managed to mold in his image—is "everything is justiciable." Here is Justice Barak's view of justiciability, in his own words:

> In my opinion, every dispute is normatively justiciable. Every legal problem has criteria for its resolution. There is no "legal vacuum." According to my outlook, law fills the whole world. There is no sphere containing no law and no legal criteria. Every human act is encompassed in the world of law. Every act can be "imprisoned" within the framework of the law. Even actions of a clearly political nature—such as waging war—can be examined with legal criteria, as evidenced by the laws of war in international law. The mere fact that an issue is "political"—that is, holding political ramifications and predominant political elements—does not mean that it cannot be resolved by a court. Everything can be resolved by a court, in the sense that law can take a view as to its legality.[45]

One of the most instructive examples of the Court's flouting of justiciability concerns has to do with the Israeli government's consistent and conscious decision to exempt Jewish Ultra-Orthodox ("Haredi") men from compulsory military service. This policy has been in effect since the State's founding, and it has been supported by every governing coalition since. The decision has been the political solution to a host of delicate and complex social and cultural dilemmas. Importantly, this policy has always been a constant point of contention for Israeli society

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[43] HCJ 186/65 Rainer v. Prime Minister, PD 19 485 (1965).

[44] 1 AHARON BARAK, A COLLECTION OF WRITINGS 709 (2000) (Hebrew).

[45] Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 98 (2002).

and represents a typical democratic (and, one might say, multicultural) compromise between different and rival groups participating in shared government.[46] In other words, it is a classic political question.

For many years, the Court dismissed any legal challenges to the Haredi exemption as non-justiciable. Later, in the *Ressler* opinion, the Court about-faced and agreed to hear cases despite the political nature of the policies being challenged.[47] The Court eventually accepted a legal challenge to the exemption, asserting that such an arrangement must be codified in primary legislation, and that a blanket exemption by the Minister of Defense was inappropriate (despite the Defense Minister having the statutory authority to make the exemption and despite the Court's own past rejection of this exact argument).[48] In light of this ruling, the Knesset[49] passed a law authorizing the compromise in the form of primary legislation. However, later still, the Court struck down the exemption law as unconstitutional, on the grounds that it violated a core non-enumerated right to "equality."[50]

To summarize, today the Israeli Supreme Court may be petitioned to intervene in any government action, regardless of whether the action under review is suitable for judicial adjudication, and regardless of whether the action is a patently political question.

Finally, it's worth noting the interplay between the standing requirement discussed above and the question of justiciability. An effective standing requirement will inevitably keep out of court many purely political issues, as such issues usually yield no distinct injured plaintiff. A typical example is, again, senior governmental appointments. There is rarely an injured party with standing to bring a viable challenge (aside from perhaps an aggrieved runner-up), on top of the fact that such appointments are inherently political. Thus, an effective standing doctrine and a justiciability requirement would work in tandem to prevent judicial intervention in such a case. Conversely, in a legal system with a

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[46] Jonathan Lis, *Disagreement between Netanyahu and Barak on the extension of Tal Law: five or one year*, HAARETZ (Jan. 16, 2012), https://www.haaretz.co.il/news/politics/2012-01-16/ty-article/0000017f-e616-d97e-a37f-f7778c600000 (Hebrew).

[47] HCJ 910/86 *Ressler*, *supra* note 41.

[48] HCJ 3267/97 Rubinstein v. Minister of Defense (Dec. 9, 1998), Cardozo Law School Versa Database, https://versa.cardozo.yu.edu/opinions/rubinstein-v-minister-defense (henceforth, *Rubinstein* case).

[49] The Knesset is the Israeli parliament or legislature.

[50] HCJ 1877/14 Movement for Quality Government in Israel v. Knesset (Sept. 12, 2017), Nevo Legal Database, https://www.nevo.co.il/psika_html/elyon/14018770-c29.htm (henceforth, HCJ *Recruitment Law*). *See infra* at Section VIII for a discussion of the validity of this legal-constitutional argument.

weaker standing requirement, any justiciability constraints would have to be all the more stringent to avoid the Court serving as an omnipotent adjudicator in all policy disagreements. Yet Israel has effectively abolished both standing and justiciability.

## V. THE INSTITUTIONAL STRUCTURE OF THE JUDICIARY: FIRST AND FINAL SAY

The Israeli Supreme Court is the highest court in the land and has two primary functions. One is that of the "High Court of Justice" (HCJ).[51] The HCJ has original and final jurisdiction for a host of administrative and constitutional issues, and really for any consequential challenge to government action, be it executive or legislative. Many of the key cases on publicly contentious matters would usually be heard and decided in the context of an HCJ petition. There is no additional court or tier with higher authority than the Supreme Court, and HCJ rulings are not appealable. In extremely rare instances, the Court may decide, at its own sole discretion, to review its own rulings with an extended panel of judges.

The Court's second function is as an appellate court for most District court cases as a matter of right. The District courts have original jurisdiction for almost any substantial case (e.g., involving issues above certain thresholds of financial value or of criminal severity), such that thousands of appeals are routinely heard by the Supreme Court. This in no way resembles the highly discretionary appellate function of the U.S. and UK Supreme Courts, which select the cases they choose to hear and which usually serve as a third tier of review at the very least (i.e., they typically review cases already decided by other appellate courts).

The practical ramifications of this institutional design are disquieting.

First, the HCJ is the court of first and last instance for the most controversial and publicly charged lawsuits in the entire legal system. It has no higher appellate body or tier reviewing its decisions and no prior process of judicial consideration and fact-finding. The HCJ judges are answerable to no one for their rulings, and at the same time are the first tier to adjudicate the most important, value-laden and contested cases in the nation. This would seem to defy established notions of natural justice and common sense—surely such decisive and consequential cases ought to be appealable, or to pass through at least two tribunals. West-

[51] § 15(c)-(d), Basic Law: The Judiciary (Isr.).

ern court systems are built around precisely the core assumption that a single tier is inadequate for the determination of complex and fraught cases.

Second, the same Supreme Court judges preside over a vast number of appeals from the lower District courts. Most of these are a first appeal as a matter of right. This means that almost any ordinary case of consequence in the entire country will easily and inevitably find itself in the hands of the Supreme Court.[52]

This appellate jurisdiction has a system-wide detrimental effect with many manifestations. It provides politically-minded and agenda-driven judges the opportunity to apply their ideology far more often than in HCJ cases (as the case load is much higher) and with far less public scrutiny (due to the general lack of public interest in thousands of routine civil and criminal appeals). As District court cases of original jurisdiction are appealable by right, the Supreme Court need not offer any justification for selecting a specific case for review, and even the brittle and diminished threshold requirements of standing and justiciability do not apply. The Court has access to thousands of cases and can select the most opportune and convenient one out of the dozens heard each day, with the intent to make that particular case an example, to set a new precedent, or for any other purpose. Tellingly, the *Bank Hamizrachi* ruling, largely considered the most important case in Israeli constitutional law, was in fact a civil appeal and not part of an HCJ proceeding.[53]

Besides providing opportunities for ideological mischief, this design makes the development of appellate case law erratic and unpredictable. An ordinary appellate judge may feel more constrained by precedent, more subject to judicial oversight from a higher-tier court, and more inclined to value stability and predictability in the legal system. But a high court constitutional judge is accustomed to hearing the most publicly contentious and significant cases of their age, and to setting new rules or charting new legal territory. Imagine, if you will, the Supreme

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[52] According to the Courts Administration Authority, in 2021, the Supreme Court heard around 10,000 cases, nearly a third of which were HCJ petitions. COURTS ADMINISTRATION, ANNUAL REPORT 2021, at 17 (2022), https://www.gov.il/he/Departments/publications/reports/statistics_annual_2021 (Hebrew). *See also* Eli M. Salzberger, *Judicial Appointments and Promotions in Israel—Constitution, Law and Politics*, *in* APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER 241, 245 (Kate Malleson & Peter H. Russell eds., 2006).

[53] CA 6821/93 United Mizrahi Bank v. Migdal Cooperative Village (Nov. 9, 1995), Cardozo Law School Versa Database, https://versa.cardozo.yu.edu/opinions/united-mizrahi-bank-v-migdal-cooperative-village (henceforth, *Bank Hamizrachi*).

Court of the U.S. or the UK routinely hearing thousands of ordinary civil and criminal appeals. Under such circumstances, the entire appellate system would take on a different character—any routine appeal could suddenly become a landmark judicial event if the judge was so inclined.[54] Indeed, the gradual deterioration of legal consistency and predictability in all fields of Israeli law due to Supreme Court meddling through its appellate function has been the object of much criticism.

Despite the protestations of some judges regarding the burden of handling so many cases, it is no accident that the Supreme Court has consistently blocked all efforts to establish an appellate division of the District courts, or a "Constitutional Court" dedicated only to the separate adjudication of major constitutional cases. The Court benefits enormously from the considerable influence afforded by its dual function as HCJ and as-of-right appellate court.

An additional element of note is the erratic, inconsistent, and at times ideologically suspect nature of Supreme Court rulings as a function of its panel compositions. The fifteen Supreme Court justices never hear a case en banc (although the first ever en banc hearing has just been scheduled for September 2023). Rather, cases are heard by different panels ranging from (the default) three to (a rare) thirteen members. While an outline of the procedure for panel selection is beyond the scope of this essay, the panel selection process is in some cases demonstrably subject to manipulation and bias; further, even without concern for deliberate tampering, the mere variance between panels may lead to legal discrepancies and inconsistent rulings.[55]

The third crucial feature of the Court's design is that the Chief Justice may elect to hear certain cases with an expanded panel, and she has sole discretion as to how many members sit on the panel. While by custom justices are selected to panels according to seniority on the bench, the Chief Justice is still able to manipulate judicial outcomes by selecting the panel size. For instance, she may choose a panel of seven judges so as to create a majority of four liberal over three conservative judges,

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[54] *See, e.g.*, CA 48/16 Dahan v. Simhon, at §§ 39-43 of Justice Barak-Erez's opinion (Aug. 9, 2017), Nevo Legal Database, https://www.nevo.co.il/psika_html/elyon/16000480-a16.htm (Hebrew) (Barak-Erez, using past decisions, creates an "objective" bona fides doctrine, contrary to the literal wording of § 9, Land Law, 5729-1969, in a situation where it seemed fitting to assign responsibility to the third party, instead of the first buyer. She based her decision on Chief Justice Aharon Barak's objective bona fides doctrine in CA 2643/97 Ganz v. British Colonial LTD., PD 57(2) 385 (2003) (Hebrew)).

[55] Yehonatan Givati & Israel Rosenberg, *How would Judges Compose Judicial Panels? Theory and Evidence from the Supreme Court of Israel*, 17 J. EMPIRICAL LEGAL STUD. 317 (2020), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3630071.

whereas a panel of five judges would have rendered a majority of three conservative over two liberal judges. Thus, the Chief Justice has the power to tip the scales in favor of a particular result in a contentious constitutional case by determining how many judges—with their own judicial and ideological inclinations—hear the case.[56]

One final element is that the Supreme Court does not conduct any evidence hearings—virtually all proceedings involve strictly legal argumentation. There is no witness testimony or cross-examination, no expert or physical evidence submitted. The closest the Court comes to fact-finding is through affidavits which counsel submits and upon which they may elaborate in oral argument.[57] While this may make sense for appellate courts and proceedings, it is most unusual within the context of the Court's function as High Court of Justice.

First, recall that the HCJ is the court of first-and-last instance for constitutional cases. The challenge to and supervision of government action must rest on salient and legally established facts. Naturally, almost any administrative or constitutional case will typically involve factual elements and disputes which require adjudication and resolution: the procedure undertaken to arrive at a given executive decision, the information and data which served as the basis for policy, the harm caused or right violated by a specific measure, and so on. Rarely is such a case argued on purely legal grounds. One must wonder at the Court's sweeping discretion and decision-making power, considering its utter inability to establish questions of fact. Consider the many cases scrutinizing military policy down to rules of engagement, all of which involve complex questions of real-world impact and effectiveness, and which often revolve around technical factual disputes. Consider the Pinhasi-Deri rulings, which did not involve the testimony or examination of any law enforcement officials regarding the criminal investigations against the named cabinet members.

Second, the issue of standing—discussed at length above—is inherently linked to questions of fact. Whether a plaintiff has an individual and discernable grievance against government action is often a factual question to be ascertained at an early stage of litigation. Thus, without any fact-finding procedure in place, the Court would be limited in its ability to establish standing even if it wanted to.

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[56] Maoz Rosenthal, Gad Barzilai, & Assaf Meydani, *Judicial Review in a Defective Democracy*, 9 J.L. & CTS. 137, 151 (2022).

[57] Yoav Dotan, *Judicial Accountability in Israel: The High Court of Justice and the Phenomenon of Judicial Hyperactivism*, 8 ISR. AFFS. 87, 100 (2002).

## VI. AN INTERIM SUMMARY

It's worth pausing to review the five issues discussed above and their combined effect. Any person or organization can petition the Court for redress regardless of whether they are directly harmed or affected by the action being challenged (standing). No issue is considered to be beyond the reach of legal scrutiny or outside the bounds of judicial authority (justiciability). Any technically lawful government action or policy is nevertheless subject to substantive review on its merits (unreasonableness).

All of these converge elegantly in the aforementioned landmark Pinhasi-Deri cases.[58]

In the Pinhasi-Deri affair, then-Prime Minister Yitzhak Rabin refused to fire two senior ministers in his government who were under criminal investigation; neither's trial had commenced, and only one had been formally indicted. The black-letter law had (and to this day has) no requirement that indicted ministers resign or be dismissed.

There were no aggrieved parties who could claim to be directly harmed by Rabin's decision not to dismiss the ministers. If there were such parties, they did not take legal action. The only conceivable harmed party in the most abstract sense was the electorate at large, which of course has a political remedy at its disposal: periodic elections. Yet because Israeli courts lack a standing requirement, the petition was filed by a public interest NGO in its own name.

A decision by the head of the executive whether and under what circumstances to dismiss senior government ministers would typically be considered squarely within their discretion. It is a quintessentially political issue and in no sense a legal subject fit for judicial scrutiny. Yet because it has abolished the concept of justiciability and claims authority to review any decision and policy regardless of its non-legal nature, the Court heard the case.

Finally, the legal basis and standard for review of a political personnel decision should be illegality (ultra vires) or another coherent and firmly established cause for judicial intervention—especially due to the deeply political nature of the decision under review. Yet on the basis of its expansive unreasonableness doctrine, the Court found for the petitioners and ruled against the Prime Minister. The Court held that the Prime Minister's refusal to dismiss the accused ministers would so undermine public confidence and trust in the government—an abstract

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[58] *Pinhasi-Deri* case, *supra* note 27.

assertion with no direct empirical support—that it was severely unreasonable and therefore unlawful. This was ironic as the Court itself does not have a political appointment process which could lend its decisions a semblance of democratic legitimacy, and it does not seem to consider the effects of its rulings on public trust and confidence in the courts or in the legal system.

Rabin complied with the ruling and accordingly dismissed both ministers, causing the collapse of his government.

This was in 1993.

## VII. THE JUDICIAL APPOINTMENTS VETO: JUDGES CHOOSE THEIR COLLEAGUES AND SUCCESSORS

In Israel, judges of all tiers in the primary judicial system are appointed and promoted by a nine-member committee. In that committee, Supreme Court judges exercise veto power over appointment of their future colleagues. By law, this committee consists of two government ministers (one of whom, the Justice Minister, chairs the committee), two legislators, two attorneys appointed by the Israel Bar Association, and three judges currently serving on the Supreme Court (these are selected by the Chief Justice, who is usually one of the three committee members from the Court).[59] The committee composition is striking in that representatives of the elected branches are a minority—only four out of nine members. The other five members are part of the legal establishment.

Judges in Israel are forced to retire at the age of 70, though a judge appointed at a young age may serve on the Court for a number of decades because there are no term limits. The Chief Justice is technically appointed by the judicial appointments committee, but by custom he or she is the longest-serving judge on the Court. The combination of these two points means that the identity of the Chief Justice (who holds considerable power and influence) can be predicted decades in advance.

A recent comparative study by the Kohelet Policy Forum found that Israel stands out for the mismatch between its judicial selection process and the expansive powers wielded by its judiciary.[60] In almost all developed democracies, membership of the highest judicial court is deter-

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[59] § 4(b), Basic Law: The Judiciary (Isr.), *available at* https://main.knesset.gov.il/EN/activity/Documents/BasicLawsPDF/BasicLawTheJudiciary.pdf.

[60] SHAI-NITZAN COHEN, SHIMON NATAF, & AVIAD BAKSHI, KOHELET POL'Y F., SELECTING JUDGES TO CONSTITUTIONAL COURTS—A COMPARATIVE STUDY (2022), https://en.kohelet.org.il/publication/selecting-judges-to-constitutional-courts-a-comparative-study.

mined directly by the public or by their elected representatives, especially when such a court enjoys semi-legislative authority in the form of constitutional judicial review. In contrast, the Israeli public has decidedly limited influence on the Court's composition due to elected representatives being outnumbered on the committee; this seems to contradict established notions of democratic legitimacy and accountability, particularly given the power that the Israeli Supreme Court enjoys.

The appointments system has been severely criticized for a variety of reasons. The very presence of the Israel Bar Association (henceforth the IBA, which simultaneously serves as both the statutory regulator of the legal profession and attorneys' representative labor union) leads to questionable incentives for both lawyers and judges throughout the legal system. Lawyers can indirectly influence the promotion of judges before whom they appear in court, and senior judges in the legal system can determine which lawyers are appointed as judges. Aside the more subtle biases this can cause, there have in fact been some shocking scandals involving alleged illicit intimate relationships between judicial candidates and the highest IBA officials,[61] as well as other sexual misconduct allegations against senior IBA officials.[62]

At the same time, its presence on the committee gives the IBA enormous leverage over the elected branches. The latter rely on the IBA's cooperation for judicial nominations, which are often a key part of political campaign promises and government agendas.[63] Politicians are therefore wary of rocking the boat with the IBA and thus often neglect to properly exercise government oversight over the legal profession. It is nearly impossible to enact any kind of reform regarding the legal profession in Israel, and the IBA successfully and consistently advances its own agenda through government action.[64]

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[61] Yonah Jeremy Bob, *Female judge in sex-for-judgeship scandal named as Eti Karif*, THE JERUSALEM POST (Mar. 14, 2019), https://www.jpost.com/israel-news/female-judge-in-sex-for-judgeship-scandal-names-as-eti-karif-583323.

[62] *Alleged misconduct by Israel Bar chief to be probed; he resigns, denies wrongdoing*, THE TIMES OF ISRAEL (Jan. 31, 2023), https://www.timesofisrael.com/police-to-probe-alleged-misconduct-by-bar-chief-who-resigns-but-denies-wrongdoing/.

[63] Tova Tzimuki, *Hayut, Shaked gear up for Supreme Court nominee tug of war*, YNET (Nov. 1, 2018), https://www.ynetnews.com/articles/0,7340,L-5069669,00.html.

[64] For example, the IBA successfully lobbied the legislature to enact a bill which granted the IBA a statutory right to voice its opinion regarding any pending legislation, and which redefined the IBA's role to include protecting human rights, the rule of law, and Israel's "core values." The IBA also successfully lobbied to significantly lengthen mandatory legal apprenticeships (a condition to being admitted to the bar). Both major governmental concessions to the IBA were widely considered to be part of a deal involving the IBA's cooperation with the

Another important effect of the judicial appointments system is that lower-tier judges are reluctant to challenge problematic precedents and to push the boundaries of the judicial status quo. In a functioning legal system, the lower-tier courts play an important role as legal laboratories, testing the boundaries of binding appellate rulings and new legal norms in the field, so to speak, and conveying problems upwards through the judicial hierarchy. For instance, such courts may convey when a legal precedent is simply not working—by expressing their discontent explicitly in their rulings, or even by making defiant decisions that will likely be overturned. However, the current method of judicial promotions (which work the same way as appointments) serves as a strong disincentive against any such judicial feedback. The involvement of Supreme Court justices in promotion decisions means that lower court judges are reticent about challenging rulings made by their senior peers. Any judge making a decision knows that if she is not sufficiently careful and does not toe the legal line, she could be jeopardizing her future judicial career.

Yet all these flaws are overshadowed by the starkest divergence of Israeli judicial appointments from democratic sensibilities: the de facto judicial veto power over Supreme Court appointments. The fact that sitting Supreme Court judges participate at all in choosing their future counterparts is alarming in and of itself, and one may reasonably wonder how such involvement can be justified. But far more egregiously, Supreme Court appointments by the committee require a supermajority of seven votes (unlike the five votes needed for other tiers). This grants the three Supreme Court judges on the nine-member committee effective veto power over any appointment to their own bench. In a nutshell, *it is impossible to appoint a judge to the Israeli Supreme Court if the sitting judges do not favor that particular candidate*. Even if the judiciary and the elected branches are at a deadlock, and no judges are nominated, all the sitting judges need do is wait patiently for a more cooperative government to come along.

This design flaw is not merely theoretical—the judicial veto power has in fact been abused, increasingly since the 1990s. Perhaps the most illustrative example is that of Prof. Ruth Gavison, who was famously not appointed in 2005 to the Supreme Court due to the objection of presiding Chief Justice Aharon Barak. Gavison was a political moderate and renowned legal scholar, studied at Oxford under H.L.A. Hart, was

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government on judicial nominations. *See* § 1, Israel Bar Association Law (Amendment No. 38), 5776-2016, SH 662.

a founder of Israel's leading civil rights NGO, and was universally considered qualified for the job. She was also a compelling and outspoken critic of the Court's activist jurisprudence spearheaded by Justice Barak, leading Barak to say Gavison "has an agenda unfitting for the Court."[65] Much later on, Barak seemed to repeat this sentiment when discussing the Gavison affair, saying that the Supreme Court is "a family," and that it was not possible to admit someone "from outside the family."[66] The attempt to appoint Prof. Gavison to the Supreme Court was ultimately unsuccessful, despite her reflection of public sentiment and in the teeth of the elected branches' clear desire that she join the bench.

Of course, one might argue that a mere judicial veto power does not amount to the ability to positively *choose* colleagues and successors for the bench. While intuitively appealing, this is not quite the case. As mentioned above, in the case of severe disagreement or poor relations between the judicial-legal establishment and the political-elected branches of government, all the former needs do is to "ride it out." Supreme Court judges know precisely how long their tenure is and can plan ahead accordingly; politicians need to deliver on campaign promises and present some measure of success to voters within a very limited timespan, and they must consider the likelihood that they will fairly soon no longer be in power. Thus, politicians have a strong incentive to compromise and avoid rocking the boat—one non-optimal judge (acceptable to the current judges) appointed is better than the optimal judge never appointed. On the other hand, the Supreme Court justices know precisely when their tenure ends (and indeed who will be Chief Justice, and when), and they can weather a standoff until the current government is replaced, in the hope that the ensuing one will be more favorable. This imbalance of incentives and maneuverability means that a seemingly benign veto power translates into the ability to de facto dictate who is appointed to the bench. As illustrated above, this is not a theoretical question—in addition to being implicit in any debate around judicial candidates, the Court has exercised this power for a number of potential nominations over the past few decades.

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[65] David Hazony, *The First Word: Aharon Barak's true colors*, THE JERUSALEM POST (Nov. 24, 2005), https://www.jpost.com/opinion/editorials/the-first-word-aharon-baraks-true-colors.

[66] Michael Deborin, *Aharon Barak Brings His War on Israeli Democracy to the Next Level*, MOSAIC (Avi Woolf trans., Dec. 9, 2016), https://mosaicmagazine.com/picks/israel-zionism/2016/12/aharon-barak-brings-his-war-on-israeli-democracy-to-the-next-level/.

## VIII. THE ISRAELI PSEUDO-CONSTITUTION: THE SUPREME COURT UNILATERALLY INVENTS AND PROCEEDS TO ENFORCE THE ISRAELI CONSTITUTION

The Supreme Court has single-handedly created an Israeli constitution out of whole cloth from which it derives considerable power. The very existence of this constitution and the validity of the authority purportedly derived from it are deeply controversial to this day.

Israel has no "constitution" in the commonly accepted and understood meaning of the term. Despite stating a desire to do so in its Declaration of Independence from 1948, Israel in fact never adopted a comprehensive formal constitution. In lieu of the typical constitutional instrument, lawmakers in the early days of the Knesset decided to legislate various "Basic Laws" piecemeal, with the aspiration that one day these would be fused into a constitution.[67] All agree that this amalgamation has yet to happen. Basic Laws were (and still are) enacted by the same exact process as ordinary laws, and they involve no special requirements such as an enlarged majority or quorum, enhanced debate, or separate legislative procedures. They are, essentially, ordinary laws which are marked by the title "Basic Law" as having some measure of importance and as serving as draft candidates for future constitutional consolidation. Over the years, Israel has indeed enacted many Basic Laws which deal with the state's fundamental institutions and powers.

A full account of the nature of Israeli constitutional law and of the "constitutional revolution" is beyond the scope of this essay. My purpose here is to emphasize just how far removed Israeli constitutional law is from conventional theory and practice. To this end, some key issues bear elaboration: I will focus on the circumstances surrounding Israel's watershed constitutional moment, and on the substance of Israel's most significant constitutional legislation. While it is easy to get lost in the details and technicalities of the Israeli "constitutional revolution," the essence of this revolution and its particular evil can be summarized fairly simply: The Israeli Supreme Court took Israel's unwritten (or "political") constitution and began treating it as if it were a written (or "legal") constitution.[68]

Israel has had an unwritten constitution since its founding, much like the United Kingdom and New Zealand and unlike the United

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[67] DK, 1st Knesset, Session No. 152 (1950), at 1728 (Isr.), https://fs.knesset.gov.il/1/Plenum/1_ptm_250235.pdf#page=21 (Hebrew).

[68] *See generally* Daphne Barak-Erez, *From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective*, 26 COLUM. HUM. RTS. L. REV. 309 (1995).

States and most continental European democracies. Even without a distinguishable constitution per se, Israel had some generally accepted understanding of the fundamental rules defining the structure of government, delineating government authority, and limiting governmental action. To borrow a phrase from Lord Jonathan Sumption, Israel had a "political constitution," enforced by the political classes, by custom, by public opinion, and by the electorate, whereas countries like the United States have a "legal constitution" that is primarily enforceable by the judiciary.[69]

Like all other unwritten constitutions, the Israeli version had some written elements such as Basic Laws, other significant statutes, established institutions, and some key judge-made case law. And like all democratic regimes with an unwritten (or political) constitution, Israel had one ultimate and insurmountable constitutional rule: parliamentary sovereignty or "legislative supremacy."[70] Such a rule means simply that no court may invalidate legislation—that the elected legislature has final say. This is consistent with the established idea that courts may wield power over primary legislation only under authority granted by a written (or legal) constitution—an explicit constitutional instrument with its unique hallmarks and familiar methods of adoption. Absent the deliberate enactment of such a document, any democratic system reverts to the default model of a political constitution. Indeed, legislative supremacy is perhaps the defining distinction between democratic regimes with written and unwritten constitutions.

Seen in this context, the actions of the Israeli Supreme Court may be described more easily. The Court decided to treat a handful of new Basic Laws (by most accounts merely additional written elements of the overall unwritten constitution) as a transformative event essentially establishing the "substantive" equivalent of a new Israeli written constitution. In doing so, the Court made a unilateral, controversial, and legally dubious decision to upend the entire Israeli constitutional order. The Court simply took the unwritten Israeli constitution, proclaimed it to be a written one, and proceeded to assume judicial supervision of parliamentary legislation.

Let us resume with this in mind.

In 1992, the Knesset enacted two novel Basic Laws which listed a slew of core individual rights. These included protection of one's life,

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[69] Lord Sumption lecture, *supra* note 14.

[70] Dicey defines this as the cornerstone of the original uncodified (political) English constitution. *See* A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 20 (Liberty Classics 1982) (1915).

person, dignity, property, liberty, and privacy, among other rights.[71] The laws were enacted by a transitional government (i.e., in the leadup to national elections), with only a small number of legislators voting. Out of 120 Knesset members, 32 voted in favor and 21 against (tellingly, a majority of the "in favor" votes were cast by members of the Opposition). The law did not expressly grant courts the power of judicial review over legislation, or any new authority which did not already exist.[72] It was considered a fairly inconsequential piece of legislation which passed with little fanfare and virtually no public attention. As noted above, the legislative procedure for enacting or amending a Basic Law was (and remains) generally the same as for any ordinary law.

A few years later, the Supreme Court led by Justice Aharon Barak elevated these two laws to constitutional status in a landmark ruling, in what is today called the "constitutional revolution," a term coined by Barak himself (or, to some of its detractors, the "judicial coup"). In the famous 1995 case of *Bank Hamizrachi*, the Supreme Court dedicated some 600 pages to deliberating the constitutional significance of the two new laws.[73] The Court held that the enactment of the two Basic Laws amounted to a "constitutional revolution," which made these Basic Laws (and most other earlier Basic Laws along with them) the supreme law of the land. It also held that new legislation contradicting or violating norms found in these Basic Laws could be struck down by the Court. The Court has indeed relied on this "substantive constitution" to reshape the entirety of Israel's public law, including by invalidating duly enacted primary legislation.

The fundamental conceit in Barak's argument was that a political and legal constitution are interchangeable—that Israel indeed has a *political* (or uncodified) constitution which can nevertheless be regarded for all intents and purposes as a *legal* (or codified) constitution. That legislative supremacy is the hallmark of the former and can only be overcome by explicit adoption of the latter was, to Barak, quite beside the point. To sidestep this thorny issue, the Court posited that the constitution's existence may be inferred by merely "interpreting" specific

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[71] Basic Law: Human Dignity and Liberty, *available at* https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/39134/97918/F1548030279/ISR39134.pdf; Basic Law: Freedom of Occupation, *available at* https://main.knesset.gov.il/EN/activity/documents/BasicLawsPDF/BasicLawOccupation.pdf (henceforth, *Basic Law: Human Dignity* and *Basic Law: Freedom of Occupation*, respectively; *1992 Basic Laws* collectively).

[72] *See* Gideon Sapir, *Constitutional Revolutions: Israel as a case-study*, 5 INT'L J.L. IN CONTEXT 355, 366 (2009).

[73] *Bank Hamizrachi*, *supra* note 53.

clauses within the new Basic Laws. The Court deftly glossed over the fact that the very existence of a constitution limiting the exercise of majority rule—the bedrock of democratic government—is not an interpretive question but rather a factual one, external and prior to the statutory text itself.

Some (including Aharon Barak) contend that the *Hamizrachi* case resembles the U.S. Supreme Court's decision in *Marbury v. Madison*,[74] which recognized the Court's authority to invalidate government acts violating the U.S. Constitution.[75] However, any such comparison is patently false. In *Marbury*, there was no question as to the very existence and validity of a written Constitution—the U.S. Constitution had been debated, adopted, and ratified only twenty-four years earlier by clear majorities of the several United States. *Hamizrachi* could not have been more different. The larger part of *Hamizrachi* was dedicated to resolving whether Israel in fact had any constitution to begin with—whether two obscure and vaguely worded Basic Laws, passed in a near-empty chamber with virtually no public attention or awareness (let alone discussion and debate), could in fact be considered the new Israeli constitution, revolutionizing the Court's jurisprudence and the entire Israeli system of government. Indeed, the Court first had to answer the fundamental question of whether the Knesset even possessed the authority to enact constitutional legislation—a unique power which until that time was not thought to be vested in the Knesset. To top it all off, around 90 percent of the ruling was in fact obiter dictum; the judges unanimously agreed that the law being challenged in the case was not "unconstitutional," and the challenge was thus dismissed, making the debate at the heart of the ruling entirely theoretical and immaterial to the final result in the case. While *Marbury* may have created judicial review based on the existing U.S. Constitution, *Hamizrachi* invented the Israeli constitution itself.

In a detailed and scathing dissent, Associate Justice Mishael Heshin painstakingly dismantled the arguments presented by Barak and other judges, and he characterized their elaborate theories as wishful thinking: while a written constitution enshrining basic rights was certainly desirable, the two new Basic Laws were clearly not such a constitution, as a matter of simple fact. Not only Heshin disputed the *Hamizrachi* ruling and the "constitutional revolution" it proclaimed. Some of the most

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[74] 5 U.S. 137 (1803).

[75] Yoram Rabin & Arnon Gutfel, Marbury v. Madison *and Its Impact on Israeli Constitutional Law*, 15 U. MIAMI INT'L & COMPAR. L. REV. 303, 310 (2007); 1 AHARON BARAK, *supra* note 44, at 398.

prominent, learned, and respected jurists of the age weighed in against it. Among these were Prof. Ruth Gavison and former Supreme Court Chief Justice Moshe Landau. Landau, who had served on the Court for over thirty years and had retired a decade earlier, published a detailed critique of the ruling titled "Granting Israel a Constitution By Way of Judicial Decree." He believed Israel was the only country in the world in which a constitution came into being through "judicial utterances":

> Glaring above all the caveats I have tried to outline up to this point is the striking question of legitimacy in seizing the right of oversight that the court has claimed for itself: By what right? What or who granted the Supreme Court the authority to do so, without explicit authorization by the legislative body? Without such authorization, the theories upon which the decision is constructed lack any basis in existing law.[76]

The various critiques pointed out the obvious: not only was the Court contradicting its own precedent and rulings regarding Basic Laws since Israel's inception, but the new laws bore none of the hallmarks of a momentous constitutional event. The laws were not adopted by any special procedure; they were not recognized as having constitutional status when deliberated; they were not celebrated and were hardly noticed when enacted; there was no empirical indication they actually represented any kind of broad consensus, within the public or even within the legislature. When arguing for the existence of a judicially-enforceable Israeli constitution, the Supreme Court essentially demanded that the Israeli citizen (and any thoughtful observer) ignore or deny all overwhelming evidence to the contrary. Small wonder Prof. Daniel Friedmann contends that Aharon Barak's constitutional revolution "stands on chicken legs"—that is, on very weak grounds indeed.[77]

There is something fundamentally counter-intuitive about a contested constitution. Surely a valid and good-faith dispute regarding the very existence of a constitutional instrument (including a dissent to that effect by a Supreme Court judge) undermines the entire function and purpose of a constitution: that it be a widely agreed and publicly accepted supreme norm which governs all other laws and institutions. Whether a constitution exists or not ought to be beyond debate and abundant-

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[76] Moshe Landau, *Granting Israel a Constitution By Way of Judicial Decree*, 3 MISHPAT UMIMSHAL L. REV. 697 (1995), https://law.haifa.ac.il/wp-content/uploads/2021/11/14-landoy.pdf (Hebrew) (translation of the title is the author's).

[77] This term is used on page 587 of the Hebrew version of Friedmann's "The Purse and the Sword." The official English version uses the sentence ". . . Barak had constructed a constitution for Israel out of nothing . . ." *See* FRIEDMANN 2016, *supra* note 2, at 333.

ly clear. Six hundred pages of philosophical deliberation would seem to obviate the very question being debated, by its existence suggesting a negative conclusion. Nonetheless, this is the nature of the Israeli pseudo-constitution: born in controversy, deeply and vehemently disputed, yet in full force and wielded by the courts to great effect.

Now we turn briefly to the substance and application of the Israeli constitution. As constitutions go, the provisions of the 1992 Basic Laws are vague and ambiguous.[78] The handful of short operative sections are general, laconic, and abrupt. The limitations and rights appear at a high level of abstraction, as with "there shall be no violation of the life, body or dignity of any person as such."[79] More obscure yet is the provision permitting such violations only by "a law befitting the values of the State of Israel, enacted for a proper purpose."[80] These terms are very broad, and they afford great judicial discretion when treated as binding constitutional text.

Using terms of this high level of abstraction and ambiguity, the Supreme Court has essentially treated almost any conceivable claim as an unenumerated right protected by the Basic Law. And it has subjected legislation to remarkably fluid and subjective standards of review, such as whether it seeks to realize a "proper purpose" or whether it is consistent with Israel's values as a "Jewish and democratic" state.[81] All this, while the very basis for *any* constitutional authority of the Basic Laws is highly dubious. Once the floodgates had been opened, mere expansive interpretation of constitutional norms seemed small beans compared with the judicial creation of a binding constitution. Since 1997, the Court has invalidated over a score of laws (it is admittedly and regrettably difficult to keep track), many of them going to the core of public policy and debate and relating to the most contentious and fraught issues in Israeli society and politics; others, relating to mundane and almost trivial matters.

Several examples will serve to illustrate this. In 2003, amid a severe economic recession, the Israeli government decided to reduce various welfare payments so as to cut public expenditure and passed the necessary legislation to that end. The welfare cuts were challenged in court, with the petitioners arguing that the enumerated right to "dignity" entailed a right to "dignified living" that included a certain basic mini-

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[78] 1992 Basic Laws, *supra* note 71.
[79] § 2, Basic Law: Human Dignity.
[80] § 8, *id.*; § 4, Basic Law: Freedom of Occupation.
[81] § 2a, Basic Law: Human Dignity.

mum income, which the state was obligated to provide.[82] Though the case was ultimately dismissed, the Supreme Court seemed close to accepting the petition, and it ordered that the government provide the Court with an estimation of what constitutes a minimum income for "dignified living." This potential judicial intervention in pure economic policy during a national economic crisis caused an uproar, and the government refused to provide such an estimation, arguing that no objective standard for "dignified living" exists. At the same time, the Knesset initiated legislation which would have directly curtailed the Supreme Court's authority. It seems that this explicit threat of a showdown between the judiciary and legislature was what mollified the Court, leading to the case being dismissed. Nonetheless, the Court recognized in principle a right to "dignified living," essentially a social welfare right, which ostensibly exists under the explicit right to "dignity" in the Basic Law.[83]

Some years later, the Court found the opportunity to make good on its recognition of a right to "dignified living." Various petitions challenged a government policy according to which ownership of an automobile precluded eligibility for certain welfare benefits. During the proceedings, this policy was incorporated into law via an amendment to the "Income Support Law." In 2012, the Supreme Court ruled to invalidate the amendment and to cancel the policy, holding that it unjustifiably violated the benefit recipient's right to a minimum standard of dignified living.[84]

Regardless of one's opinion about various social welfare policies, the example above demonstrates the way in which obscure, vague terms in the quasi-constitutional text of the Basic Laws can be used to further almost any personal agenda and almost any subjective values. Here, a right to "dignity" was used to dictate to the government a particular social welfare policy, right down to minute eligibility criteria for welfare payments.

Another example is the Court's direct and consistent intervention in legislation concerning immigration policy. Israel is the only developed country in the world which has a land border with continental Africa.

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[82] HCJ 366/03 Commitment to Peace and Social Justice Society v. Minister of Finance (Dec. 12, 2005), Cardozo Law School Versa Database, https://versa.cardozo.yu.edu/opinions/commitment-peace-and-social-justice-society-v-minister-finance.

[83] *Id.* at § 16 of Chief Justice Barak's opinion.

[84] HCJ 10662/04 Salah Hassan v. National Insurance Institute, § 71 of Chief Justice Beinisch's opinion (Feb. 28, 2012), Cardozo Law School Versa Database, https://versa.cardozo.yu.edu/opinions/hassan-v-national-insurance-institute.

For many years, Israel saw a steady increase in the amount of illegal immigration (by way of border infiltration) by African migrants looking for work and for a better life. While measures were taken to erect physical obstacles to infiltration, many believed that the only way to curb such immigration would be to change the incentives of would-be migrants. That meant severely limiting the income opportunities for those entering Israel illegally.

Over the years, the Court has struck down at least four different laws designed to address illegal immigration.[85] Let us set aside the first three laws, which defined various physical detention schemes, and which were deemed unconstitutional by the Court due to their disproportionate violation of the migrant's right to liberty and human dignity. The fourth law, commonly referred to as "the deposit law," set up a financial mechanism whereby illegal work migrants had to "deposit" a maximum of 20% of their income (in many cases the actual maximum was 6%).[86] This sum would be returned to them upon repatriation, if and when they moved back to their country of origin or to a third country. As illegal work migrants don't pay Israeli social security, this "withheld" sum was no more than what ordinary Israeli citizens were obligated to pay as part of Israel's standard welfare income deductions.

In a 2020 majority ruling, the Court held that this arrangement was unconstitutional, violating the migrant's right to property and to human dignity. Thus, based on an expansive reading of the obscure right to "property," the Court struck down a critical piece of primary legislation in the key area of immigration policy.[87] This constitutional nuclear option was wielded against a fairly benign financial constraint, no more severe than most taxes paid by law-abiding citizens.

Perhaps most striking of all is the Court's relentless involvement in the contentious issue of Haredi military service, as mentioned above in the context of justiciability. Since the State's founding, Haredi men have been exempt from serving in the Israel Defense Forces based on a blanket exclusion from compulsory military service issued periodically by the Minister of Defense. A host of petitions were filed against this

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[85] A law to tackle a related phenomenon—that of legal foreign workers who unlawfully remain in the country past the expiration of their work visas—was also recently struck down, bringing the tally to five. HCJ 6942/19 Chevano v. Minister of Interior (July 12, 2023), Nevo Legal Database, https://www.nevo.co.il/psika_html/elyon/19069420-V44.htm (Hebrew).

[86] § 4, Law for the Prevention of Infiltration and Assuring the Exit of Infiltrators from Israel (Amendments and Temporary Orders), 5775-2014, SH 84.

[87] HCJ 2293/17 Garsegeber v. Knesset (Apr. 23, 2020), Nevo Legal Database, https://www.nevo.co.il/psika_html/elyon/17022930-V53.htm (Hebrew).

policy in the early years, but they were thrown out of Court as inherently political and non-justiciable.

This modest judicial approach was upended by Aharon Barak's Court in the late 90s, when the Court ruled that the Minister of Defense was no longer authorized to provide such a blanket exclusion, and that such an exemption must be grounded in primary legislation.[88] Israeli lawmakers obliged, arriving at elaborate and painful legislative compromises between the various factions in the Knesset representing Israeli society. But then two separate Haredi exemption laws were summarily struck down by the Supreme Court as unconstitutional, the first in 2012 and the second in 2017 (the latter may be said to have instigated the political turmoil that has engulfed Israel over the past few years).[89]

For our current purposes, we may focus on the legal reasoning behind these decisions, the aftershocks of which are still felt throughout Israeli society and politics. The Court found the Haredi exemptions to be in violation of the "right to equality."[90] The astute reader may have noticed above that no such right is explicitly recognized in the text of the "Basic Law: Human Dignity and Liberty." Rather, the Court *deduced* the existence of an amorphous constitutional right to equality—yet another instance of an unenumerated right justifying constitutional review of primary legislation.

To make matters far worse, consider that the "right to equality" was deliberately and explicitly excluded from the Basic Law in the first place. Previous drafts of the Basic Law bill included references to equality and corresponding "rights," yet these drafts did not command a majority of legislators who would support it. The historic compromise between various factions in the Knesset which enabled enactment of the 1992 Basic Laws was predicated precisely on the exclusion of a "right to equality" from the statute.[91] Even more clearly, the Haredi legislators involved (who supported the final version which omitted any right to equality) were unequivocal about their concern: they were worried a right to equality would be used to destabilize many religious status quo arrangements, foremost among them the military exemptions.[92] This

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[88] *Rubinstein* case, *supra* note 48.

[89] HCJ 6298/07 Ressler v. Knesset (Feb. 21, 2012), Cardozo Law School Versa Database, https://versa.cardozo.yu.edu/opinions/ressler-v-knesset; HCJ 1877/14 Movement for Quality Government v. Knesset (Sept. 12, 2017), Nevo Legal Database (Hebrew).

[90] HCJ *Recruitment Law*, *supra* note 50.

[91] Sapir 2009, *supra* note 72, at 365.

[92] Judith Karp, *Basic Law: Human Dignity and Liberty—A Biography of Power Struggles*, 1 MISHPAT UMIMSHAL L. REV. 323, 337 (1993) (Hebrew); Yuval Shani, *Basic Law: Equality*

legislative history is universally acknowledged and is not a matter of debate.[93]

In this context, whether a vague right to dignity may be reasonably interpreted to consist of a still vaguer right to equality is immaterial. The Court read into the text of the Basic Law an unenumerated right to equality, in complete contradiction to the political agreement to exclude the very same right from the final bill as it was approved. In this, the Court exhibited a blatant disregard for the express and undisputed intent of the legislature, and for the very validity and force of legislative political compromise—the bread and butter of a functioning democracy.

It's also worth noting that this undefined and unanchored blanket right to abstract equality is unparalleled in most democracies, which usually settle for an explicit right to "equal protection of the laws" or "equality before the law" in the sense of non-discrimination. The judicially-invented Israeli version of equality is thus far more potent than similar provisions elsewhere, giving the judiciary and its proxies vast discretion to enforce so-called equality for any purpose or end it sees fit.

Finally, two examples serve to illustrate the judicial pettiness that has led the Court to strike down some fairly inconsequential laws. The very first law struck down following the *Hamizrachi* ruling, in 1997, was a minor amendment relating to the licensing of investment advisors.[94] There were (per the Court's own reasoning) other routes to reaching an identical result, but the path of constitutional invalidation was chosen nonetheless.[95] Comparably, the most recent law struck down, in 2023, related to an amendment of local municipality elections rules. In this instance, the Court struck down a law due to it being of a "personal" nature, designed to benefit a particular candidate in the mayoral race in the small town of Tiberius (population under 50,000).[96] "Personal legislation" is not prohibited by any statute or concrete constitutional rule,

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11 (Israel Democracy Institute, Policy Paper No. 37, 2020), https://www.idi.org.il/media/15253/proposed-basic-law-equality.pdf (Hebrew).

[93] Hillel Sommer, *In Favor of Judicial Restraint in Constitutional Cases*, 14 RUNI L. REV. 155 (2012), https://www.runi.ac.il/media/b0gpbyr1/sommer.pdf (Hebrew).

[94] HCJ 1715/97, Association of Investment Managers v. Minister of Finance (Sept. 24, 1997), Nevo Legal Database.

[95] Sommer, *supra* note 93, at 178. Sommer submits that the Court was eager to strike down a marginal law out of public view, so as to establish precedent of judicial review without arousing public attention or opposition.

[96] HCJ 5119/23, The Movement for Integrity v. the Knesset (July 30, 2023), Nevo Legal Database. The Court issued a curt decision with detailed reasoning to be published at a later time.

and indeed scores (if not hundreds) of laws have been passed under similar circumstances throughout Israel's history. In the Tiberius case, the Court did not even seem to bother anchoring its ruling in any hitherto known Israeli legal norm.

These examples paint a portrait of a Court heavily engaged in judicial legislation of individual policy preferences while contemptuous of the legislature's policymaking prerogative, and indeed barely faithful to the ostensibly constitutional text of the 1992 Basic Laws. The Court's willingness to strike down duly-enacted primary legislation reflecting public debate and compromise, coupled with its casual eagerness to strike down mundane laws with negligible impact, show that it has rejected its duty of prudential constitutional adjudication, such as was championed by Justice Louis Brandeis in his famous *Ashwander* rules:

> It must be evident to any one that the power to declare a legislative enactment void is one which the judge, conscious of the fallibility of the human judgment, will shrink from exercising in any case where he can conscientiously and with due regard to duty and official oath decline the responsibility.[97]

The Israeli experience of judicial review could not be more distant.

Last but not least, it is worth pointing out that Israel's so-called constitution is missing many essential components, such as a user manual regarding the constitution itself. How can it be amended? When can legislation be considered as having constitutional status? Are *all* Basic Laws part of the constitution? Are there ordinary laws which are also of a constitutional nature? (Note, for example, that the Law of Return, a key element of Israeli immigration policy and considered part of the bedrock of the Israeli system of government, is not a Basic Law.) Much remains unclear.

This lack of clarity and certainty has led to a severe constitutional crisis, with the Supreme Court actively considering the legality of Basic Laws passed since 2017—that is, deliberating on petitions against constitutional legislation itself.[98] In a challenge to the "Basic Law: Israel Nation-State of the Jewish People,"[99] the Court upheld the law but reasoned that it has the authority to invalidate Basic Laws in the future if it

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[97] Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 345 (1936) (Brandeis, J., concurring).

[98] Johnny Green, *A Looming Constitutional Crisis in Israel?*, THE ALGEMEINER (Sept. 20, 2018), https://www.algemeiner.com/2018/09/20/a-looming-constitutional-crisis-in-israel/.

[99] Emmanuel Navon, *Israel's Nation-State Law*, *in* THE PALGRAVE INTERNATIONAL HANDBOOK OF ISRAEL 1 (P.R. Kumaraswamy ed., 2021), *available at* https://navon.com/wp-content/uploads/2022/02/Navon2021_ReferenceWorkEntry_IsraelSNation-StateLaw.pdf.

holds they violate Israel's core values as a "Jewish and democratic" state.[100]

In much the same way, in the recent *Shafir* case, the Court blindsided the Israeli constitutional order by invalidating a provisional Basic Law based on a new "misuse of constituent power" doctrine.[101] The Court assumed for itself the authority to determine whether a law that the legislature characterizes as a constitutional amendment is in fact deserving of such characterization; it also claimed the right to invalidate constitutional legislation it deems unworthy of elevated constitutional standing. Per the Court's reasoning, the fact that the Knesset (in this instance the constituent power by the Court's own definition) made a conscious and deliberate decision to bestow constitutional status on certain legislation is of no consequence.

More recently yet, the Court is entertaining petitions against multiple amendments to Basic Laws which go to the core of Israel's system of government, and it will hear oral arguments on these petitions over the next few months in the fall of 2023.[102]

The gall of reviewing the legality of Basic Laws is nothing short of astonishing. For one thing, the Court has frequently made assurances that the Knesset (and the Israeli electorate) retained sole discretion in forming Basic Laws, and thus that final democratic decision-making power was still vested in the legislature. When critics alleged that the Court was usurping political power, overstepping its bounds, and violating principles of separation of powers and the rule of law, the Court (and Aharon Barak himself) maintained in its defense that the legislature was always free to amend the Basic Laws, and as such always had recourse to roll back or amend judicially-created constitutional rules.[103]

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[100] HCJ x5555/18, Hasson v. Knesset, § 3 of Justice Hendel's opinion (July 8, 2021), Nevo Legal Database, https://www.nevo.co.il/psika_html/elyon/18055550-V36.htm (Hebrew).

[101] HCJ 5969/20, Shafir v. Knesset (May 23, 2021), Nevo Legal Database (Hebrew); Yaniv Roznai & Matan Gutman, *Saving the Constitution from Politics*, VERFASSUNGSBLOG (May 30, 2021), https://verfassungsblog.de/saving-the-constitution-from-politics/.

[102] Michael Starr, *All 15 High Court Justices to Convene for Judicial Reform Law Hearing*, THE JERUSALEM POST (July 31, 2023), https://www.jpost.com/breaking-news/article-753169.

[103] *Bank Hamizrachi*, *supra* note 53, at § 60 of Chief Justice Barak's opinion, and § 13 of Justice Levin's opinion. In addition, Aharon Barak made these comments to senior jurists convened at the Knesset in 2003: "The Knesset may pass a Basic Law annulling constitutional judicial review, and the court could not overturn such a rule . . . If the court strikes down a law as unconstitutional, the Knesset could override such a ruling by re-enacting the law anew as a Basic Law." These remarks were considered obvious and uncontroversial at the time. *Barak: Only the Knesset can Remove Judicial Review by way of BASIC Law,* GLOBES (Nov. 20, 2003) (Hebrew), https://www.globes.co.il/news/article.aspx?did=743373.

In other words, the idea that the Knesset retained the power to amend Basic Laws as it saw fit was employed by the Court as a justification for (and a check on) the systematic expansion of judicial power. If the Court places novel judicial limits the Knesset's power to amend Basic Laws, most critiques of the Court for pursuing unbridled judicial supremacy would be confirmed.

A further point is that the Court had maintained throughout the years that it was not enforcing the opinions and values of its individual judges (as critics alleged), but that it was merely enforcing the Basic Laws which prohibited violations by lesser ordinary legislation. By the Court's own reasoning, the Basic Laws are the highest legal norms—the "supreme law of the land," so to speak. Striking down Basic Laws would require the pretense that they violate some higher legal norm; but none exists.[104] It is unclear what "legal" (in any established sense) norm a Basic Law could violate, beyond abstractions such as "democracy" or "justice" which, when wielded by judges to make binding rulings, are no more than pseudonyms for the exercise of blunt political power.[105]

The absence of legal arrangements surrounding the constitution should come as no surprise. The development of Israeli constitutional law by the legislature was halted in its tracks precisely by the *Hamizrachi* ruling. Israel may well have been much closer today to a comprehensive constitution had it continued at the same pace as had previously existed. Up to that 1995 decision, Basic Laws were legislated on a fairly consistent basis, true to the original aim of preparing the building blocks for a future constitution. *Hamizrachi* made the enactment of Basic Laws seem an unreasonable risk: if the Court could turn the two innocuous 1992 laws into a "constitutional revolution," then any legislation could be bent or broken to fit judicial whims. Veteran ultra-orthodox politician Aryeh Deri summed it up well after *Hamizrachi*, when he famously quipped that he would vote against adopting even the biblical Ten Commandments as a Basic Law, for fear of the way in which it might be interpreted and applied by the Court.[106] *Hamizrachi* and ensuing rulings destroyed the public perception of constitutional legislation; it began to seem like a futile exercise in a world where the last word belonged to the courts.

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[104] *Bank Hamizrachi*, *supra* note 53, at § 63 of Chief Justice Barak's opinion.

[105] Barak uses the term "Basic Values of the System." AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW 163-65 (Sari Bashi trans., 2005).

[106] Moshe Gorali, *Rights of Passage*, HAARETZ (Mar. 26, 2002), https://www.haaretz.com/2002-03-26/ty-article/rights-of-passage/0000017f-eff8-d487-abff-fffe19fa0000.

In sum, the experience of the past three decades must lead to the doctrinal conclusion that the Israeli constitution is in fact whatever the Supreme Court says it is. There would seem to be no other qualifying factor—not the legislative text itself, nor the designation of legislation as Basic Laws, nor notions of separation of powers and the rule of law, nor the Court's own historical reasoning. As Member of Knesset Simcha Rothman has quipped, Israel truly has a "living constitution," in that the constitution is vested in the very persons of the presiding Supreme Court justices themselves, and scarcely elsewhere.[107]

## IX. UNPARALLELED POWER: THE LEGAL COUNSEL TO THE GOVERNMENT

The Israeli Legal Counsel to the Government (LCG) oversees government legal counsel, government representation in court, and the criminal prosecution system. According to renowned political science expert Prof. Shlomo Avineri, the Israeli LCG is one of the most powerful figures in the democratic world.[108] He or she is Attorney General, Solicitor General, Advocate General, and Chief Prosecutor, all rolled into one astonishingly centralized yet unelected role. The LCG can dictate government policy, either by issuing (ostensibly) binding proclamations that certain government actions and policies are illegal, or by ruthlessly employing a monopoly on government representation in litigation, or by some combination of both. At the same time, the LCG serves as head of the government criminal prosecution apparatus, with final say on a host of issues including whether to investigate or indict high-ranking political and government officials. Many of these powers are not granted by any statute and were not born of legislative reflection, deliberation, and compromise; rather they were carved out in controversial Supreme Court rulings.

As this explanation proceeds, keep in mind that while the Israeli LCG is often called the "Attorney General," the position is *not* equivalent to that of the U.S. Attorney General, who is a cabinet member and is in essence the political Justice Secretary that stands at the head of the Department of Justice. The LCG is more similar to the UK Attorney General insofar as she is an unelected (and indirectly appointed) civil

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[107] *See Basic Law: Legislation—Necessity or Calamity?*, Israel Law & Liberty Forum Student Chapter Debate between Simcha Rothman and Yaniv Roznai (Hebrew), YOUTUBE (Jan. 11, 2022), https://youtu.be/CQdu04o4neI.

[108] Shlomo Avineri, *Decentralize Now*, HAARETZ (Oct. 25, 2009), https://www.haaretz.com/2009-10-25/ty-article/decentralize-now/0000017f-e2ac-df7c-a5ff-e2fe36640000.

servant, and the Office of the LCG is a quasi-independent government body within the Justice Ministry, which some have called the Israeli "fourth branch of government." Israel has a separate Minister of Justice that heads the Justice Ministry and is a member of the government, but who is effectively powerless when opposing actions or policy of the LCG.

Monopoly on Representation. The Pinhasi-Deri cases discussed above set another critical precedent in addition to the substantive rule regarding dismissal of indicted government ministers: The Supreme Court ruled that the LCG is the sole representative of the Israeli government in litigation proceedings, and thus that no adverse legal position may be argued before the Court unless expressly authorized by the LCG.[109] In the Pinhasi-Deri cases, then-LCG Yosef Harish was in agreement with the *petitioners* against the government; he claimed that Prime Minister Rabin was indeed obligated to dismiss the implicated ministers. The Prime Minister wanted to argue that he was under no legal obligation to do so.[110]

The Court refused to consider Rabin's argument. The Court reasoned that the LCG is the exclusive legitimate government representative in court, and that he therefore speaks for the hypothetical government (or for the "reasonable" Prime Minister), regardless of what the actual, real-life government might argue. The Court held that the government itself is not entitled to argue its own case before the Court and, crucially, that in the case of a legal disagreement between the LCG and the government itself, the Court will only consider (and usually will only hear) the LCG's legal position. Consequently, in the event that the LCG agrees with the petitioner's challenge against the government and disagrees with the government's legal argument, the Court will effectively not consider or hear *any* opposing legal argument in defense of the disputed government action or policy. The judges will preside over an artificial controversy where the parties do not disagree, the defendants (i.e., the government and the people represented by it) will lose by forfeit, and the petitioners will win in what is essentially an ex parte proceeding.

Under such rules, it is hardly surprising that the Court ruled as it did in the Pinhasi-Deri case. The Court considered only one legal posi-

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[109] HCJ 4287/93 Amitai Foundation v. Yizhak Rabin, Prime Minister, PD 47(5) 441 (1993).

[110] *Pinhasi-Deri* case, *supra* note 27.

tion—that of the plaintiff, which was echoed by the LCG acting on behalf of the government.

One must admire the audacity of both the Court and the LCG in advocating such a policy. While an elaboration of why this approach is so alien to democratic sentiments seems unnecessary, one could start with the widely accepted second tenet of natural justice: "audi alteram partem"—hear the other side.[111]

The resulting sway the LCG holds over government decisions and policy cannot be overstated. Any dispute or disagreement between the LCG and the government itself comes with an implicit (and at times explicit) threat: the LCG can choose to simply not defend a government decision in the event of a challenge by litigation, and the decision would be automatically defeated in court. In such an event, the decision under consideration would often be abandoned in light of the LCG's effective veto.

Some brief examples are in order, of which there is no shortage. In 2010, the Israeli government voted to appoint General Yoav Galant to the position of Israel Defense Forces Chief of Staff. Soon after, media outlets reported zoning and planning violations with regard to Galant's home. The decision was nonetheless approved by the official state nonpartisan committee charged with vetting senior government appointments. Following an HCJ petition challenging the appointment, then-LCG Yehuda Weinroth told the government he would not defend the appointment in court. As a result, considering their almost certain legal defeat, the Prime Minister and Defense Minister backed down and withdrew the appointment.[112] This instructive example demonstrates the chilling effect caused by the LCG representation monopoly—one can only imagine how many legal positions are abandoned and never make it to court due to the LCG adopting an adverse position or even merely expressing misgivings.

In 2018, Minister of Science Ofir Akunis refused to approve the appointment of scientist Prof. Yael Amitai to a certain statutory research-related council, despite the recommendation of a subordinate professional committee. The appointment required the Minister's approval by

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[111] *Natural Justice*, OXFORD REFERENCE, https://www.oxfordreference.com/view/10.1093/oi/authority.20110803100225319 (last visited Aug. 1, 2023).

[112] Amos Harel, *Barak Still Pushing for Galant to Be Named IDF Chief, Despite AG's Ruling*, HAARETZ (Feb. 4, 2011), https://www.haaretz.com/2011-02-04/ty-article/barak-still-pushing-for-galant-to-be-named-idf-chief-despite-ags-ruling/0000017f-f959-d7c0-afff-fd5b85770000; Amos Harel, *Benny Gantz Approved as Israel's New Army Chief*, HAARETZ (Feb. 10, 2011), https://www.haaretz.com/2011-02-10/ty-article/benny-gantz-approved-as-israels-new-army-chief/0000017f-e3ad-d75c-a7ff-ffad13bf0000.

law, and this approval was declined due to Amitai's past remarks calling on Israeli soldiers to refuse to serve in the West Bank. When this decision was challenged in the Supreme Court (under the unreasonableness doctrine, of course), the LCG refused to argue the Minister's case, and at the same time refused to permit Akunis to retain a private attorney who could do so. The LCG maintained that the Minister's decision was indeed unlawful, and that the LCG was the sole legitimate representative of a government legal position in court. As such, the *only* legal counsel in court, on both sides, was that in favor of the petitioners. Perhaps unsurprisingly, Akunis lost the case.[113]

In the ruling, Justice Alex Stein cast doubt on the legal validity of the LCG's monopoly on government representation.[114] Stein mused, not without a hint of sarcasm, that if there was in fact no controversy between the parties due to the apparent consensus between them, why had they spent precious judicial time adjudicating a seemingly nonexistent dispute? And indeed, Stein wondered, why was there any need for the Court to provide a ruling in light of the supposed agreement between the parties?

In 2020, Minister of Internal Security Amir Ohana was in the midst of defending a legal challenge against some regulations he had mandated with regard to firearm licensing. (Ohana's name will come up a few times, as until recently he has been one of the few politicians willing to openly challenge the legal norms discussed in this essay.) The LCG sided with the petitioners, refusing to argue Ohana's legal claims, and also did not permit Ohana to retain his own representation in Court. Ohana took an unprecedented step and filed an independent brief with the Court in his own name, stating simply that the LCG did not represent the Minister and that he demanded to be represented by his own counsel. Ohana noted that if this request was not granted, the Court would essentially be ruling without having heard the arguments of the primary respondent in the suit. The basic right to assistance of counsel in Court—afforded to the common criminal—was not being extended to senior government officials carrying out their duties as democratically elected representatives of the public will.[115]

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[113] HCJ 5769/18 Amitai v. Minister of Science and Technology (Mar. 4, 2019), Nevo Legal Database, https://www.nevo.co.il/psika_html/elyon/18057690-Z09.htm (Hebrew).

[114] *Id.* at §§ 7-11 of Justice Stein's opinion.

[115] Avishai Grinzaig, *Minister Ohana Independently Requested the HCJ to Terminate his Representation by the LCG*, GLOBES (Oct. 2, 2020), https://www.globes.co.il/news/article.aspx?did=1001344388 (Hebrew).

The Court did not seem impressed with Ohana's desperate plea for a fair hearing. In a short decision, the Court dismissed his motion, as it was filed without the LCG's consent, and ordered it removed from the case file. The government has since been replaced, and a new Minister of Internal Defense has clarified that he will comply with the petition (and with the LCG) and will reevaluate the regulations being challenged. The case was recently resolved in favor of the petitioners.[116]

From Legal Counsel to Binding Directive. The LCG is the formal and foremost source of legal counsel and advice to the executive branch, to the government as a whole and its individual members, and to the various administrative authorities throughout the state. This is the original and primary function of the Israeli "Legal Counsel to the Government," as the name suggests. Even without a comprehensive and exhaustive review, the peculiar direction in which this position has evolved will immediately strike the reader. A discussion of two aspects of this evolution will suffice for the purpose of this essay.

First, what was originally legal "counsel" has become something just short of a "mandatory directive."[117] The LCG's legal position on almost any issue, including pure policy decisions, has binding effect such that any such legal pronouncement by the LCG's office obligates adherence by government authorities and agencies. Any government action in violation of such directives is immediately branded as illegal, even though these are not binding regulations in a typical sense (i.e., these are not rules or guidance issued by a higher figure in the government hierarchy), and even in cases where there is in fact legitimate dispute as to the legality of the action in question.

One theoretical exception to this rule pertains to decisions of the actual government itself, i.e., the collective group of ministers who head the various government departments and who jointly issue official government decisions and policy (also sometimes known as a "cabinet," though in Israel this term is usually reserved for a smaller clique of senior government officials). However, this exception has been gradually eroded over the years, and the LCG's pronouncement on legality is increasingly seen as constraining even the actual national government.

A recent development is the new legal construct of "legal prevention" (or "legal prohibition"), which has started appearing in public

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[116] Hadas Labrisch, *Public Security Minister Bar Lev to rethink Erdan's lax gun laws*, THE JERUSALEM POST (July 23, 2021), https://www.jpost.com/israel-news/public-security-minister-bar-lev-to-rethink-erdans-lax-gun-laws-674723.

[117] HCJ 1635/90 Zarzevsky v. Prime Minister, PD 45(1) 749 (1991); *Pinhasi-Deri* case, *supra* note 27.

statements and court briefings filed by the LCG. The LCG has begun characterizing his policy opinions—on matters that appear to be disputes over correct application or interpretation of the law—as the black-letter law itself. As such, any action or decision not in accordance with the LCG's position is deemed illegal and void. As some have pointed out, the use of this term seems to be inversely correlated to the legal basis of the LCG's considered opinion—the weaker the legal argument, the likelier the claim of a "legal prevention" will be trotted out.[118]

It is worth recalling that the very use of the term "legal" can in fact be misleading, particularly where the "unreasonableness" standard is in play. If any government action or decision is subject to the quasi-legal standard of "unreasonableness," discussed above, then the LCG can determine the precisely "reasonable" action in advance and advise the government that it has no choice but to make the only reasonable decision. In other words, because of the unreasonableness standard, just about any policy decision may be considered a legal issue and therefore made subject to the LCG's scrutiny and binding directives.

The innovative construct of the "legal prevention" recently came to a head in court. In February of 2020, then-Minister of Justice Amir Ohana led an initiative to appoint a governmental commission which would report on the state of the Police Investigations Department (Israel's "internal affairs" authority, which is part of the Justice Ministry, but which ultimately reports to the LCG). This was during Ohana's tenure within an interim "caretaker" government (i.e., the government which has lost the confidence of the legislature, but which continues to govern until a new one is formed after national elections). The motion to appoint the commission was expected to be approved by the government.

The LCG objected to this proposal in advance, and he issued a directive not only describing the legal grounds for his objection, but also invoking the new "legal prevention" claim, stating that the government simply could not make such a decision. After having duly considered the LCG's objection, the government proceeded to vote in favor and appointed the commission. This decision was immediately challenged in court. While the LCG disagreed with the government decision and was effectively a party to the petitions, he graciously deigned to permit

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[118] *See* Aharon Gerber, *The "Legal Prevention" of the LCG—Criticism and Evaluation*, RESHUT HARABBIM BLOG (Feb. 7, 2021), https://lawforum.org.il/wp-content/uploads/2021/02/Garber-Legal-Prevention.pdf (Hebrew).

the government to retain its own independent representation for the legal proceedings.[119]

Let us put aside the merits of the legal argument against appointing the committee (if you had guessed "unreasonableness," you would not have been wrong), and let's put aside the fact that there seems to be a conflict of interest since the Police Investigations Department is under the LCG's responsibility and jurisdiction. Remarkably, both the petitioners *and the LCG himself* advanced the argument that the LCG directive itself bound the government, such that the decision to appoint the commission was illegal merely because the LCG has so opined—regardless of the legal basis of the directive itself. In other words, they claimed that the highly contested quasi-legal opinion of the unelected and unaccountable LCG is, in and of itself, sufficient to render illegal any decision or action by the elected national government.

The Court issued a temporary injunction freezing any activity of the commission pending further thorough adjudication, though it did not elaborate the prima facie legal grounds for this initial decision. The order effectively buried the commission as a new Minister of Justice had since assumed office, who was not interested in advancing the commission's activity.[120] Indeed, the commission remained in limbo until it was finally disbanded an entire year later, as its commencement was not pursued by the new Minister of Justice.

A second aspect of the LCG's evolving advisory function is the demand that the LCG enjoy a complete monopoly over the provision of legal counsel to the government. In yet another recent controversy, the Israeli government was set to discuss a slew of COVID-19-related restrictions, including various limitations on public protests. The LCG had presented the government with a particular legal argument regarding the government's authority to so issue such restrictions. One government member, Amir Ohana, felt that the legal opinion was one-sided and flawed, and he sought to present the government with opposing legal argumentation. To that end, he summoned Dr. Aviad Bakshi, a respected scholar of public and constitutional law and head of the legal research department at an established policy think tank, to present an alternative legal analysis of the government's authority with regard to

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[119] *AG asks High Court to halt work of panel probing internal police investigations*, THE TIMES OF ISRAEL (Feb. 21, 2020), https://www.timesofisrael.com/ag-asks-high-court-to-halt-work-of-panel-probing-internal-police-investigations/.

[120] *High Court order freezes panel probing internal police investigations*, THE TIMES OF ISRAEL (Feb. 24, 2020), https://www.timesofisrael.com/high-court-orders-freezes-panel-probing-internal-police-investigations/.

the restrictions being contemplated, and also regarding whether the LCG's legal counsel should be considered binding.

Sure enough, in a brief letter to the cabinet secretary, the LCG vehemently opposed both Bakshi's presence in the meeting and any indirect presentation of Bakshi's legal position to the government. So forceful was his opposition that some government members—those representing a political faction more sympathetic towards the legal status quo and the LCG's extensive authority—threatened to cancel the critical government meeting altogether if Ohana proceeded with presenting the opinion. Bakshi consequently remained outside the meeting, and the alternative legal opinion was not presented.[121]

Regardless of whether the LCG's objection was grounded in existing law or was an unfounded fiction, the very notion that the government is not entitled to receive alternative legal viewpoints seems highly objectionable and intuitively problematic.

Chief Prosecutor. The LCG is the official head of the government criminal prosecution apparatus, with extensive powers both in formulating policy and in specific key decisions left to the LCG's discretion by statute. The LCG oversees government agencies such as the police prosecutions department and the state prosecution service, including its "internal affairs" police investigations department. Many aspects of high-profile criminal cases lie within the LCG's discretion, including the initiation of preliminary probes, full-scale investigations, and the indictment of senior politicians in public corruption cases. The LCG holds key authority that can make or break the careers of any but the most senior, popular, and resolute politicians.

The notion of an over-zealous LCG prosecuting unfavored politicians is firmly grounded in reality. In the aforementioned case of Justice Minister Yaakov Neeman in 1996, then-LCG Michael Ben-Yair was overheard saying of Neeman, "I'm going to screw that fascist," mere days before filing the bogus charges against him.[122] There is in fact a respectable tally of top-tier politicians, public figures, and legal professionals, all considered adverse to the legal establishment, who have had their careers tanked and worse only to be fully exonerated down the

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[121] Netael Bandel, *Likud Minister Request for Outside Legal Opinion on Curbing Protests Shot Down*, HAARETZ (Sept. 22, 2020), https://www.haaretz.com/israel-news/2020-09-22/ty-article/.premium/likud-minister-request-for-outside-legal-opinion-on-curbing-protests-shot-down/0000017f-e186-d75c-a7ff-fd8fded60000.

[122] Kalman Liebskind, *Following Mandelblit's tapes: Where's Netanyahu's Responsibility for the Malfunctions in the Law Enforcement System?*, MAARIV (Oct. 17, 2020), https://www.maariv.co.il/journalists/Article-795994 (Hebrew).

line. A partial list may leave an impression: Yaakov Neeman as Justice Minister, indicted and resigned—acquitted in court; President Reuven Rivlin, investigated and his appointment as Justice Minister prevented—all cases closed with no charges (in his reaction, Rivlin coined the phrase "the rule of law hoodlums");[123] Rafael Eitan, indicted and his appointment as Minister of Internal Security prevented—acquitted by the Court with "no case to answer";[124] Minister of National Security Avigdor Kahalani, indicted—fully acquitted with "no case to answer" and acquittal upheld on appeal;[125] Gal Hirsch, criminal probe initiated preventing his appointment as national police commissioner—most charges dropped;[126] Dror Hoter-Yishai, elected Chairman of the statutory Bar Association, indicted on three separate charges and hounded through the courts, destroying his career and causing him to lose his seat as Chairman—fully acquitted in court.[127]

And that's just to name a few. All of these figures were considered less-than-sympathetic to the legal establishment status quo and were vocal critics of the Supreme Court and the LCG Office. All of them were targeted in what turned out to be baseless criminal witch-hunts.

Roles in conflict. These multiple roles of the LCG are in some degree of tension with one another; in other countries, this tension would amount to a clear and indefensible conflict of interest. Since 1996, almost every Israeli Prime Minister has been under criminal investigation during his tenure, along with dozens of government ministers and elected legislators. The LCG initiates and approves the investigations and ultimately controls whether to charge these politicians with crimes. Throughout these criminal proceedings, the very same LCG is *also* the primary legal counsel to the government, sitting in regular, personal

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[123] Simcha D. Rothman, *Israel's Judicial System Has a Stranglehold On Politics*, THE JERUSALEM POST (June 14, 2021), https://www.jpost.com/opinion/israels-judicial-system-has-a-stranglehold-on-politics-opinion-671026.

[124] Evelyn Gordon, *How the Government's Attorney Became Its General*, 4 AZURE 75, 95 (1998).

[125] Zvi Harel, *Ex-minister Kahalani Cleared Again of Obstructing Justice*, HAARETZ (July 31, 2002), https://www.haaretz.com/2002-07-31/ty-article/ex-minister-kahalani-cleared-again-of-obstructing-justice/0000017f-ea54-d4a6-af7f-fed62d3f0000.

[126] Gidi Weitz, *Critics of Gal Hirsch as Israel Police Chief Should Look in the Mirror*, HAARETZ (Aug. 27, 2015), https://www.haaretz.com/2015-08-27/ty-article/.premium/look-at-who-is-attacking-hirschs-police-chief-appointment/0000017f-e305-d568-ad7f-f36f02b60000; *But see*, *Ex-general Gal Hirsch indicted for tax evasion totaling $1.9 million*, THE TIMES OF ISRAEL (Oct. 21, 2021), https://www.timesofisrael.com/ex-general-gal-hirsch-indicted-for-tax-evasion-totaling-1-9-million/.

[127] Hadas Magen, *District Court Acquits Hoter-Yishai on Tax Offence Charges*, GLOBES (June 8, 1998), https://en.globes.co.il/en/article-357032.

meetings with members of government and providing confidential legal advice in the most critical and sensitive affairs of state. The Prime Minister sits in a one-on-one legal counsel meeting with the LCG a day after the LCG publicly announces his criminal investigation against the same Prime Minister—such an image may seem bizarre, but it is par for the course in the Israeli legal system.[128]

It is not only the prosecutorial and legal counsel overlap which is untenable. Consider that any change advanced by lawmakers directly or indirectly affecting the LCG's authority or the legal system may come with a heavy price. The LCG can label key policy efforts by politicians as "legally prohibited" or may decline to defend their policies when challenged in court; thus, the LCG may often hold decisive power over a politician's ability to advance their policy agenda. The LCG can signal to legislators and policymakers that they are overstepping and are better off not interfering with his domain. Few politicians have the incentive or the wherewithal to rock the legal boat.

Take one recent example highlighting the problematic combination of the LCG's roles, from June 2020. After the LCG formally indicted him with criminal charges, Prime Minister Netanyahu sought to finance his legal defense costs. He requested that the official state gifts committee approve a grant of 10 million NIS (approximately 3 million USD) from his longtime friend and financier Spencer Partridge, who had offered to cover the considerable attorney's fees (no one, including the LCG, suggested or alleged that the sum was excessive). The LCG issued a formal memorandum to the gifts committee stating that the grant would be unlawful and directing them to deny the request. The request was accordingly denied (and some officials within the LCG department were quoted as saying that Netanyahu could easily receive double the amount—if he were to resign as PM).[129]

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[128] HCJ 4507/18 Movement for Quality Government in Israel v. Attorney General (July 22, 2018), Nevo Legal Database, https://www.nevo.co.il/psika_html/elyon/18045070-E03.htm (Hebrew) (Justice Amit, with Justices Elron and Willner concurring, stated that "it is proper to trust the LCG's judgment, when he finds that, according to his role, deliberations in "four eyes" with the Prime Minister are necessary. We presume that the Legal Counsel to the Government—in accordance with his status and the presumption of proper administration—keeps a "Chinese wall" between his different hats [referring to his dual role as legal counsel and as a prosecutor], and there is no place to assume that he's in conflict" (my translation, Y.G.)).

[129] *Rejecting request, comptroller committee says it won't weigh PM's bid for legal funds*, THE TIMES OF ISRAEL (July 2, 2020), https://www.timesofisrael.com/liveblog_entry/rejecting-request-comptroller-committee-says-it-wont-weigh-pms-bid-for-legal-funds/.

Regardless of the propriety or legality of Netanyahu obtaining external funding for his legal defense, the point here is that the LCG at the time was the key official behind the criminal charges against Netanyahu, in what is certain to be the defining criminal case of his legal career and probably the defining public decision of his life. His reputation and legacy were on the line, and his name will forever be associated with the failure or success of the Netanyahu prosecution. Naturally, the funds available to any defendant's legal team may influence the outcome of the case, and in this instance, Netanyahu's ability to finance his legal expenses could prove decisive (consider that Netanyahu was charged in three separate cases regarding a period spanning over a decade, with the prosecution mustering 333 witnesses). The LCG had a clear interest in limiting Netanyahu's legal defense as it could possibly affect the outcome of the trial. Yet here was the LCG, the same "chief prosecutor" overseeing the criminal proceedings against Netanyahu, in his role as "legal counsel" effectively deciding whether to approve the defendant's access to funds for his legal team.

Symbiotic relationship with the Supreme Court. The majority of the LCG's powers described above were never granted expressly via primary legislation, but were rather bestowed through a series of Supreme Court rulings which adopted increasingly wide interpretations regarding the LCG's authority. There is no statute which defines the LCG's legal opinion as having any legal force; there is no statute which grants the LCG a monopoly over government litigation.

The LCG is appointed via a public committee which is headed by a *former* Supreme Court justice, himself appointed to the committee by the *sitting* Supreme Court chief justice. This gives the judicial establishment enormous influence over the appointment of any LCG. Since the founding of the State of Israel, about half of all LCGs have subsequently been appointed to the Supreme Court (including two out of the four most recently retired LCGs, as of 2023). Each LCG has consistently and uniformly favored the legal system status quo, acting as a bulwark against any attempts to limit the Supreme Court's influence. The LCG functions as a de facto proxy of the Supreme Court, controlling which precedents may be challenged in litigation, and ensuring that even controversial or dubious rulings are afforded expansive interpretation and institutional backing while being enforced via binding legal directives. Prof. Yoav Dotan has dubbed the LCG a "forward base" for the Su-

preme Court—executing judicial policy without the need to go through the tedious motions of adversarial argument and legal procedure.[130]

The overwhelming and conflicting powers wielded by the Israeli Legal Counsel to the Government are a far cry from the democratic vision of limited and accountable government. In the LCG, many separate and overlapping functions of government are exercised by one man or woman who is either unconstrained by the law or who has definite authority to state the law as he or she sees fit.

## X. CRIMINAL INJUSTICE: VAGUE OFFENSES AND ZEALOUS PROSECUTION

Israeli criminal law, both substantive and procedural, includes a host of alarming features which diverge from accepted democratic norms, and at the same time lacks many elements commonly found in free societies. These reflect a severely flawed criminal justice system unconcerned with individual liberty and dominated by an unbridled criminal justice bureaucracy. While an exhaustive survey is beyond the scope of this essay, the following points serve to demonstrate the problem in all its gravity.

Criminal defendants in Israel have only a limited right against self-incrimination, and they have no right to assistance of legal counsel during police interrogation.[131] Unlike almost all adversarial common-law jurisdictions in the developed world, Israel does not hold jury trials of any kind. In addition, Israel has no "exclusionary rule" doctrine; a judge has wide discretion over whether to admit evidence obtained illegally—not to mention a "fruit of the poisonous tree" doctrine regarding subsequent evidence gained as a derivative of the initial illegal act.[132] Indeed, illegally obtained evidence is rarely deemed inadmissible in criminal trials. Israel has no second-tier approval process for authorizing severe indictments—no grand jury or impartial public committee—such that the prosecution service has near-total discretion on whether to indict and with what charges. These alone make Israel an outlier among democratic regimes.

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[130] 1 YOAV DOTAN, JUDICIAL REVIEW OVER ADMINISTRATIVE DISCRETION 308 (2022) (Hebrew).

[131] *See* Thomas Weigend & Khalid Ghanayim, *Human Dignity in Criminal Procedure: A Comparative Overview of Israeli and German Law*, 44 ISR. L. REV. 199, 209-11 (2011).

[132] A law amending Israel's evidence code was passed by the 24th Knesset, allowing judges to invalidate evidence derived from an illegal act. However, such authority remains discretionary. *See* Law Amending the Evidence Order (No. 19), 5782-2022, SH 984.

Israeli criminal conviction rates are unusually high by international standards: over 90% of criminal cases end with a final conviction (2020-21 data).[133] Perhaps not unrelatedly, the judicial bench in Israel is numerically skewed toward ex-prosecutors and other governmental lawyers. Nearly half of Israeli judges were previously government employees, with 20% of judges hailing specifically from the ranks of state prosecution and litigation—a proportion many times above their general share in the legal profession.[134] This lends credence to claims of a bench unduly sympathetic towards criminal prosecutors and towards the government in general.

Criminal offenses and statutes are often interpreted liberally, to the detriment of the suspect or defendant, despite clear statutory instructions (and the long-held Western tradition) to the resolve ambiguity in favor of the defendant.[135]

In a widely followed recent ruling, the Court adopted a dubious and groundbreaking theory of "cumulative" criminality, whereby separate and unrelated actions can lead to conviction of a crime, despite none of the individual actions constituting a crime in its own right.[136]

An especially instructive example of Israel's deviation from democratic norms in substantive criminal law is the "Fraud and Breach of Trust" criminal offense applicable to public officials. This offense covers improper use of official office that does not rise to the level of outright bribery or corruption.[137] The particular crime of "Breach of Trust" has no standard meaning or accepted definition, and it has been severely criticized by legal experts across the political spectrum as excessively

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[133] Office of the State Attorney, 2021 Yearly Report Summary 38-42 (2022), https://www.gov.il/BlobFolder/news/report2021/he/2021-year-report.pdf (Hebrew).

[134] IDO ABGER, KNESSET CTR. RSCH. & INFO., DATA ON THE DEMOGRAPHIC AND OCCUPATIONAL BACKGROUND OF JUDGES 3 (2020), https://fs.knesset.gov.il/globaldocs/MMM/e95db6db-1d12-eb11-8108-00155d0aee38/2_e95db6db-1d12-eb11-8108-00155d0aee38_11_16514.pdf (Hebrew).

[135] *See infra* section XI regarding statutory interpretation. *See generally* Boaz Sangero, *Broad Construction in Criminal Law?! On the Supreme Court Chief as a Super Legislator and Eulogizing the "Strict Construction Rule,"* 3 ALEI MISHPAT 165 (2003) (Hebrew).

[136] The "Cumulative Effect Doctrine" was used to convict former Israel Police Commissioner Nissan "Nisso" Shaham for Fraud and Breach of Trust in eight cumulative cases of actions that the Court said amounted to sexual harassment. Though the cumulative doctrine had been hinted at in past cases, Shaham's case was the first one where the Supreme Court used it to uphold a conviction by the district court. The Court reasoned explicitly that no single action of Shaham's constituted a crime in and of itself, but rather that their "cumulative effect" amounted to a punishable offense. CrimAA 6477/20 Shaham v. State of Israel (Nov. 15, 2021), Nevo Legal Database, https://www.nevo.co.il/psika_html/elyon/20064770-J07.htm (Hebrew).

[137] § 284, Penal Code, 5737-1977.

vague and unclear, thus violating the principle of legality in criminal law.[138] Simply put, politicians and other public officials can find themselves guilty of a crime without any ability to foresee their culpability in advance. Similar laws in other jurisdictions are rarely applied, and many are in the process of being scrapped. Indeed, in a recent report, the UK Law Commission recommended entirely repealing the common law offense of "Misconduct in Public Office,"[139] which was the original model for the Israeli "Breach of Trust" provision.

Nonetheless, the Breach of Trust offense is applied by the Israeli courts often and to great political effect; criminal law expert Prof. Miriam Gur-Aryeh described its effect as resembling a "moral panic."[140] In the leading case on the matter, *State of Israel v. Shavas*,[141] the Supreme Court decided to retain the crime's vague character and to leave judges wide discretion in interpreting and applying the statute, so as not to hamper the state's efforts in combating governmental corruption. Politicians and public officials have since found themselves indicted (and sometimes convicted) under ambiguous circumstances, for conduct which few had previously (or subsequently) considered of a criminal nature.

Setting aside its deficiency from both liberal and democratic perspectives in and of itself, the Breach of Trust offense is also inseparable from some of the other issues discussed above. Consider the Pinhasi-Deri doctrine requiring the resignation of indicted public officials; consider the enormous power wielded and discretion enjoyed by the Legal Counsel to the Government and the prosecution service subordinate to him or her; then consider the vague and unforeseeable nature of the Breach of Trust crime and the relative ease with which public officials can find themselves embroiled in a criminal probe.

The combination of these elements puts much of the political and governmental establishment at the mercy of near-total prosecutorial and

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[138] FRIEDMANN 2016, *supra* note 2, at 233-36; Moshe Gorali, *How the Crime of Breach of Trust Was Abolished*, HAARETZ (Feb. 6, 2003), https://www.haaretz.com/2003-02-06/ty-article/how-the-crime-of-breach-of-trust-was-abolished/0000017f-e344-df7c-a5ff-e37ebf990000; Yuval Karniel, *Breach of Trust of a Public Servant—A Proposal for Interpretation Based on the Value Protected by the Offense*, 7 MISHPAT UMIMSHAL L. REV. 415 (2004) (Hebrew).

[139] LAW COMMISSION, MISCONDUCT IN PUBLIC OFFICE, 2020, Law Com. 397 (UK), https://www.lawcom.gov.uk/project/misconduct-in-public-office/.

[140] Miriam Gur-Aryeh, *Moral Panic and Political Corruption: The Expansion of the Criminal Offense of Breach of Public Trust over Disciplinary and Ethical Areas*, 17 RUNI L. REV. 467 (2014), https://www.runi.ac.il/media/qwph2xe4/gur-arye.pdf (Hebrew).

[141] FHCrim 1397/03 State of Israel v. Shavas, PD 59(4) 385 (2004) (Hebrew).

judicial discretion—every politician and civil servant is under the constant threat of having their public career halted indefinitely or even terminated. In other words, the full effect of the Pinhasi-Deri doctrine and of the LCG's political leverage crystallizes when applied to crimes such as Breach of Trust, especially within the context of an aggressively prosecutorial criminal justice system.

Finally, Israel has a single national police force and a single state prosecution service, with jurisdiction throughout the country. District police chiefs, as well as district attorneys and state criminal prosecutors, are unelected and are not directly appointed by the elected branches—rather, they are directly accountable only to the senior prosecution bureaucracy (or national police leadership). And under the current government job application scheme, senior government-prosecutor positions are open only to existing prosecutors within the system, making it nearly impossible to inject senior "new blood" willing to challenge the status quo.[142]

Due to the lack of local accountability between law enforcement officials and the communities they are meant to serve, the Israeli criminal enforcement apparatus prioritizes national problems over the more typical localized duties of policing and criminal justice. This in turn often leads to heavy-handed over-enforcement of purported national crimes—with a special focus on political corruption and white-collar financial cases—at the expense of routine law enforcement. Ordinary cases such as those involving property crime, organized crime, personal safety, and public order tend to be underenforced.

Moreover, the entire criminal justice system is largely insulated from any kind of meaningful public or governmental supervision. Perhaps uniquely instructive regarding such a lack of oversight are the consistent and relentless media leaks of prosecution evidence, which have now become a staple feature of high-profile criminal cases. Such routine and comprehensive leaks, emanating from the police or prosecution service with the goal of inducing public support for indictment or conviction, have even raised the ire of the Supreme Court[143] and of the State

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[142] Nitzan Shafir & Chen Maanit, *Closed Prosecution: Following the Controversial Appointments Process in the State Attorney Office*, GLOBES (Dec. 29, 2020), https://www.globes.co.il/news/article.aspx?did=1001355046 (Hebrew).

[143] *Supreme Court chief calls for probe of 'worrying' leaks from Netanyahu case*, THE TIMES OF ISRAEL (Sept. 14, 2020), https://www.timesofisrael.com/supreme-court-chief-calls-for-probe-of-worrying-leaks-from-netanyahu-case/.

Comptroller,[144] to no avail. LCG Mandelblit recently refused to investigate the leaks (issued from his own subordinates) on the grounds that such a probe had "a very low chance of yielding a result."[145] This despite his own complaint to the Supreme Court in 2015, prior to his appointment as LCG, about the same type of severe and unjust leaks from a criminal probe into his own conduct. With courts unwilling to force any serious investigation into the media leaks, despite the perversion of justice and intolerable conduct, the public and their elected representatives remain relatively powerless in pursuing any kind of change or accountability.

## XI. OBJECTIVE-PURPOSIVE INTERPRETATION: BARELY-DISGUISED JUDICIAL LEGISLATION

Israeli courts regularly employ a form of statutory interpretation pioneered by Justice Aharon Barak in the mid-1980s, locally labeled "objective-purposive interpretation" (OPI). This interpretive method at times stands at odds with fundamental democratic, judicial, and linguistic norms.

The proponents of OPI argue that in addition to a "subjective" purpose (i.e., the purpose stated as part of the legislative text, or perhaps one which may be gleaned from external sources), any statute also carries an "objective" or hypothetical purpose, which is rather a moral ideal—the advancement of fundamental values, democracy, human rights, the rule of law, and much more besides. The "objective" purpose of a statute is the purpose that a "reasonable" legislator would have wanted to pursue.[146] Needless to say, judges may coax almost any desired meaning out of a given statutory text when interpreted or applied in accordance with such abstract concepts, thus dramatically expanding judicial discretion beyond conventional interpretive constraints.

While the OPI terminology seems to focus on the viewpoint of the legislator (hence "subjective" refers to the actual, real-world purpose stated by legislators, and "objective" refers to the theoretical purpose divorced from whatever a legislator may have actually contemplated), a pragmatic assessment of OPI reveals just how misleading these terms

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[144] Jacob Magid, *Ombudsman calls on AG to probe cops leaking contents of interrogations to press*, THE TIMES OF ISRAEL (Nov. 5, 2019), https://www.timesofisrael.com/ombudsman-calls-on-ag-to-probe-cops-leaking-contents-of-interrogation-to-press/.

[145] *Attorney General resists opening probe into leaks from Netanyahu case*, THE TIMES OF ISRAEL (Oct. 2, 2020), https://www.timesofisrael.com/ag-resists-opening-probe-into-leaks-from-netanyahu-case/.

[146] BARAK 2005, *supra* note 105.

can be. From a judicial point of view, the so-called subjective purpose is the only *objective* element in the analysis (that is, it may be impartially considered and debated on a textual-logical-historical basis), while the purported objective purpose amounts to little more than a vague judicial whim at the highest level of theoretical abstraction. Put differently, the so-called subjective purpose is the only one which may be jointly evaluated by an agreed standard or against the real world; the so-called objective purpose would vary between every single judge—and indeed every citizen—who might have very different notions of the ideal purpose of any given statute and of the legal system taken as a whole.

Hopefully the irony is not lost on the reader that the very reversal of the terms subjective and objective in the context of OPI is itself verbal obfuscation of their conventional, dare I say objective meanings.

Judge Richard Posner's scathing critique of Aharon Barak includes an assessment of OPI:

> This opens up a vast realm for discretionary judgment (the antithesis of "objective"); and when a judge has discretion in interpreting a statute, Barak's "advice is that . . . the judge should aspire to achieve justice." . . . It is thus the court that makes Israel's statutory law, *using the statutes themselves as first drafts that the court is free to rewrite*.[147]

So much for "a government of laws and not of men."

Similarly damning are the remarks made by Oregon State Supreme Court Justice Thomas Balmer in a review of Barak's book on judicial interpretation:

> Barak's emphasis on judicial discretion in the interpretation of legal texts and his argument that judges should interpret ambiguous statutory and constitutional texts in a way that "actualizes" unwritten and abstract social values suggest a wide-ranging judicial role that raises serious concerns about the role of the judiciary in a representative democracy.[148]

Not to put too fine of a point on the matter: OPI is not merely an outlandish mode of statutory interpretation. It is rather a judicial tool explicitly enabling courts to make binding decisions (and hence, to create law) based not on statutory text, nor even on a realistic appraisal of legislative intent, but rather on the entirely personal and prejudiced moral ideology of each and every judge. The use of OPI renders legislation meaningless, legislators powerless, and the legislative process futile.

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[147] Posner 2007, *supra* note 1 (emphasis added).

[148] Thomas A. Balmer, *What's a Judge To Do?*, 18 YALE J.L. & HUMANITIES 139, 141 (2006), *available at* https://newdemo.openrepository.com/handle/2384/583068.

OPI also seems to run afoul of the very definition of linguistic interpretation (of any kind). In his own review of Barak's book on OPI, renowned literary theorist Prof. Stanley Fish explains that the term "purposive" here is redundant—any textual interpretation is only ever about the actual purpose or intention of the author. Analysis that ceases to consider the author's intent and looks elsewhere for meaning is simply not any form of interpretation at all, but rather something entirely different. In his own words:

> I trust it will be no surprise if I respond that determining the meaning of the text at the point in time of its creation is what interpretation is supposed to do, and that substituting for that meaning a meaning friendly to modern democracy is not interpretation, but re-writing. Modern democracy's needs did not author the text and when you make modern democracy's needs the text's author, you have broken free of any and all constraints on what you then declare the law to be.[149]

The OPI method is used consistently by all Israeli courts at all levels. It is employed in insignificant disputes and in landmark cases, in criminal, civil, administrative, and constitutional law. It ties in with many of the flaws discussed at length above, as may be illustrated in the following examples.

OPI has been employed to strictly define executive authority such that its exercise against what a court deems a law's objective purpose is deemed unreasonable, even if the legal text itself seems to permit the same action. This happened in the Lara Alqasem case.[150] There, the Minister of the Interior barred an ardent BDS (anti-Israel boycott) activist from entering Israel, pursuant to a law which was enacted for this specific purpose. The Court first reasoned that the law's "objective" purpose did not include punitive measures and therefore did not apply to former BDS activists, despite the statute's text and legislative history providing no basis for such a claim. The Court then held that the Minister's decision was "unreasonable" in light of the statute's purported objective purpose.

OPI is also used to expansively construe criminal offenses such that defendants may be found guilty due to conduct violating the "protected

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[149] Stanley Fish, *Intention Is All There Is: A Critical Analysis of Aharon Barak's Purposive Interpretation in Law*, 29 CARDOZO L. REV. 1109, 1145 (2008), *available at* https://heinonline.org/HOL/LandingPage?handle=hein.journals/cdozo29&div=44&id=&page=.

[150] LAA 7216/18 Alqasem v. Ministry of Interior (Oct. 18, 2018), Cardozo Law School Versa Database, https://versa.cardozo.yu.edu/opinions/alqasem-v-ministry-interior-and-hebrew-university.

norm" at the heart of the statute's objective (i.e., judicially-determined) purpose, even when such conduct is explicitly excluded from the statutory text.[151] The Supreme Court said this in a relevant case:

> Interpretation of the law in the criminal sphere is also purposive interpretation, in the framework of which one must examine the language of the law, as well as the goals and interests that the law is intended to realize . . . An interpretation of the language of the law that is favorable to the accused may nevertheless be rejected if it fails to optimally realize the purpose of the law.[152]

Such reasoning using OPI in the context of criminal law—to indict and indeed convict defendants on the basis of a law's purported purpose and despite ambiguous statutory language favoring the defendant—has become common fare in Israeli criminal jurisprudence, with little regard for the principle of legality.

In the case of *Elka Holdings*, OPI was used to dilute and disarm economic tax legislation that the judges disfavored.[153] The Court ruled that despite clear statutory language reflecting well-considered tax and economic policy, a contested tax law had a number of broader abstract "objective" purposes such as advancing justice, protecting fundamental rights, and even "legislative harmony." These supposed objective purposes yielded an interpretation which resulted in the opposite outcome than that dictated by the statutory text, rendering the law meaningless and simply replacing the Israel Tax Authority's policy preference with that of the judges.

Putting aside objections based on principle, OPI places enormous strain on the entire legal system's efficiency due to its contribution to the law's lack of legal clarity, stability, or consistency. When judges have so much discretion to interpret statutes according to their own social values and not their literal-textual content, it is no surprise that they reach radically different conclusions when applying the same law to similar cases. Almost any legal argument may be formulated as the legitimate OPI of existing law, thus encouraging frivolous litigation (which is almost never penalized, because under OPI just about any legal argument can be said to be in good faith). At the same time, a motion to dismiss a lawsuit (or for summary judgment) will rarely be successful, as the substantive law itself becomes so nebulous under OPI that judges

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[151] Sangero 2003, *supra* note 135.

[152] CrimA 9334/08 Ali v. State of Israel (Nov. 23, 2011), Cardozo Law School Versa Database, https://versa.cardozo.yu.edu/opinions/ali-v-state-israel.

[153] CA 2112/95 Tariffs and VAT Department v. Elka Holdings, PD 53(5) 769 (1999) (Hebrew).

can hardly know in advance what the actual law is. Indeed, since the advent of OPI, the volume of litigation and the caseload backlog in Israel have skyrocketed.[154] What else could have happened, with such flexible standards for determining the meaning of textual legal norms?

## XII. CONCLUSION

In this brief overview, I have endeavored to highlight some of the most glaring and fundamental flaws in the Israeli legal system. Many of these cannot be reconciled with established notions of liberal democracy. Some are directly at odds with the very essence of accountable and legitimate self-government and with core tenets of the rule of law. Each feature stands in its own right as worthy of attention; taken together as a whole, they paint a deeply disturbing image of a system in urgent need of judicial and legal reform.

Despite arguments made by some staunch defenders of the current system, none of these features are excusable by Israel's unique story or features; our idiosyncrasies can serve, at most, as individual historical explanations, not as justifications. As Judge Richard Posner wrote in discussing similar flaws: "That is not a justification for a hyperactive judiciary, it is merely a redefinition of it."[155]

Yet these flaws are not some inevitable condition ordained by fate, just as they are not irreversible. The reader will have observed that many were introduced over a short time span, in a flurry of Supreme Court rulings led by Justice Aharon Barak and his later adherents. Consider these key cases which reshaped the Israeli legal system: Extreme unreasonableness (*Dapei Zahav*, 1980),[156] objective-purposive interpretation, (*Kibbutz Hazor*, 1985),[157] standing and justiciability requirements (*Ressler*, 1988),[158] judicial review of political appointees (*Eisenberg*, 1993),[159] impeachment by judicial review (*Pinhasi Deri*, 1993),[160] and the constitutional revolution (*Hamizrachi*, 1995)[161]—all decided within a 15-year span. The bulk of the flaws discussed in this essay originated in a concentrated judicial effort some thirty to forty years ago. They are by no

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[154] *See* Courts Administration report, *supra* note 52.
[155] Posner 2007, *supra* note 1.
[156] *Dapei Zahav* case, *supra* note 5.
[157] CA 165/82 Kibbutz Hazor v. Rehovot Assessing Officer, PD 39(2) 70 (1985).
[158] HCJ 910/86 *Ressler*, *supra* note 41.
[159] *Eisenberg* case, *supra* note 16.
[160] *Pinhasi-Deri* case, *supra* note 27.
[161] *Bank Hamizrachi*, *supra* note 53.

means sacred or inviolate. They may be unmade much in the manner they were made, or by parliamentary initiative.

The purpose of this essay is not to censure or denounce Israel, nor to agitate alarmist claims about its future. Israel remains, overall, a thriving, vibrant, and prosperous democracy deeply committed to rights, liberty, and self-determination, of which I am proud to be a native-born citizen and in which I live and raise my children.

Rather, as I set out in the introduction above, the goal of this essay is to give pause to some potential critics of Israeli public or governmental efforts to curtail judicial authority and expansionism, which are sure to come. One need not be an expert or legal scholar to recognize that the situation as it stands is untenable, and that the modern world's understanding of a free ordered society requires some significant alterations to the Israeli legal system.

Other Views:

- Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16 (2002), *available at* https://core.ac.uk/download/pdf/72831741.pdf.
- Barak Medina, *Four Myths of Judicial Review: A Response to Richard Posner's Criticism of Aharon Barak's Judicial Activism* (June 15, 2007), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=992972.
- Rivka Weill, *The Strategic Common Law Court of Aharon Barak and its Aftermath: On Judicially-led Constitutional Revolutions and Democratic Backsliding*, 14 L. & ETHICS OF HUM. RTS. 227 (2020), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3296578.
- Daphne Barak-Erez, *Broadening the Scope of Judicial Review in Israel: Between Activism and Restraint*, 3 INDIAN J. CONST. L. 118 (2009), *available at* http://www.commonlii.org/in/journals/INJlConLaw/2009/8.pdf.
- Aeyal Gross, *An Unreasonable Amendment*, VERFASSUNGSBLOG, July 24, 2023, https://verfassungsblog.de/an-unreasonable-amendment/.
- Rivka Weill, *War over Israel's Judicial Independence*, VERFASSUNGSBLOG, Jan. 25, 2023, https://verfassungsblog.de/war-over-israels-judicial-independence/.
- Yaniv Roznai & Matan Gutman, *Saving the Constitution from Politics*, VERFASSUNGSBLOG, May 30, 2021, https://verfassungsblog.de/saving-the-constitution-from-politics/.

# *GROFF V. DEJOY*: THE DEATH OF THE "DE MINIMIS" TEST BREATHES LIFE BACK INTO RELIGIOUS ACCOMMODATION*

SARAH E. CHILD**

In a unanimous decision last June, the Supreme Court in *Groff v. DeJoy* heightened the standard employers must satisfy to deny religious accommodations to their employees, clarifying a precedent that has been a thorn in the side of religious adherents for nearly 50 years.[1]

Under the 1972 amendments to Title VII of the Civil Rights Act of 1964, an employer must accommodate the religious practices of its employees unless it can demonstrate "undue hardship" on the conduct of its business.[2] In 1977, the Supreme Court in *TWA v. Hardison* defined the phrase "undue hardship" to mean "more than a de minimis cost."[3] Thereafter, the amendments that were intended by Congress to codify robust protections for religious employees for "all time"[4] were instead used to deny religious accommodations whenever an employer could cite a trivial burden. Under this low bar, the district court[5] and the Third Circuit[6] denied relief to Petitioner Gerald Groff, a devout Christian who resigned from the United States Postal Service (USPS) after it refused to accommodate his Sunday Sabbath observance.[7]

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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] 143 S. Ct. 2279 (2023).

[2] 42 U.S.C. § 2000e(j).

[3] TWA v. Hardison, 432 U.S. 63, 84 (1977).

[4] 118 Cong. Rec. 705 (1972).

[5] Groff v. DeJoy, No. 19-1879, 2021 WL 1264030, at *1 (E.D. Pa. Apr. 6, 2021).

[6] Groff v. DeJoy, 35 F.4th 162 (3d Cir. 2022).

[7] *Id.* at 167.

The disparity between Title VII's actual text and the "more than a de minimis cost" standard, conceded by the government[8] and even an amicus brief from Americans United for Separation of Church and State,[9] paved the way for a unified decision authored by Justice Samuel Alito. The opinion explicitly rejected the "more than a de minimis cost" test and pronounced that, under *Hardison*, "undue hardship" means that "a burden is substantial in the overall context of an employer's business."[10] This holding effectuated an about-face for religious freedom in the workplace, forbidding employers from relying on one line from *Hardison* to defeat religious accommodation requests.[11] And the Court did not need to overturn *Hardison* to get there, as "substantial costs" are referenced repeatedly throughout that opinion.[12]

*Groff* also addressed the extent to which burdens on fellow employees justify denying religious accommodations, since the Third Circuit had held that the imposition on Groff's co-workers, including decreased morale, constituted an "undue hardship."[13] *Groff* concluded that burdens on other employees alone are not enough; such burdens have to impact the conduct of the employer's business to constitute an undue hardship under Title VII.[14]

Both of these conclusions will fundamentally change the way employers and courts review religious accommodation requests. This article addresses these changes in theory and practice and will proceed in three parts. It begins by summarizing the *Groff* decision, including Justice Alito's comprehensive background of the "undue hardship" standard and the First Amendment issues on the Supreme Court's mind when it first encountered *Hardison*. It next sets forth employment law principles that *Groff* gave renewed emphasis, providing a primer for employers concerned about their Title VII compliance. Lastly, it explains how *Groff* changed the law. This includes its effect on cases dealing with traditional kinds of religious accommodation requests involving religious garb, absences, and speech, as well as newly emerging requests that courts are increasingly grappling with today, such as those involving preferred pronouns, vaccinations, and pharmaceutical products.

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[8] Br. for United States at 30, *Groff*, 143 S. Ct. 2279.

[9] Br. for Americans United for Separation of Church and State as Amicus Curiae at 4, *Groff*, 143 S. Ct. 2279 ("*Hardison* is wrong in too many ways to withstand scrutiny.").

[10] *Groff*, 143 S. Ct. at 2294.

[11] *Id.*

[12] *Hardison*, 432 U.S. at 83 n.14.

[13] *Groff*, 35 F.4th at 175.

[14] *Groff*, 143 S. Ct. at 2296.

## I. SUMMARY OF OPINION

### *A. Facts*

Gerald Groff is a Christian and Sunday Sabbath observer whose religious beliefs dictate that Sunday is meant for worship and rest, not "secular labor" and the "transport[ation]" of worldly "goods."[15] He began working for the USPS in 2012 but was not required to work on Sundays at that time.[16] When his post office began delivering packages for Amazon on Sundays, he transferred to a post office in Holtwood, Pennsylvania that had not yet implemented Sunday Amazon deliveries.[17] In 2017, the Holtwood post office also began delivering Amazon packages on Sundays.[18]

Since Groff would not work on Sundays due to his sincerely held religious beliefs, others on the Holtwood staff, including the postmaster, performed Sunday deliveries during peak season.[19] During non-peak season, carriers working from the regional hub were assigned Groff's shifts.[20] At least one employee filed a grievance over this arrangement, which the USPS settled.[21] Groff received repeated discipline for failing to work and, knowing termination was inevitable, resigned in January 2019.[22]

Groff sued the USPS for discriminating against him on the basis of his religion in violation of Title VII.[23] The United States District Court for the Eastern District of Pennsylvania granted summary judgment in favor of the USPS,[24] which the Third Circuit affirmed over Judge Thomas Hardiman's dissent.[25] Following *Hardison*'s "more than a de minimis cost" test, the panel determined there was undue hardship because accommodating Groff "imposed on his coworkers, disrupted the workplace and workflow, and diminished employee morale."[26] The dissent, on the other hand, emphasized that

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[15] *Id.* at 2286.
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.* at 2286 n.1.
[22] *Id.* at 2287.
[23] *Id.*
[24] *Groff*, No. 19-1879, at *1.
[25] *Groff*, 35 F.4th at 164-65.
[26] *Id.* at 175.

"impact on coworkers alone" was not enough to constitute undue hardship "without showing business harm."[27]

*B. Overview of "Undue Hardship"*

In an overview comprising more than half the opinion, Justice Alito thoroughly examined the Supreme Court's decision in *Hardison*, including the history of the phrase "undue hardship" and the state of the Establishment Clause at that time. This lengthy history was warranted, given it was the Court's "first opportunity in nearly 50 years to explain . . . [*Hardison*'s] contours . . . ."[28]

1. 1972 Amendments

Title VII makes it unlawful for covered employers to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion."[29] The phrase "undue hardship" was not included in the original text passed in 1964. In 1967, the EEOC introduced the language, requiring employers "to make reasonable accommodations to the religious needs of employees" whenever doing so would not create "undue hardship on the conduct of the employer's business."[30]

Responding to lower court decisions rejecting a duty to accommodate,[31] Congress added "undue hardship" to Title VII's 1972 amendments in the definition of religion:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's

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[27] *Id.* at 176 (Hardiman, J., dissenting).

[28] *Groff*, 143 S. Ct. at 2287.

[29] 42 U.S.C. § 2000e–2 (a)(1).

[30] *Groff*, 143 S. Ct. at 2287-88 (citing 29 CFR § 1605.1 (1968)).

[31] *Id.* at 2288 (discussing Dewey v. Reynolds Metals Co., 429 F.2d 324 (1970), *aff'd*, 402 U.S. 689 (1971)); Riley v. Bendix Corp., 330 F. Supp. 583 (M.D. Fla. 1971). Indeed, the sponsor of the amendments, Senator Jennings Randolph—himself a Seventh Day Baptist—said the amendments were intended to "resolve by legislation" court decisions such as *Dewey* that had "clouded the matter with uncertainty." 118 Cong. Rec. 705-06 (1972). And the Chairman of the House Committee stated, "[t]he purpose of th[ese] [amendments] . . . is to provide the statutory basis for EEOC to formulate guidelines on discrimination because of religion such as [the EEOC's 1967 guidelines] . . . challenged in Dewey . . . ." 118 Cong. Rec. 7167 (1972).

> religious observance or practice without undue hardship on the conduct of the employer's business.[32]

This definition made it clear that Title VII does not just protect employees from discrimination based on their religious beliefs, but also from discrimination based on their religious practices, including through the use of generally applicable policies.[33]

2. *TWA v. Hardison*

The *Groff* opinion next turned to *Hardison* itself, which interpreted the 1967 regulation and not the text of Title VII, since the dispute arose before the enactment of the 1972 amendments.[34]

Hardison, a clerk in the Stores Department of the Kansas City base of Trans World Airlines (TWA), underwent a religious conversion after being hired but was denied a religious accommodation for his Saturday Sabbath observance.[35] The accommodation that he sought would have overridden seniority rights granted by the relevant collective bargaining agreement, a dispositive fact in the eventual Supreme Court opinion.[36] Hardison was eventually terminated for "insubordination" and brought a lawsuit against TWA and his union, International Association of Machinists and Aerospace Workers (IAM).[37]

*a. The Establishment Clause in* Hardison

The Establishment Clause played a central role in the ensuing litigation, with the Eighth Circuit rejecting defendants' arguments that the statute violated it, and the Supreme Court granting TWA's petition for certiorari presenting the same issue on appeal, "particularly insofar as [the Eighth Circuit]

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[32] 42 U.S.C. § 2000e(j).

[33] *See Hardison*, 432 U.S. at 87 (Marshall, J., dissenting).

[34] Since *Hardison* did not interpret the actual text of Title VII, Justice Clarence Thomas has argued that its reasoning is merely dicta. EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 787 n.1 (2015) (Thomas, J., concurring in part and dissenting in part). Groff made the same point in this case. Br. for Pet'r at 13, *Groff*, 143 S. Ct. 2279. The *Groff* opinion addressed Justice Thomas's concerns explicitly, stating, "because we—like the Solicitor General—construe *Hardison* as consistent with the ordinary meaning of 'undue hardship,' we need not reconcile any divergence between *Hardison* and the statutory text." *Groff*, 143 S. Ct. at 2294 n.15.

[35] *Groff*, 143 S. Ct. at 2288-89.

[36] *Id.* at 2290.

[37] *Id.* at 2289.

had approved an accommodation that allegedly overrode seniority rights granted by the relevant collective bargaining agreement."[38]

In its brief, TWA applied the *Lemon* test, set forth in *Lemon v. Kurtzman* six years earlier, and argued that accommodations under Title VII had "the primary purpose and effect of advancing religion and entail[ed] 'pervasive' government 'entanglement . . . in religious issues.'"[39]

Nevertheless, the Court's opinion did not even mention the Establishment Clause, causing many to believe that it "must have been based on constitutional avoidance."[40] Justice Alito said as much at oral argument.[41] Given that the Court abrogated the *Lemon* test in last term's *Kennedy v. Bremerton School District*,[42] the majority's inclusion of this context in the *Groff* opinion seems to imply a view that the constitutional concerns underlying the *Hardison* decision were unfounded.

*b. Seniority Rights in* Hardison

Instead of focusing on the Establishment Clause, the *Hardison* Court framed the issue as whether an employer has an obligation to violate a seniority system to accommodate the religious practices of a junior employee.[43] The only way Hardison could have been accommodated was to force senior employees to take his shifts, and the Court held that Title VII did not require TWA to go that far.[44] This was so because Title VII carves out special protections for such seniority systems,[45] and the Court had previously held that their "routine application" was not unlawful.[46]

*c.* Hardison*'s "More Than a De Minimis Cost"*

Although the parties did not discuss the standard of undue hardship in their briefing or oral argument, the *Hardison* Court concluded its analysis by

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[38] *Id.* at 2289, 2289 n.6 (quoting Pet. for Cert., *Hardison*, No. 75-1126, at 2-3, 17-22). The Supreme Court also granted IAM's petition, but it designated TWA as the lead petition. *Id.* at 2289.

[39] *Id.* at 2290 (quoting Br. for Pet'r at 20, *Hardison*, 432 U.S. 63).

[40] *Id.* at 2290 n.9. Other recent cases before the high Court had also considered the issue, such as *Parker Seal Co. v. Cummins*, 429 U.S. 65 (1976) (per curiam), an evenly divided affirmance upholding an accommodation despite an Establishment Clause challenge, and *Dewey v. Reynolds Metals Co.*, 402 U.S. 689 (1971) (per curiam), which rejected the 1967 guidelines due to Establishment Clause avoidance. *Id.* at 2289.

[41] Tr. of Oral Argument at 19:25-20:24, Groff v. DeJoy, 22-174 (Apr. 18, 2023).

[42] 142 S. Ct. 2407, 2427 (2022).

[43] *Groff*, 143 S. Ct. at 2290.

[44] *Id.*

[45] *See* 42 U.S.C. § 2000e–2(h).

[46] *Groff*, 143 S. Ct. at 2290 (citing *Hardison*, 432 U.S. at 82).

asserting that "[t]o require TWA to bear more than a de minimis cost in order to give Hardison Saturdays off is an undue hardship."[47] But while "this line would later be viewed by many lower courts as the authoritative interpretation of the statutory term 'undue hardship,' it is doubtful that it was meant to take on that larger role."[48]

Why? First, the *Hardison* majority "described the governing standard quite differently" no fewer than three times throughout the opinion, "stating . . . that an accommodation is not required when it entails 'substantial' 'costs' or 'expenditures.'"[49] "Substantial costs" is far more textually consistent with Title VII than "more than a de minimis cost."

And second, because of *Hardison*'s concern with seniority rights. Justice Thurgood Marshall proposed that TWA could have accommodated Hardison by paying employees overtime wages until Hardison could transfer to the night shift in three months.[50] The *Hardison* majority rejected this proposal, but not because of the "more than a de minimis cost" that it would entail.[51] Instead, the Court was concerned with the accommodation's impact on seniority rights, disagreeing that Hardison would have had enough seniority to work the night shift in three months, and finding that TWA would have had to pay overtime wages to Hardison's co-workers indefinitely.[52] Since it was "not clear that any of the possible accommodations would have actually solved Hardison's problem without transgressing seniority rights," *Hardison*'s holding does not speak to the kinds of costs that would justify denying religious accommodations when seniority rights are not involved.[53]

*d. The Legacy of* Hardison*'s "More Than a De Minimis Cost" Test*

The *Groff* opinion went on to describe how lower courts have "latched on" to *Hardison*'s "de minimis" language despite its "fleeting" discussion, the multiple mentions of "substantial" costs, and the focus on seniority rights.[54] And while the *Groff* Court acknowledged the government's argument that many lower courts had gotten it right by interpreting *Hardison*'s "de

[47] *Id.* at 2291 (quoting *Hardison*, 432 U.S. at 84).

[48] *Id.* at 2291-92.

[49] *Id.* at 2292 (quoting *Hardison*, 432 U.S. at 83 n.14).

[50] *Id.* at 2291. This would have cost TWA, one of the largest airlines in the world at the time, approximately $150 per month (or $1,250 in 2022). *Id.*

[51] *Id.* at 2292.

[52] *Id.* at 2291. This would have cost TWA approximately $600 per year (or $5,000 per year in 2022). *Id.*

[53] *Id.* at 2292.

[54] *Id.*

minimis" language in light of its facts and reasoning, amicus briefs from "a bevy of diverse religious organizations," including Sikhs, Muslims, Orthodox Jews, and Seventh Day Adventists, told a different story.[55] Furthermore, though the EEOC had attempted to mitigate *Hardison*'s damage by stating that re-scheduling costs, temporary overtime pay, and voluntary shift swaps are not an undue hardship, lower courts had not always ruled that way.[56] Transitioning to the analysis portion of the opinion, the Court made one thing clear: *Hardison*'s "de minimis" language should not be taken literally.[57]

*C. Analysis*

1. Death of the "More Than a De Minimis Cost" Test

The Court began its analysis with the parties' common ground: the "more than a de minimis cost" test "does not suffice to establish undue hardship under Title VII."[58] Grounding its analysis in the text of Title VII, the Court provided definitions of the words "undue" and "hardship" from dictionaries contemporaneous with the 1972 amendments.[59] "Hardship" was commonly defined as "suffering" or "privation" and "under *any* definition, a hardship is more severe than a mere burden."[60] Costs on the employer must therefore constitute not only a burden, but an "undue" one, with undue defined as "excessive" or "unjustifiable."[61]

The natural and ordinary understanding of "undue hardship" when the phrase was adopted is therefore more akin to the "substantial costs" and "substantial expenditures" of *Hardison* rather than the legal definition of "de minimis": "very small or trifling."[62]

While agreeing "de minimis" had to go, the parties differed in their suggested definitions.[63] Groff proffered a "significant expense or difficulty" test, which is how "undue hardship" is defined in the Americans with Disabilities

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[55] *Id.*

[56] *Id.* at 2293, 2293 n.12.

[57] *Id.* at 2293-94.

[58] *Id.* at 2294.

[59] *Id.*

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

[61] *Id.*

[62] *Id.* at 2295 (quoting BLACK'S LAW DICTIONARY, at 388). This was also demonstrated by the EEOC regulation that *Hardison* ratified, the EEOC's use of the phrase before the amendments were enacted, and the use of "undue hardship" in other statutes. *Id.* at 2295.

[63] *Id.*

Act.[64] The government, on the other hand, asked the Court to clarify that *Hardison*'s reference to "substantial" costs controls.[65]

Adopting the government's formulation, the Court reasoned it was enough to "say that an employer must show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of the particular business."[66] It stressed, however, that the "favored synonym" is not as important as the process.[67] And the process requires the employer to consider "all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, 'size and operating cost of [an] employer.'"[68]

The parties had another difference of position. *Groff* asked the Court to make ADA case law the polar star, while the government requested that the Court affirm all EEOC guidance on *Hardison*.[69] The Court declined to do either. It did not address the propriety of Groff's request, but the Court did explain that it would not be reasonable to "ratify *in toto* a body of EEOC interpretation" pre-dating the clarification in *Groff*, even if a "good deal" of it remains post-*Groff*.[70] Ultimately, "[w]hat is most important is that 'undue hardship' in Title VII means what it says, and courts should resolve whether a hardship would be substantial in the context of an employer's business in the commonsense manner that it would use in applying any such test."[71]

2. Burdens on Co-Workers

The Court then addressed the second question presented, adopting many of the government's arguments in the process. It began by noting that the parties agreed that accommodations must be evaluated in light of their impact on "the conduct of the employer's business," which is required by the statute.[72] Hence, courts may only examine the accommodation's impacts on co-workers—which the Third Circuit had found dispositive—if they affect the conduct of the business.[73] Moreover, as the government stressed, some

[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *Id.* (quoting Br. for United States at 40, *Groff*, 143 S. Ct. 2279 (internal quotation marks omitted)).
[69] *Id.*
[70] *Id.* at 2296.
[71] *Id.*
[72] *Id.*
[73] *Id.*

impacts on co-workers are not legally cognizable even if they affect the conduct of the business, including bias or hostility to a particular religion, religion in general, or the idea that religion should be accommodated.[74] Considering such burdens would make Title VII "at war with itself."[75]

The Court next clarified that Title VII requires accommodation, not just an evaluation of the reasonableness of a given accommodation, proffered by the employee or otherwise.[76] It would therefore be insufficient for the USPS to determine that compelling Groff's co-workers to work overtime would constitute an undue hardship without also considering other possible accommodations such as volunteer shift swaps.[77]

In conclusion, the Court noted that in following the "de minimis" test, the Third Circuit may have failed to consider certain accommodations such as incentive pay or coordinating with other stations employing more people.[78] Acknowledging that the government might still prevail, it vacated and remanded.[79]

*D. Concurrence*

The concurrence, authored by Justice Sonia Sotomayor and joined by Justice Ketanji Brown Jackson, also acknowledged that "de minimis" was "loose language" and that "[t]he statutory standard is undue hardship, not trivial cost."[80] *Hardison*'s value lay not in one misconceived line, however, but in its facts and reasoning.[81]

An undue hardship existed in *Hardison* because accommodating the employee would have deprived other employees of seniority rights under the collective bargaining agreement or caused substantial costs to the business, such as higher wages and lost efficiency.[82] In the concurrence's view and as advanced by the Solicitor General at oral argument,[83] the EEOC under seven

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[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.* at 2297.
[78] *Id.*
[79] *Id.*
[80] *Id.* (Sotomayor, J., concurring).
[81] *Id.*
[82] *Id.*
[83] Tr. of Oral Argument at 56:7-10, Groff v. DeJoy, 22-174 (Apr. 18, 2023).

presidential administrations from Reagan to Biden had properly interpreted *Hardison* within these broader parameters.[84]

The concurrence next applauded the Court for clarifying that "undue hardship" under *Hardison* means "substantial costs," rather than overruling the case in favor of the ADA's "significant difficulty or expense" standard.[85] It explained that stare decisis has the most force in statutory interpretation cases and that Congress had both "spurned" several attempts to reverse *Hardison* and amended Title VII in response to other Supreme Court decisions.[86] The opinion thus preserved the separation of powers by preventing interested parties from circumventing the legislative process to achieve their preferred policies.[87]

Finally, the concurrence addressed the second issue presented. Groff had asked the Court to say that undue hardship can only be met by showing burdens on the business.[88] But the concurrence explained that the text of the statute requires the showing of undue hardship on the "*conduct* of the employer's business," which includes burdens on the functioning and control of the business's employees.[89] After all, even *Hardison* turned on other employees' seniority rights.[90] The concurrence nonetheless acknowledged that some burdens on co-workers will not rise to the level of undue hardship, such as hostility towards a protected group or managing voluntary shift swaps.[91]

## II. THE AFTERMATH OF *GROFF*: WHAT STAYS THE SAME?

Several key employment law principles continue in full force after *Groff*. They are worth mentioning given their fresh emphasis in the opinion and the tendency of employers to overlook or contravene them.

First, *Hardison* is still good law, but it is most applicable to cases involving its "principal issue": seniority rights.[92] Such rights are given special protection in Title VII and, regardless of any undue hardship inquiry, employers are

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[84] *Groff*, 143 S. Ct. at 2297 (Sotomayor, J., concurring). Even so, the majority pointed out that decisions taking into account *Hardison*'s facts and reasoning still lack the clarification of the Court's decision in *Groff*. *Groff*, 143 S. Ct. at 2296.

[85] *Id.* at 2297.

[86] *Id.* at 2297-98.

[87] *Id.* at 2297.

[88] *Id.*

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

[90] *Id.*

[91] *Id.*

[92] *Id.* at 2290-92.

never required to transgress them to accommodate the religious beliefs and practices of their employees.[93]

Second, the burden is on the employer to demonstrate undue hardship. Indeed, "*[t]he employer must show* that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business."[94] "Undue hardship" is therefore not a trump card to be used in conclusory fashion. Rather it must be supported by direct evidence of "substantial costs" in the "overall context" of the employer's business, taking into account "all relevant factors . . . , including the particular accommodations at issue and their practical impact in light of the nature, size, and operating cost of an employer."[95]

Third, some evidence of undue hardship is simply "off the table" and always has been.[96] As the Court asserted, "[t]o the extent that this was not previously clear," an employer cannot deny an accommodation because of "animosity to a particular religion, to religion in general, or to the very notion of accommodation religious practice[.]"[97] The reasoning of cases like *EEOC v. Sambo's of Georgia, Inc.*—in which a restaurant failed to hire a Sikh man for a managerial position, citing the public's "aversion to, or discomfort in dealing with, bearded people" as an undue hardship—is therefore completely untenable.[98]

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[93] *Id.* at 2292-94.

[94] *Id.* at 2295 (citing *Hardison*, 432 U.S. at 83 n.14) (emphasis added).

[95] *Id.* at 2294-95. As the government argued in its brief, "the EEOC has emphasized that the . . . burden remains on the employer to 'demonstrate how much cost or disruption the employee's proposed accommodation would involve' with 'objective information'—not reliance on 'hypothetical hardship.'" Br. for United States at 30, *Groff*, 143 S. Ct. 2279 (quoting EEOC, Compliance Manual § 12-IV(B)(1)). This puts to bed reasoning used in numerous cases decided before *Groff*. *E.g.*, Weber v. Roadway Exp., Inc., 199 F.3d 270, 274-75 (5th Cir. 2000) ("Roadway's hypotheticals regarding the effects of accommodation on other workers are not too remote or unlikely to accurately reflect the cost of accommodation."); Favero v. Huntsville Indep. Sch. Dist., 939 F. Supp. 1281, 1293 (S.D. Tex. 1996) (rejecting argument that under Title VII, employers could "deny requests [for religious accommodations] only when they were certain in advance that the requested absence would cause an undue hardship"); Decls. of Krista O'Dea, New Yorkers for Religious Liberty v. City of New York, 1:22-cv-00752, ECF Nos. 15 and 53 (E.D.N.Y. Sept. 6, 2022) (allowing discharge of paramedic for religious objections to vaccination due to "the potential for undue hardship"), appeal argued, 22-1801 (2d. Cir. Feb. 8, 2023).

[96] *Groff*, 143 S. Ct. at 2296.

[97] *Id.*

[98] 530 F. Supp. 86, 89 (N.D. Ga. 1981), abrogated by *Groff*, 143 S. Ct. at 2296; *see also* Camara v. Epps Air Service, Inc., 292 F. Supp. 3d 1314, 1318-19 (N.D. Ga. 2017) (finding that permitting a Muslim customer service representative to wear her hijab would constitute more than a de minimis hardship because it would "adversely affect the image that [the employer] seeks to present to the

Fourth, Title VII requires an employer to make an affirmative effort to accommodate an employee. This means it cannot stop at evaluating and dismissing one possible accommodation.[99] It must consider reasonable alternatives.[100] Therefore, employers faced with religious absence requests cannot just conclude that compelling their other employees to work overtime would constitute an undue hardship; they must also consider asking for volunteers to swap their shifts, among other alternatives.[101]

Fifth, "a good deal of the EEOC's guidance in this area is sensible and will, in all likelihood, be unaffected by [the] clarifying decision [in *Groff*]."[102] This includes the EEOC's caution "against extending [undue hardship] to cover such things as the 'administrative costs' involved in reworking schedules, the 'infrequent' or temporary 'payment of premium wages for a substitute,' and 'voluntary substitutes and swaps' when they are not contrary to a 'bona fide seniority system.'"[103] It also includes accommodations that "the EEOC's guidelines consider to be ordinarily required, such as the relaxation of dress codes and coverage for occasional absences."[104] While some courts and employers paid little heed to this guidance prior to *Groff*,[105] it was impermissible then, and there is no excuse to ignore it now, with the caveat that the Court understandably could not "ratify *in toto*" all pre-*Groff* guidance.[106] It would not be surprising if the EEOC soon promulgates new guidance further delineating the new standard.

## III. THE AFTERMATH OF *GROFF*: WHAT CHANGES?

*Groff* effectuated two fundamental changes for religious accommodations in the workplace. First, while *Hardison* is still good law, the "more than a de

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public through a uniform policy and potentially cost it business if some customers go elsewhere"); Birdi v. UAL Corp., No. 99 C 5576, 2002 WL 471999, at *1 (N.D. Ill. Mar. 26, 2002) (finding that providing Sikh ticket agent with alternative non-customer-facing positions was a reasonable accommodation when his turban violated the grooming policy).

[99] *Groff*, 143 S. Ct. at 2296-97.

[100] *Id.*

[101] *Id.* at 2297.

[102] *Id.* at 2296.

[103] *Id.* at 2293 (citing §§1605.2(e)(1), (2)).

[104] *Id.*

[105] *E.g.*, EEOC v. Walmart Stores East, L.P., 992 F.3d 656, 659-60 (7th Cir. 2021) (finding undue hardship for employer to facilitate voluntary shift swapping); Logan v. Organic Harvest, LLC, 2:18-cv-00362, 2020 WL 1547985, at *5 (N.D. Ala. Apr. 1, 2020) (holding the employer was not required "even to assist the plaintiff in finding someone to swap shifts with him").

[106] *Groff*, 143 S. Ct. at 2296.

minimis cost" definition of undue hardship that courts previously took *Hardison* to espouse is not.[107] Instead, an undue hardship has to be substantial in the overall context of the employer's business.[108] This better comports with the text of Title VII and the reasoning of *Hardison*, which dealt with seniority rights. Accordingly, evaluating undue hardship is a commonsense, fact-specific inquiry that considers all relevant factors about the employer including its size, nature, and operating costs.[109]

And second, burdens on co-workers can only constitute an undue hardship if they impact the conduct of the business.[110]

These principles fundamentally affect the employment landscape because employers must now meet a greater burden of proof to avoid making religious accommodations. How this plays out in the lower courts will depend on the factors the Supreme Court discussed, as well as the specific types of accommodations requested. Such requests range from traditional ones like religious garb, religious absences, and religious speech—all of which were mentioned at oral argument—to newly emergent requests involving preferred pronouns, vaccination, and pharmaceutical products. Ultimately, the death of the de minimis test will make the inquiry more stringent in all cases.

### *A. Three Buckets of Traditional Accommodation Requests*

At oral argument, the Solicitor General mentioned three common categories or "buckets" of requests in which she claimed that employers were already regularly granting accommodations, despite lower courts' reliance on *Hardison*.[111] These three categories are requests for exemptions from dress or grooming policies, requests for religious absences, and requests related to religious expression in the workplace.[112] Despite the Solicitor General's optimism, individuals in each of these types of cases have long dealt with denials of their accommodation requests under the "de minimis" standard, as amicus briefs and cases cited within the *Groff* opinion established.[113] *Groff* increases the likelihood that such cases will be resolved in favor of the religious employee, although the answer may not always be as clear when courts confront competing rights, particularly in speech cases.

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[107] *Id.* at 2294.
[108] *Id.*
[109] *Id.* at 2295.
[110] *Id.* at 2296.
[111] Tr. of Oral Argument at 77:22-79:15, Groff v. DeJoy, 22-174 (Apr. 18, 2023).
[112] *Id.* at 78:4-6, 21-22; 79:5-9.
[113] *E.g.*, *Groff*, 143 S. Ct. at 2292, 2293 nn.12-13, 2296.

1. Religious Garb

With respect to dress/grooming cases, *Groff*'s potential impact is well illustrated in the case of *Litzman v. New York City Police Department*. There, the Southern District of New York found that the NYPD was not required to accommodate an Orthodox Jewish police officer's request to wear a one-inch beard under *Hardison*'s "more than a de minimis cost" standard, but that it was required to accommodate him pursuant to the more exacting definition of "undue hardship" set forth in the New York City Human Rights Law (NYCHRL).[114] The latter is more akin to the clarified rule under *Groff*.

Litzman was denied a religious accommodation because the NYPD required its officers to be certified to use a respirator as part of its Chemical Ordinance, Biological and Radiological Awareness Training Program (CBRN), which is impossible to do with facial hair.[115] While the Department's decreased efficiency due to plaintiff's lack of CBRN certification constituted "more than a de minimis cost," it failed to satisfy the NYCHRL's more "rigorous definition of an employer's 'undue hardship' as 'an accommodation requiring significant expense or difficulty[.]'"[116] This was because the employer had not provided "details about the costs of accommodation and other individuals who may seek a similar accommodation," and the court could not "conclude that Defendants would accrue significant expense or difficulty if Plaintiff joined the 30% of NYPD officers who are not CBRN certified or those who qualify for a medical exemption . . . ."[117] This case demonstrates how *Groff* will make it easier for an employee to obtain a religious accommodation under the undue hardship standard.

While *Litzman* still resulted in the employee being accommodated due to the more demanding standard in the NYCHRL, such accommodations are the exception and not the rule in pre-*Groff* jurisprudence. For example, in 2013, the Fifth Circuit upheld an undue hardship defense against a Sikh federal employee's request to wear a three-inch dulled kirpan blade to work at the Internal Revenue Service.[118] The court was unpersuaded by the fact that other objects in the workplace such as scissors and box cutters were sharper than the kirpan, and it instead focused on the minimal daily burden on the security officers who would have to determine whether the blade was sharp

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[114] No. 12 CIV. 4681 HB, 2013 WL 6049066, at *6-7 (S.D.N.Y. Nov. 15, 2013).

[115] *Id.* at *2.

[116] *Id.* at *6-7 (citing N.Y.C. Admin Code Section 8—107(3)(b)).

[117] *Id.* at *7.

[118] Tagore v. United States, 735 F.3d 324, 329-30 (5th Cir. 2013).

or dull.[119] While the Religious Freedom Restoration Act (RFRA) would have permitted the kirpan, the court said, Title VII's gutted standard contained no such requirement.[120] The reasoning of this and similar cases fails under *Groff*.[121]

A pending garb case to watch in which *Groff*'s elevated undue hardship standard may be dispositive is *Brown v. Delaware Department of Services for Children*. There, the employer terminated three Muslim youth rehabilitation counselors and caused another to resign because of their religiously required hijabs.[122] This was despite the fact that visitors, contractors, and other employees in the facility were permitted to wear hijabs, and the women had volunteered to wear numerous alternative hijabs that would have eliminated their employer's safety concerns.[123] Under *Groff*'s undue hardship analysis, the employer cannot ignore these factors. A summary judgment motion in the case is still pending.[124]

2. Religious Absences

In religious absence cases, courts have denied accommodations for a wide variety of improper reasons, including de minimis economic burdens,[125] the inconvenience of finding other employees to cover shifts,[126] the necessity of

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[119] *Id.* at 326, 330.

[120] *Id.* at 330; *see also* EEOC v. GEO Grp., Inc., 616 F.3d 265, 269 (3d Cir. 2010) (concluding that it was an undue hardship to permit Muslim prison employees to wear their khimars because it would require the prison to expend "*some* additional time and resources") (emphasis added); *Camara*, 292 F. Supp. 3d at 1331-32 (finding undue hardship because the sight of a woman wearing a hijab might harm the business in light of "negative stereotypes and perceptions about Muslims"); Webb v. City of Philadelphia, 562 F.3d 256, 260-62 (3d Cir. 2009) (finding undue hardship to permit police officer to wear hijab on the job because it would threaten public perception of police department's religious neutrality).

[121] *Groff*, 143 S. Ct. at 2289-90, 2293 nn.13-14, 2294.

[122] Brown v. Del. Dep't of Servs. for Child., 1:20-cv-01048, ECF No. 57 at 4, 9, 7 (D. Del. Jan. 9, 2023).

[123] *Id.* at 3, 11-12.

[124] *Id.* at ECF Nos. 50 and 55.

[125] Cook v. Chrysler Corp., 981 F.2d 336, 339 (8th Cir. 1992) (concluding that it constituted an undue hardship for Chrysler Corporation to pay $1,500 annually for a reduced benefit package to permit Seventh Day Adventist to observe the Sabbath).

[126] *Walmart Stores East, L.P.*, 992 F.3d at 659-60 (concluding that it would be an undue hardship for America's largest private employer to facilitate voluntary shift trading to accommodate Sabbath observance of Seventh Day Adventist).

paying a minimal amount of overtime,[127] and bias against accommodation.[128] None of these constitutes an undue hardship under *Groff*.[129]

Another common pre-*Groff* reason for finding "undue hardship" in religious absence cases was employee morale.[130] For example, in *Aron v. Quest Diagnostics*, the Third Circuit affirmed the district court's grant of summary judgment to an employer that failed to accommodate an Orthodox Jew's request to be exempt from Saturday work requirements because it would "negatively affect employee morale."[131] And in *EEOC v. JBS USA, LLC*, the District of Colorado concluded that the employer met its burden of demonstrating it would be a de minimis cost to accommodate Muslim employees' request for a meal break coinciding with sunset during Ramadan because of the possible effect on employee morale when the employees' co-workers preferred a "late break" and became "more tired and hungry" when they had an earlier break.[132] Under *Groff*, such impacts are insufficient without any accompanying substantial cost on the business. Even the Solicitor General agreed at oral argument that impacts on co-workers' morale alone are not enough to constitute undue hardship.[133]

Pending religious absence cases to watch in which the heightened undue hardship standard may be dispositive include *Podell v. Whitworth* and *Cassell v. SkyWest*. In *Podell*, a Jewish applicant for a police officer position who could not attend pre-employment processing due to his Sabbath observance was denied an alternative date by the U.S. Department of Defense and

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[127] El-Amin v. First Transit, Inc., No. 1:04-cv-72, 2005 WL 1118175, at *8 (S.D. Ohio May 11, 2005) (finding that paying an employee two hours of overtime to accommodate a religious practice exceeded a de minimis cost).

[128] Brener v. Diagnostic Ctr. Hosp., 671 F.2d 141, 143-44 (5th Cir. 1982) (denying Orthodox Jew's request to change shifts because accommodation would deprive other employees of "their shift preference at least partly because they do not adhere to the same religion as [plaintiff]").

[129] *Groff*, 143 S. Ct. at 2295-96.

[130] EEOC v. JBS USA, LLC, No. 10CV318, 2013 WL 6621026, at *19 (D. Neb. Oct. 11, 2013) (finding that modifying Muslim employees' break schedule to permit daily prayer constituted undue hardship because, inter alia, the "extra breaks could have a negative impact on employee morale"); *Weber*, 199 F.3d at 274 ("The mere possibility of an adverse impact on co-workers" constituted undue hardship when truck driver's religious beliefs prevented him from being accompanied by female employee).

[131] 174 F. App'x 82, 83 (3d Cir. 2006).

[132] 339 F. Supp. 3d 1135, 1182 (D. Colo. 2018).

[133] Tr. of Oral Argument at 102:4-13, Groff v. DeJoy, 22-174 (Apr. 18, 2023) ("Mere coworker grumbling or resentment that someone else is getting an exemption from a neutral policy is not sufficient and cannot factor into the analysis of undue hardship. That's equally true for actual actions like quitting or transferring if it's motivated by just being unhappy that there's a religious accommodation requirement out there or by actual religious animus.").

eventually refused employment.[134] The action is currently stayed while the parties engage in settlement talks.[135]

*Cassell v. SkyWest* is a Title VII case arising from a Seventh Day Adventist pilot's claim that an airline refused to hire him because of his Sabbath observance.[136] While the parties are currently in settlement talks, the court is poised to open discovery for a limited period on the topic of whether accommodating the pilot would impose substantial costs on the airline in light of *Groff*.[137]

3. Religious Speech

While the Solicitor General mentioned religious speech as the third bucket of common accommodation requests, the oral argument, briefing, and eventual opinion in *Groff* focused less on this category and contained little analysis of whether decisions in this area constituted a major casualty of *Hardison*, were appropriately decided, or both. This may be because a smaller percentage of religious accommodation claims prior to *Groff* involved speech. It may also be because religious speech by its nature directly implicates the rights of others in the workplace, making it a tougher needle to thread for employers and courts, regardless of the standard used to determine undue hardship.

For example, in *Peterson v. Hewlett-Packard Company*, a Christian employee was fired after he refused to remove from his cubicle Scripture condemning homosexuality.[138] He had posted the verses in response to his employer's display of diversity posters, including one that said "Gay."[139] The Ninth Circuit concluded that accommodating the employee's religious speech by permitting him to continue to display the Scripture would be an undue hardship for the employer because the speech constituted harassment of the employee's co-workers.[140] Moreover, the court found that the employee's other requested accommodation—Hewlett-Packard removing its diversity poster—would also be an undue hardship, as it would infringe on the

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[134] Second Amended Compl., Podell v. Whitworth, 2:22-cv-03505, ECF No. 21 (E.D. Pa. Nov. 29, 2022).

[135] Order Staying Action Pending Settlement Discussions, Podell v. Whitworth, 1:23-cv-01025, ECF No. 63 (E.D. Va. Sept. 22, 2023).

[136] Cassell v. SkyWest, 2:19-cv-00149 (D. Utah filed Mar. 4, 2019).

[137] *Id.* at ECF No. 144.

[138] 358 F.3d 599, 602 (9th Cir. 2004).

[139] *Id.*

[140] *Id.* at 608.

employer's ability to promote diversity and encourage goodwill among its employees.[141]

While *Groff* certainly heightens the standard for employers to deny religious accommodations to employees with religious speech claims, the impact it will have on cases in which the speech is potentially harassing or violative of another workplace policy is uncertain. The factual question of whether the impact is mere grumbling by fellow employees or customers or something more substantial will certainly play a role. Also pertinent will be the tendency of courts to find undue hardship when an accommodation could expose employers to liability under other statutes, as discussed in the next section on newer types of accommodation requests.[142] Employees may seek recovery under other theories of liability if a competing workplace policy or law or the

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[141] *Id.*; *see also* Swartzentruber v. Gunite Corp., 99 F. Supp. 2d 976, 979 (N.D. Ind. 2000) (holding that allowing employee to uncover his religiously inspired KKK "Firey Cross" tattoo constituted an undue hardship as violative of the employer's racial harassment policy); Ervington v. LTD Commodities, LLC, 555 Fed. App'x 615, 618 (7th Cir. 2014) (finding employer "was not required to accommodate [the employee's] religion by permitting her to distribute pamphlets offensive to other employees"); Mitchell v. Univ. Med. Ctr., Inc., 2010 U.S. Dist. LEXIS 80194, at *22-23 (W.D. Ky. Aug. 9, 2010) (holding that allowing employee to have religious conversations with co-workers about the end of the world and the Antichrist would impose an undue hardship as violative of the workplace harassment policy); Chalmers v. Tulon Co. of Richmond, 101 F.3d 1012, 1021 (4th Cir. 1996) (determining that employer was not required to accommodate employee's religious need to send harassing letters to co-workers accusing them of immoral behavior); Wilson v. U.S. W. Commc'ns, 58 F.3d 1337, 1339-40 (8th Cir. 1995) (finding employer offered pro-life employee reasonable accommodations by asking her to cover button depicting fetus while at work, only wear it in her cubicle, or wear a similar button without a fetus, when other employees found button disturbing and there was a 40 percent decline in productivity); Knight v. Conn. Dep't of Public Health, 75 F.3d 156, 164 (2d Cir. 2001) (holding that permitting state sign language interpreter and nurse consultant to evangelize while servicing clients "would jeopardize the state's ability to provide services in a religion-neutral matter"). *But see* Hickey v. State Univ. of N.Y. at Stony Brook Hosp., No. 10-CV-1282, 2012 WL 3064170, at *9 (E.D.N.Y. July 27, 2012) (finding no undue hardship in permitting employee to wear "I <3 Jesus" lanyard because Title VII's religious accommodation provision does not violate the Establishment Clause); Banks v. Serv. Am. Corp., 952 F. Supp. 703, 705, 709, 710 (D. Kan. 1996) (holding there was no undue hardship in allowing food service workers to say "God bless you" to their patrons because undue hardship requires more than mere grumblings, customers could choose to avoid plaintiffs, and there was no evidence that a boycott by objectors would have any impact on the profitability of the business).

[142] *E.g.*, Yeager v. FirstEnergy Generation Corp., 777 F.3d 362, 363 (6th Cir. 2015) ("[E]very circuit to consider the issue" has held "that Title VII does not require an employer to reasonably accommodate an employee's religious beliefs if such accommodation would violate a federal statute.") (citing cases).

denial of the accommodation itself involves a violation of the Constitution or RFRA.[143]

One case to watch in this area is the appeal in *Carter v. Transport Workers Union of America Local 556*. The plaintiff, a Southwest Airlines employee, secured a jury verdict in her favor in a Title VII accommodation case over her religious speech last year.[144] The flight attendant was fired for posting pro-life messages on her personal Facebook page and sending them to her union president.[145] While acknowledging the "de minimis" test in the jury instruction, the court in *Groff*-like fashion stated that undue hardship requires more than just demonstrating "any cost or any disruption or inconvenience to the business."[146] Over the defendant's objection, it also declined to adopt an instruction about the role of employee morale and said that undue hardship must be "either in terms of financial costs or disruption of the business."[147] The court later denied the defendant's motion for a new trial,[148] and the defendant appealed from the court's entry of the verdict.[149] Undue hardship will likely be a focus of the appeal, and Southwest and TWU will have to fight an uphill battle to justify the flight attendant's termination. Nevertheless, Southwest may highlight the trial court's failure to acknowledge that employee morale may be considered under *Groff* if it impacts the conduct of the business. Southwest's brief in the appeal is due in October.[150]

### *B. Newly Emerging Accommodation Requests*

*Groff* also has implications for other kinds of religious accommodation requests that are less reflected in the current body of case law and that often involve sensitive and controversial issues in today's workplace. Such

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[143] Kennedy v. Bremerton Sch. Dist., 991 F.3d 1004 (9th Cir. 2017) (holding it would be an undue hardship to accommodate plaintiff football coach's request to offer private prayers at 50-yard line following games due to Establishment Clause violation and affirming denial of summary judgment on free speech and free exercise claims), rev'd, 142 S. Ct. 2407 (2022) (holding that preventing employee's prayer violated the First Amendment).

[144] Jury Verdict, Carter v. Transp. Workers Union of Am. Local 556, 3:17-cv-02278, ECF No. 348 (N.D. Tex. July 14, 2022).

[145] Carter v. Transp. Workers Union of Am. Local 556, 353 F. Supp. 3d 556, 565 (N.D. Tex. 2019).

[146] Jury Instructions at 17-18, Carter v. Transp. Workers Union of Am. Local 556, 3:17-cv-00278, ECF No. 343 (N.D. Tex. July 14, 2022).

[147] *Id.*

[148] Order Denying Mot. for a New Trial, Carter v. Transp. Workers Union of America Local 556, 3:17-cv-00278, ECF No. 409 (Apr. 24, 2023).

[149] Carter v. Local 556, appeal filed, 23-10008 (5th Cir. Jan. 5, 2023).

[150] *Id.* at ECF No. 82.

requests—involving the use of preferred pronouns, vaccination mandates, and the provision of pharmaceutical products—are becoming more common and are no less included within Title VII's protections than the traditional requests. *Groff*'s directives regarding the higher standard and impacts on co-workers are likely to play a crucial role in these contexts. Employers' competing obligations under other valid federal and state laws, however, may limit *Groff*'s applicability in some cases.

1. Pronouns

Religious employees are increasingly seeking religious exemptions from requirements that they use the preferred pronouns of other individuals in their workplaces. This area is an offshoot of the religious speech bucket. No court has yet ruled on this issue under *Groff*'s standard, but in July, the Seventh Circuit vacated its opinion and judgment in one such case and remanded for the district court to apply the clarified standard to the religious accommodation claim.[151]

In *Kluge v. Brownsburg Community School Corporation*, a Christian high school music teacher in Indiana requested an accommodation to refer to his students by their last names only due to his religious objection to the use of students' preferred pronouns where they did not correspond to their sex.[152] After initially granting him the accommodation, the school later rescinded it, citing complaints from students and faculty.[153] Kluge was forced to resign and sued under Title VII.[154]

The district court asserted that "refusing to affirm transgender students in their identity can cause emotional harm" and that such harm causes the defendant to incur "a more than de minimis cost to its mission to provide adequate public education that is equally open to all."[155] It further held that "the law [did] not require" the school to "propose an alternative accommodation, or to engage in further discussions" with Kluge, and that the threat of a Title IX lawsuit brought by a transgender student also constituted an undue hardship.[156] The Seventh Circuit affirmed,[157] but then vacated its opinion

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[151] Order Vacating Op. and Remanding to District Ct., Kluge v. Brownsburg Cmty. School Corp., 21-2475, ECF No. 83 (7th Cir. July 28, 2023).

[152] Kluge v. Brownsburg Cmty. Sch. Corp., 548 F. Supp. 3d 814 (S.D. Ind. 2021).

[153] *Id.* at 823, 829, 835.

[154] *Id.* at 831.

[155] *Id.* at 845-46.

[156] *Id.* at 839-40, 846.

[157] Kluge v. Brownsburg Cmty. School Corp., 64 F.4th 861 (2023).

after *Groff* came out. On remand, the district court's decision may turn on whether the affected students' alleged emotional harms substantially impact the "overall context" of the school's "business," whether bias towards Kluge's beliefs or religious accommodation in general motivated the failure to accommodate, and the actual threat of Title IX liability. The court's assertion that the school had no duty to explore other possible accommodations is no longer viable under *Groff*.[158]

A similar fact pattern but different outcome occurred in the case of *Meriwether v. Hartop* in 2021. There, the Sixth Circuit denied a public college's motion to dismiss in the case of a Christian professor who also used a last-names-only policy with respect to his transgender students.[159] While *Meriwether* was a First Amendment case and involved different legal standards, it is still instructive in this context since both free speech and Title VII accommodation claims require courts to engage in a balancing inquiry that analyzes the employer interests at stake. In contrast to the district court in *Kluge*, however, the Sixth Circuit found that the teacher's use of one transgender student's last name did not "inhibit[] his duties in the classroom," "hamper[] the operation of the school," or deny the transgender student "any educational benefits."[160] Had *Meriwether* been a Title VII case, it is doubtful the court would have found undue hardship, even under the de minimis standard.

Another line of reasoning in *Meriwether* concerned neutrality. Neutrality is part of the free exercise inquiry, since laws that burden religious exercise must be neutral and generally applicable or pass strict scrutiny to be valid.[161] Neutrality is also pertinent to religious accommodation requests under *Groff*, since bias or hostility towards religious beliefs cannot constitute undue hardship as a matter of law.[162] The *Meriwether* court found the professor's neutrality allegations to be sufficiently pled, as evidenced by statements from university officials (including that religion "oppresses students," that Christian professors like plaintiff "should be banned" from teaching Christianity courses, and that plaintiff's beliefs were akin to "religiously motivated racism or sexism").[163] The court also inferred potential hostility from the university's

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[158] *Groff*, 143 S. Ct. at 2296.
[159] Meriwether v. Hartop, 992 F.3d 492 (6th Cir. 2021).
[160] *Id.* at 511.
[161] Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 877-78 (1990).
[162] *Groff*, 143 S. Ct. at 2296.
[163] *Meriwether*, 992 F.3d at 512-13.

rescission of its last-names-only accommodation.[164] Under this reasoning, Kluge's rescinded accommodation could become relevant to the undue hardship inquiry on remand.

In another pronoun case from earlier this year, the plaintiff's failure to accommodate claim under Title VII survived a motion to dismiss over her employer's undue hardship defense, even prior to the Supreme Court's decision in *Groff*.[165] The defendant argued that it would pose an undue hardship to permit the Christian plaintiff to decline to refer to her co-workers by their preferred pronouns because it would expose it to Title VII liability.[166] The court nonetheless found that "the complaint alone does not demonstrate that Defendant could not reasonably accommodate Plaintiff's beliefs without undue hardship."[167] This aligns with *Groff*'s reasoning that employers cannot automatically reject proposed accommodations when other anti-discrimination laws and regulations are implicated; they must still try to accommodate.[168] Defendants in that case continued to assert an undue hardship in their answer,[169] and a trial is currently set for April 2024.[170]

2. Vaccination

One area in which *Groff* could have a substantial effect is in litigation related to vaccination requirements. During the Covid-19 pandemic, these cases proliferated across the country as religious adherents of all kinds sought and were often denied religious exemptions to employer vaccine mandates. While many of these mandates are no longer in effect due to the pandemic's conclusion, the litigation continues as terminated employees seek damages and reinstatement from their lost employment.

One court has already ruled in favor of an employee under *Groff*'s higher bar. In *Payne v. St. Charles Health System*, the District of Oregon held that it would not be an undue hardship to allow plaintiff, a Christian facilities supervisor with religious objections to his hospital employer's vaccine mandate,

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[164] *Id.* at 515.

[165] Haskins v. Bio Blood Components, 1:22-cv-586, 2023 WL 2071483, at *3 (W.D. Mich. 2023).

[166] *Id.* at *2.

[167] *Id.* at *3.

[168] *Groff*, 143 S. Ct. at 2296.

[169] Answer, Haskins v. Bio Blood Components, 1:22-cv-586, ECF No. 24 (W.D. Mich. Mar. 3, 2023).

[170] Second Am. Case Management Order, 1:22-cv-586, at ECF No. 29 (W.D. Mich. May 18, 2023).

to wear an N-95 mask and engage in antibody testing in lieu of vaccination.[171] The court rejected the employer's argument that monitoring plaintiff's compliance with such accommodations would have constituted more than a de minimis hardship, due to *Groff*'s more exacting standard.[172]

*New Yorkers for Religious Liberty v. City of New York* (*NYFRL*), consolidated with *Kane v. de Blasio*, was pending before the Second Circuit when the Supreme Court issued its decision in *Groff*. The case challenged the process by which the City of New York denied thousands of city employees' requests for religious accommodations to its vaccination mandate.[173] The employers' "undue hardship" findings in that case were particularly puzzling. For example, one Seventh Day Adventist plaintiff already held a remote teaching position instructing medically fragile students via an online classroom before the vaccine mandate even went into effect.[174] Nevertheless, she was repeatedly denied the accommodation of remote work, provided to other teachers whose religious exemption requests were granted, because of a conclusory finding of "undue hardship."[175] She was eventually terminated.[176] Another plaintiff was a paramedic who worked unvaccinated through the worst of the pandemic (including performing lifesaving procedures on a cardiac victim) and was discharged for her religious objections to the vaccine during a staffing shortage because of "the potential for undue hardship."[177] This does not satisfy the de minimis standard, let alone *Groff*'s.

*NYFRL* was brought as a First Amendment case, but Title VII became relevant when the Second Circuit struck down the standards that the City of New York used to assess accommodation requests as violative of the First Amendment and instructed it to reassess all plaintiffs' requests under the standards set forth in Title VII.[178] Thereafter, a Citywide Panel denied most requests under the "more than a de minimis cost" standard, despite the

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[171] No. 6:22 CV 01998-MK, 2023 WL 4711095, at *3 (D. Or. July 6, 2023).

[172] *Id.*

[173] New Yorkers for Religious Liberty v. City of New York, 22-1801 (2d Cir. argued Feb. 8, 2022).

[174] Consolidated Am. Compl. ¶¶ 690-731, Keil v. City of New York, 2022 U.S. Dist. LEXIS 154260 (S.D.N.Y. Aug. 26, 2022) (1:21-cv-07863), appeal argued sub nom. New Yorkers for Religious Liberty v. City of New York, 22-1801 (2d Cir. Feb. 8, 2023).

[175] *Id.*

[176] *Id.*

[177] Decls. of Krista O'Dea, New Yorkers for Religious Liberty v. City of New York, 1:22-cv-00752, ECF Nos. 15 and 53 (E.D.N.Y. Sept. 6, 2022), appeal argued, 22-1801 (2d. Cir. Feb. 8, 2023).

[178] Kane v. de Blasio, 19 F.4th 152, 176-77 (2d Cir. 2021).

architect of the Citywide Panel admitting that none of the City's departments provided any individualized assessment of undue hardship.[179] Oral argument in *NYFRL* occurred in February, and the Second Circuit has yet to rule.

In *Leigh v. Artis-Naples, Inc.*, Artis-Naples fired three musicians from their tenured positions with the Naples Philharmonic after denying their requests for religious exemptions from its vaccination mandate.[180] The employees had regularly tested and masked with all other Philharmonic members during the 2020-2021 performance season when there was no mandate in place.[181] In the subsequent Title VII suit, the district court found that plaintiffs made a prima facie case of discrimination but denied their motion for a preliminary injunction under Title VII because "the undue hardship test is 'not a difficult threshold to pass.'"[182] Artis-Naples had "met its minimal burden" of establishing undue hardship, and plaintiffs had not submitted enough evidence to show they could overcome the defense.[183] An amended complaint[184] and answer[185] have been filed in this case, and *Groff*'s tightened standard will likely influence the next stages of the litigation given the way the district court analyzed undue hardship.

For vaccination cases in which religious exemptions were denied pursuant to valid state laws, *Groff* may be less relevant. For example, in *Cagle v. Weill Cornell Medicine*, decided just one day after *Groff*, the Southern District of New York considered a Title VII claim of religious discrimination brought by a healthcare employee subject to a statewide healthcare employee vaccination mandate.[186] The mandate, which was challenged and upheld under the First Amendment in *We the Patriots USA v. Hochul*,[187] provided for medical but not religious exemptions.[188] The court found that requiring the employer to provide a religious accommodation constituted an undue hardship even under *Groff* because it would violate state law.[189] It is likely that other employers or courts considering religious accommodations under valid state

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[179] Br. & Special App., New Yorkers for Religious Liberty v. City of New York, 22-1801, ECF No. 114 at 11, 13, 54 (2d Cir. argued Feb. 8, 2023).

[180] No. 2:22-cv-606-JLB, 2022 WL 18027780, at *1 (M.D. Fla. 2022).

[181] *Id.* at *10.

[182] *Id.* at *8 (quoting *Webb*, 562 F.3d at 260).

[183] *Id.*

[184] Amended Compl., No. 2:22-cv-606, ECF No. 67 (M.D. Fla. Apr. 21, 2023).

[185] Answer, No. 2:22-cv-606, at ECF No. 73 (M.D. Fla. June 23, 2023).

[186] No. 22-CV-6951 (LJL), 2023 WL 4296119, at *4 (S.D.N.Y. June 30, 2023).

[187] 17 F.4th 266 (2d Cir. 2021), cert. denied sub nom. Dr. A. v. Hochul, 142 S. Ct. 2569 (2022).

[188] *Id.* at *1.

[189] *Id.* at *4 n.2.

mandates will reach a similar result, regardless of *Groff*'s higher standard. This is because, as discussed earlier, courts generally agree that requiring an employer to violate federal or state law to accommodate an employee is an undue hardship.[190]

3. Pharmaceutical Products

Religious objections to the provision of various pharmaceutical products, including but not limited to contraceptives and gender-reassignment drugs, is one area of accommodation not included in the traditional buckets that has become increasingly common and perhaps even more acrimonious in the aftermath of the 2022 decision in *Dobbs v. Jackson Women's Health Organization*.[191]

One case to watch is *Kloosterman v. Metropolitan Hospital*, which alleges both First Amendment and Title VII violations for a hospital's failure to accommodate a Christian physician assistant's religious objection to providing gender-reassignment drugs when accommodations were given to other employees for secular reasons.[192] *Groff*'s higher standard and the Supreme Court's instruction that antipathy towards religion cannot be an undue hardship may be implicated in this case. This is because the plaintiff alleges that the hospital showed hostility towards her request and that it could have accommodated her without even a de minimis cost.[193] The hospital argues that undue hardship exists because accommodating the plaintiff would violate Section 1557 of the Patient Protection and Affordable Care Act preventing discrimination on the basis of sex, including gender identity.[194] The plaintiff responds that the operative version of Section 1557 at the time of her termination protected religious healthcare providers and did not threaten any penalties on healthcare facilities that accommodated religious objections to

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[190] *E.g.*, *Yeager*, 777 F.3d at 363; Weber v. Leaseway Dedicated Logistics, Inc., No. 98-3172, 1999 WL 5111, at *1 (10th Cir. Jan. 7, 1999); Sutton v. Providence St. Joseph Med. Ctr., 192 F.3d 826, 830-31 (9th Cir. 1999); United States v. Bd. of Educ., 911 F.2d 882, 891 (3d Cir. 1990); Baltgalvis v. Newport News Shipbuilding Inc., 132 F. Supp. 2d 414, 419 (E.D. Va. 2001); Does 1-2 v. Hochul, No. 21-CV-5067 (AMD) (TAM), 2022 WL 4637843, at *15 (E.D.N.Y. Sept. 30, 2022).

[191] 142 S. Ct. 2228 (2022) (overturning *Roe v. Wade*).

[192] Compl., Kloosterman v. Metro. Hosp., 1:22-cv-00944-JMB-SJB, ECF No. 1 at 2 (W.D. Mich. Oct. 11, 2022).

[193] *Id.* at 2-3, 143.

[194] Br. in Support of Def. U. Michigan Health West's Mot. to Dismiss Pl.'s Corrected First Amended Compl., Kloosterman v. Metro. Hosp., No. 1:22-cv-00944-JMB-SJB, ECF No. 37 at 11-12 (W.D. Mich. Feb. 20, 2023).

gender-transition drugs and procedures.[195] The district court recently denied the hospital's motion to dismiss plaintiff's disparate treatment claims under Title VII, holding that Kloosterman sufficiently alleged that her employer failed to accommodate her and asserting that whether the employer had an "undue hardship" should be resolved at summary judgment.[196]

CVS is facing lawsuits in Texas, Kansas, and Virginia over its new religious accommodation policy with respect to the prescription of contraceptives—at least two of which may hinge on *Groff*. All three were filed by Christian nurse practitioners whose sincerely held religious beliefs prevent them from prescribing contraceptive and abortifacient drugs.[197] CVS had previously accommodated each plaintiff, for six and a half, ten, and three years, respectively—permitting them to refer patients seeking these prescriptions to another provider—until it implemented a new policy denying all religious exemption requests.[198] CVS's change in policy came after it deemed treatment for pregnancy prevention an "essential" service.[199] In all three cases, the plaintiffs were terminated after they refused to abandon their sincerely held religious beliefs,[200] and in two of them, CVS claimed undue hardship as an affirmative defense and argued that accommodating the plaintiff would cause it more than a de minimis burden.[201]

*Groff*'s new standard will likely figure prominently in the ensuing motions practice and trials, especially since plaintiffs claim there was no undue hardship for the years they were accommodated,[202] and CVS now deems the provision of pregnancy prevention treatment to be imperative to the functioning of its business, no exceptions. CVS's automatic revocation of each plaintiff's accommodation appears to violate *Groff*'s prohibition of discrimination

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[195] Br. in Opp'n to Defs. Pai, Booker, Cole, Pierce, and Smith's Mot. to Dismiss Pls.' Corrected First Amended Compl., Kloosterman v. Metro. Hosp., No. 1:22-cv-00944-JMB-SJB, ECF No. 55 at 33 (W.D. Mich. May 9, 2023).

[196] Order Granting in Part and Denying in Part Defs.' Mots. to Dismiss, Kloosterman v. Metro Hosp., No. 1:22-cv-00944-JMB-SJB, ECF No. 68 (W.D. Mich. Sept. 20, 2023).

[197] Compl., Strader v. CVS Health Corp., 4:23-cv-00038-P, ECF No. 1 (N.D. Tex. Jan. 11, 2023) ("Strader"); Compl., Schuler v. MinuteClinic Diagnostic of Kan., P.A., 2:22-cv-02415-KHV-KGG, ECF No. 4 (D. Kan. Oct. 13, 2022) ("Schuler"); Am. Compl., Casey v. MinuteClinic Diagnostic of Va., LLC, 1:22-cv-01127-PTG-WEF, ECF No. 48 (E.D. Va. May 18, 2023) ("Casey").

[198] Strader at 1; Schuler at 7, 9; Casey at 1, 6-7.

[199] Strader at 7; Schuler at 8.

[200] Strader at 2; Schuler at 9; Casey at 1.

[201] Answer, *Strader*, 4:23-cv-00038-P, ECF No. 25 at 19-20 (N.D. Tex. Apr. 7, 2023); Answer, *Schuler*, 2:22-cv-02415-KHV-KGG, ECF No. 7 at 18-19, 22, 24 (D. Kan. Nov. 21, 2022).

[202] *E.g.*, Strader at 11.

against accommodation.[203] These denials require a more fulsome explanation of substantial costs to be viable under *Groff*.

Some states have regulations that require pharmacies to sell certain pharmaceuticals, or that compel the expedited provision of certain pharmaceuticals. To the extent such laws are valid, religious employees' ability to secure accommodations in such jurisdictions will depend on the cost to the employer of compliance with the law. *Groff*'s increased standard will certainly help plaintiffs in these kinds of cases, but the strictness of state laws will be highly relevant to the outcome.

For example, in 2007, the state of Washington implemented a health regulation requiring all pharmacies in the state to carry the emergency contraceptive drug Plan B and prohibiting any conscience-based referrals.[204] A Christian family that owned a pharmacy and several pharmacists brought suit challenging the regulation on First Amendment grounds in *Stormans v. Wiesman*.[205] While the district court found that the regulation violated the First Amendment,[206] the Ninth Circuit upheld the regulation,[207] and the Supreme Court denied certiorari.[208]

In his dissent from the denial of certiorari, Justice Alito highlighted the predicament of employees with religious objections to dispensing Plan B.[209] While the regulation did not require pharmacists themselves to provide contraceptives in violation of their beliefs, "if a pharmacy wishes to employ a pharmacist who objects to dispensing a drug for religious reasons, the pharmacy must keep on duty at all times a second pharmacist who can dispense those drugs," which was an expense "few pharmacies are likely to be willing to bear."[210] Indeed, courts have found this to be an undue hardship under *Hardison*'s standard.[211] Whether this constitutes an undue hardship under

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[203] *Groff*, 143 S. Ct. at 2296.

[204] Stormans, Inc. v. Wiesman, 794 F.3d 1064, 1071 (9th Cir. 2015).

[205] 854 F. Supp. 2d 925 (W.D. Wash. 2012).

[206] *Id.* at 975.

[207] *Stormans*, 794 F.3d at 1071.

[208] Stormans, Inc. v. Wiesman, 136 S. Ct. 2433 (2016).

[209] *Id.* at 2436 (Alito, J., dissenting).

[210] *Id.* (quoting Br. for National and State Pharmacists' Associations as Amici Curiae in Stormans, Inc. v. Wiesman, at 23-24, 136 S. Ct. 2433 (2016)).

[211] *E.g.*, *Brener*, 671 F.2d at 146 (finding that "hiring a substitute pharmacist, plainly would involve more than a de minimus [sic] cost"); Hellinger v. Eckerd Corp., 67 F. Supp. 2d 1359, 1365 (S.D. Fla. 1999) (finding that the need to hire an additional worker would constitute an undue hardship).

*Groff*'s standard will likely depend on the size and operating costs of the pharmacy.

At the time of the litigation in *Stormans*, Washington was the only state in the country implementing such a strict regulation. Other state rules provide for more leeway, which eases the predicament for religious employees. For example, in *Vandersand v. Wal-Mart Stores, Inc.*, Wal-Mart defended its failure to accommodate a Christian pharmacist with religious objections to dispensing contraceptives by pointing to a state regulation requiring pharmacies in Illinois to dispense emergency contraceptives without delay.[212] In denying Wal-Mart's motion to dismiss, the court noted that the law did not require individual pharmacists to deliver contraceptives without delay and noted that it may have been possible for Wal-Mart to fulfill its regulatory duty "by other means," such as permitting another pharmacist to fill the relevant prescriptions.[213] Accordingly, while employers must take their obligations under all state and federal laws seriously, simply assuming without investigation that a competing statute forecloses accommodation violates *Groff*'s mandate to explore all possible accommodations.

## IV. CONCLUSION

*Groff* radically changed the way that employers and courts will review religious accommodation requests under Title VII. It did away with the "more than a de minimis cost" test of *Hardison*, while still keeping the precedent intact by replacing "de minimis" with a "substantial costs" standard discussed elsewhere in the same opinion. Besides being more stringent, this new rule also means that impacts on co-workers cannot be an undue hardship unless they also affect the business.

*Groff* also reinforced principles that have been in force since the inception of Title VII: antipathy to religion or to accommodation cannot form the basis for an undue hardship defense, the burden is on the employer to demonstrate its substantial costs, and employers must do more than just deny an employee's proffered accommodation.

Ultimately, *Groff* has the potential to affect numerous cases pending before the federal district and appellate courts, in traditional areas of religious garb, absences, and speech, and in less traditional areas of pronouns,

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[212] 525 F. Supp. 2d 1052, 1056 (C.D. Ill. 2007).

[213] *Id.*

vaccinations, and pharmaceuticals. The lower courts will continue to flesh out *Groff*'s contours, particularly with respect to how impacts on co-workers affect the conduct of the business and the intersection of religious accommodation requests and other state and federal laws. One thing is certain: undue hardship means what it says, and employers can no longer use it to shirk their responsibilities to religious employees under Title VII.

Other Views:

- Brief for Freedom from Religion Foundation as Amicus Curiae in Support of Respondent, Groff v. DeJoy, 143 S. Ct. 2279 (2023), *available at* https://ffrf.org/uploads/legal/22-174Brief.pdf.
- Brief for Americans United for Separation of Church and State and Lambda Legal Defense and Education Fund as Amici Curiae in Support of Respondent, Groff v. DeJoy, 143 S. Ct. 2279 (2023), *available at* https://www.au.org/wp-content/uploads/2023/04/AU-Amicus-Brief-Groff-v.-DeJoy-SCOTUS-3.30.23.pdf.
- *Supreme Court Goes Postal: A Rapid Response to Groff v. DeJoy*, ABA (July 18, 2023), *available at* https://www.americanbar.org/groups/crsj/events_cle/recent/supreme-court-goes-postal/.
- Ian Millhiser, *The other big decision handed down by the Supreme Court today, explained*, VOX, June 29, 2023, https://www.vox.com/scotus/2023/6/29/23778728/supreme-court-samuel-alito-groff-dejoy-religion-accomodations-workplace.
- Kenneth C. Broodo & John R. FitzGerald, *Religious Accommodation for Employees: The Potential Impact and Likely (Unintended) Consequences of SCOTUS' Groff v. DeJoy Decision*, FOLEY INSIGHTS, July 17, 2023, https://www.foley.com/en/insights/publications/2023/07/religious-accommodation-employees-scotus.

# THE LABOR LAW ENIGMA: ARTICLE III, JUDICIAL POWER, AND THE NATIONAL LABOR RELATIONS BOARD*

ALEXANDER MACDONALD**

*Axon Enterprises v. FTC*[1] wasn't supposed to be about labor law. In fact, it wasn't supposed to be about any area of substantive law. It seemed to be about only a dry jurisdictional issue: does a plaintiff challenging an agency's constitutionality have to exhaust the agency's internal procedures before going to court?[2] The Supreme Court ultimately said no.[3] And had the case ended there, its effect might have been muted.

But it didn't end there—not quite. In a spirited concurrence, Justice Clarence Thomas used the case as an opportunity to address a bigger issue: the very nature of judicial power.[4] He wrote that because of political, social, and historical developments, the rights of private parties have increasingly come to be adjudicated not by courts, but by administrative agencies.[5] These agencies take evidence, find facts, and interpret statutes.[6] More important, their decisions receive only the most cursory judicial review. In even serious cases, these decisions are effectively final.[7]

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[1] No. 21-86, slip op. at 1–2 (U.S. Apr. 14, 2023).

[2] *Id.* at 2.

[3] *Id.*

[4] *Id.* at 2–9 (Thomas, J., concurring).

[5] *Id.* at 4–6 (Thomas, J., concurring).

[6] *Id.* (Thomas, J., concurring).

[7] *See id.* at 1, 7–9 (Thomas, J., concurring).

That arrangement, Thomas wrote, clashes with Article III of the U.S. Constitution.[8] Article III vests all "judicial power" in courts.[9] Historically, judicial power was understood as the power to issue binding decisions affecting "core private rights"—i.e., life, liberty, and property.[10] Article III gave that power to federal courts—and only federal courts.[11] It left no room for the exercise of judicial power by agencies.[12] And yet, in modern practice, more and more cases have been shunted into internal agency processes, effectively allowing agencies to wield power over core private rights.[13] That is, agencies have come to wield the power denied them by Article III.[14]

Justice Thomas wasn't the first to raise these concerns: he was building on a groundswell of legal scholarship.[15] In recent years, scholars have increasingly questioned whether agency adjudication can be squared with Article III.[16]

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[8] *See id.* at 1 (Thomas, J., concurring) (expressing "grave doubts about the constitutional propriety of Congress vesting administrative agencies with primary authority to adjudicate core private rights with only deferential judicial review on the back end").

[9] U.S. CONST. art. III § 1. *See also* Martin v. Hunter's Lessee, 14 U.S. 304, 330 (1816) ("If, then, it is a duty of congress to vest the judicial power of the United States, it is a duty to vest the *whole judicial power*. The language, if imperative as to one part, is imperative as to all.").

[10] *Axon*, No. 21-86, slip op. at 3 (Thomas, J., concurring). *See also* Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1373 (2018) (explaining that Article III distinguishes between public rights and private rights, the latter of which may be adjudicated only by courts).

[11] *See Axon*, No. 21-86, slip op. at 3–9 (Thomas, J., concurring). *See also Oil States Energy*, 138 S. Ct. at 1373; Exec. Benefits Ins. Agency v. Arkison, 573 U.S. 25, 32–33 (2014).

[12] *See Axon*, No. 21-86, slip op. at 3–9 (Thomas, J., concurring). *See also Arkinson*, 573 U.S. at 33; PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 154 (2014) (explaining that the Constitution vests all judicial power in courts and leaves no room for binding adjudication by the executive).

[13] *See Axon*, No. 21-86, slip op. at 3–9 (Thomas, J., concurring). *Cf.* HAMBURGER, *supra* note 12, at 488 ("What once seemed a mere variation, however, has since become a central mode of governance—a full-scale alternative to the constitutionally established forms of government.").

[14] *See Axon*, No. 21-86, slip op. at 3–9 (Thomas, J., concurring).

[15] *See, e.g.*, Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 979–80 (2011); Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 569 (2007); Jennifer Mascott, *Constitutionally Conforming Agency Adjudication*, 2 LOYOLA U. CHI. J. REG. COMPLIANCE 22, 45 (2017); Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1727–70 (2012); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1247 (1994). *Cf.* Adam B. Cox & Emma Kaufman, *The Adjudicative State*, 132 YALE L.J. 1769, 1788 (2023) (describing groundswell of scholarship aimed at reviving "Article III essentialism").

[16] *See, e.g.*, Mascott, *supra* note 15, at 45; Lawson, *supra* note 15, at 1247; Merrill, *supra* note 15, at 980 ("The appellate review model, from this perspective, represents a major challenge: Is there a

And even more recently, litigants have seized on those doubts and challenged agency adjudication in court.[17] Those challenges have resulted in some startling victories, including a recent decision from the Fifth Circuit striking down aspects of the Securities and Exchange Commission's adjudicatory procedures.[18] And while no direct Article III challenge has yet reached the Supreme Court, one could soon.[19] The stage seems set for a decisive ruling.

Yet amid this debate, a puzzle presents itself. One agency perhaps best illustrates the Article III problem. This agency exercises broad power over private rights, and it does so almost exclusively through case-by-case adjudication.[20] But so far, it has escaped the notice of litigants. None of the new crop of challengers has confronted it with a claim under Article III. And all the while, it has continued to decide the rights of private parties,[21] often in

principled justification for what appears to be a violation of the plain requirements of the Constitution?").

[17] *See, e.g.*, Jarkesy v. SEC, No. 20-61007 (5th Cir. May 18, 2022) (holding that SEC's internal adjudicative process was unconstitutional); Sun Valley Orchards, LLC v. DOL, No. 1:21-cv-16625, 2023 BL 257772, at *6-7 (D.N.J. July 27, 2023) (considering and rejecting challenge to Department of Labor's H-2B visa enforcement mechanisms, including adjudication by an administrative official, because in the court's view that program involved public rather than private rights); Compl., C.S. Lawn & Landscaping, Inc. v. U.S. Dep't of Labor, Case No. 1:23-cv-01533 (D. Md. May 30, 2023) (arguing that DOL's administrative adjudication process for H-2B visa program violated Article III by giving a non-Article III decisionmaker power over core private rights).

[18] *Jarkesy*, No. 20-61007, slip op. at 5–15.

[19] *Cf.* Kalvis Golde, *Another Federal Agency Challenges Adverse Ruling by 5th Circuit*, SCOTUSBLOG (Mar. 31, 2023), https://www.scotusblog.com/2023/03/another-federal-agency-challenges-adverse-ruling-by-5th-circuit/ (noting that the Supreme Court will consider constitutional challenges to multiple agency structures next term, including the structures of the CFPB and the SEC).

[20] *See also* William B. Gould IV, *Politics and the Effect on the National Labor Relations Board's Adjudicative and Rulemaking Processes*, 64 EMORY L.J. 1501, 1505 (2015) (noting that the Board was originally designed as an "effective substitution" for courts through the "mechanism" of an "expert" administrative tribunal).

[21] *See, e.g.*, Daniel Wiessner, *NLRB Paves Way for Workers to Unionize Without Formal Elections*, REUTERS (Aug. 25, 2023), https://www.reuters.com/legal/government/nlrb-paves-way-workers-unionize-without-formal-elections-2023-08-25/ (reporting on Board decision authorizing union recognition without an election); Robert Iafolla, *Unions Score Big as NLRB Eases Path to Representation*, BLOOMBERG LAW (Aug. 25, 2023), https://news.bloomberglaw.com/daily-labor-report/unions-score-big-win-as-labor-board-resurrects-joy-silk-doctrine (same).

headline-grabbing cases.[22] It is, of course, the National Labor Relations Board.[23]

The Board is one of the oldest and, in some ways, most powerful independent agencies.[24] It sets labor policy for the entire country.[25] It decides which workers are protected, with whom they can organize, and when they can use their employer's property for that purpose.[26] It makes those decisions through a quasi-judicial process, developing its own legal "precedent."[27] And that precedent receives near-total deference in court.[28]

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[22] *Compare* Sean Redmond, *NLRB's* Cemex *Decision Denies Workers' Rights to Make Free and Fair Choice About Unions*, U.S. CHAMBER OF COMMERCE (Aug. 31, 2023), https://www.uschamber.com/employment-law/unions/nlrb-cemex-decision-denies-workers-rights-to-make-fair-choice-union (criticizing Board's decision to deny workers free choice over unionization), *with* Tascha Shahriari-Parsa, Cemex *Is a Big Change, but It's Not* Joy Silk, ONLABOR (Aug. 26, 2023), https://onlabor.org/cemex-is-a-big-change-but-its-not-joy-silk/ (arguing that *Cemex* benefits workers but does not go far enough).

[23] *Cf.* Nelson, *supra* note 15, at 601 (describing the Board as one of the more "adventurous" efforts to assign adjudicatory responsibility to agencies).

[24] *See* Theodore St. Antoine, *The NLRB, the Courts, The Administrative Procedures Act, and* Chevron*: Now and Then*, 64 EMORY L.J. 1529, 1538 (2015) (tracing judicial deference to Board's decisions predating the APA and *Chevron*).

[25] *See* Beth Israel Hosp. v. NLRB, 437 U.S. 483, 500 (1978) ("It is the Board on which Congress conferred the authority to develop and apply fundamental national labor policy.").

[26] *See* St. Antoine, *supra* note 24, at 1542–50 (surveying recent Board precedent and judicial review over a broad array of issues). *See also* The Atlanta Opera Inc., 372 N.L.R.B. No. 95, 2023 WL 4051664, at *20 (June 13, 2023) (adopting new test for determining when a worker is an "employee" protected by federal labor law and rejecting test adopted by federal courts); Cemex Constr. Materials Pac., LLC, 372 N.L.R.B. No. 130 (Aug. 25, 2023) (adopting new rule allowing union recognition without an election in a broader array of cases); NLRB Gen. Counsel Br. in Support of Exceptions, NLRB Case No. 10-CA-379843 (Apr. 28, 2023) (urging Board to overturn multiple recent precedents and arguing that the Board should require employers to allow workers to use employer email systems for organizing purposes).

[27] *See* Gould, *supra* note 20, at 1505–06 (describing Board's quasi-judicial proceedings).

[28] *See, e.g.*, 29 U.S.C. § 160(e), (f) (requiring courts to accept Board's factual findings when supported by "substantial evidence"); Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951) (explaining that a court must defer to Board's factual determinations if supported by substantial evidence even if the court would have weighed the evidence differently); NLRB v. Hearst Publications, 322 U.S. 111, 130 (1944) (treating the interpretation of statutory terms as merely part of the "administrative routine" of the Board and directing courts to defer), *abrogation on statutory grounds recognized in* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318 (1992); NLRB v. Curtin Matheson Sci., Inc., 494 U.S. 775, 778 n.2 (1990) (deferring to Board's interpretation of NLRA because the interpretation was "rational and consistent with the Act"); Stephens Media, LLC v. NLRB, 677 F.3d 1241, 1250 (D.C. Cir. 2012) (deferring to Board's conclusion that employee's secret tape recording was protected activity under the NLRA) ("As we have noted many times before, our role in reviewing an NLRB decision is limited.") (quoting Wayneview Care Ctr. v. NLRB, 664 F.3d 341, 348 (D.C. Cir. 2011)).

It is a puzzle, then, that the Board has so far avoided a challenge.[29] But the Board's relative safety may be temporary. The more the legal community starts to question agency adjudication, the more glaring the Board's status will become. Eventually, someone will realize that of all the federal agencies, the Board might be the one in most tension with Article III. And if Justice Thomas is right, that tension may be untenable.[30] The Board's very structure may be unconstitutional.

## I. ARTICLE III, JUDICIAL POWER, AND PRIVATE RIGHTS

The phrase "judicial power" is deceptively straightforward. It calls to mind the ordinary work of judges: applying law to facts.[31] But to the American founders, it meant something more specific.[32] It was the power to make binding decisions affecting "core private rights."[33] Core private rights were the rights held by people as individuals.[34] These rights did not come from government; they were prior to government.[35] They existed in the state of nature and survived the creation of civil society.[36] They were sometimes called

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[29] *Cf.* Michael C. Harper, *The Case for Limiting Judicial Review of Labor Board Certification Decisions*, 55 GEO. WASH. L. REV. 262, 317–18 (1987) (observing that a "broad" reading of Article III would call the Board's adjudicatory authority into question).

[30] *Cf.* Perez v. Mortgage Bankers Assn., 575 U.S. 92, 119 (2015) (Thomas, J., concurring) (explaining that judicial power was originally understood to require a court to exercise its independent judgment in interpreting and expounding the laws—without deference to the executive).

[31] *See* NLRB v. Robbins Tire & Rubber Co., 161 F.2d 798, 802 (5th Cir. 1947) (Waller, J., concurring) (citing one "generally used" definition: "the power of a court to decide and pronounce judgment and to carry it into effect between parties who bring the case before it for decision" (quoting Gentry v. Fry, 4 Mo. 120 (1835))); Nelson, *supra* note 15, at 559 (rejecting "easy equation" of judicial power with binding adjudication).

[32] *See Axon*, No. 21-86, slip op. at 3 (Thomas, J., concurring). *See also* Chapman & McConnell, *supra* note 15, at 1687 (tracing ban on executive exercise of judicial power to English common law and thought of Sir Edward Coke).

[33] *Axon*, No. 21-86, slip op. at 3 (Thomas, J., concurring); Nelson, *supra* note 15, at 563. *See also* HAMBURGER, *supra* note 12, at 2 (explaining that administrative power conflicts with private rights only when it exercises binding power).

[34] *Axon*, No. 21-86, slip op. at 3 (Thomas, J., concurring).

[35] *Id.*; Nelson, *supra* note 15, at 565–67.

[36] Nelson, *supra* note 15, at 567; HAMBURGER, *supra* note 12, at 330 (describing how natural-law theory influenced founders' understanding of separation of powers). *See also* JOHN LOCKE, SECOND TREATISE ON GOVERNMENT § 11.135 (Dover ed. 2002) (arguing that natural law—the law existing in a state of nature—remains in effect after people form civil societies).

individual rights, sometimes fundamental rights, sometimes natural rights.[37] But whatever the label, they could be taken away only by due process of law.[38]

In contrast to core private rights were "public rights."[39] Public rights were rights created by the government and belonged to the citizenry as a whole.[40] They included what we might today call licenses or privileges.[41] Classic examples were veterans' benefits, patents, and public land grants.[42] When the government distributed these privileges, it was often applying law to facts.[43] After all, it had to determine who qualified for what privilege.[44] But it was not depriving anyone of core private rights.[45] And for that reason, it was not exercising "judicial power."[46] Its activity could be more fairly described as legislative or executive.[47]

To the modern mind, that distinction may seem arbitrary. But the founders had good reasons for it—reasons owing mostly to the relative competencies of the three branches.[48] The legislative and executive branches were by

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[37] *See Axon*, No. 21-86, slip op. at 4 (Thomas, J., concurring) (explaining that private-rights doctrine developed from Lockean social-contract theory of natural rights).

[38] *See id.* (explaining that private rights, unlike public rights, could be abridged only through the exercise of judicial power by courts). *See also* John Harrison, *Jurisdiction, Congressional Power, and Constitutional Remedies*, 86 GEO. L.J. 2513, 2516 (1998) ("The measure of judicial involvement was private right."). *Cf. Hunter's Lessee*, 14 U.S. at 330 ("If, then, it is a duty of Congress to vest the judicial power of the United States, it is a duty to vest the *whole judicial power*. The language, if imperative as to one part, is imperative as to all.").

[39] *See, e.g.*, *Oil States Energy*, 138 S. Ct. at 1373 (explaining that Article III distinguishes between public and private rights); *Arkinson*, 573 U.S. at 32–33 (same); Nelson, *supra* note 15, at 565–72 (same).

[40] *Axon*, No. 21-86, slip op. at 4 (Thomas, J., concurring).

[41] *Id.*

[42] *See id.*; Merrill, *supra* note 15, at 950, 990; Nelson, *supra* note 15, at 557, 609; HAMBURGER, *supra* note 12, at 4 (listing examples of public rights).

[43] *See* Nelson, *supra* note 15, at 609.

[44] *See id.*

[45] *See* HAMBURGER, *supra* note 12, at 293 ("But generally executive power—the executive's 'public rights' as understood through much of the nineteenth century—was not a power to bind subjects, this being why it could be a realm of discretion defined and allowed by law.").

[46] *See Axon*, No. 21-86, slip op. at 4 (Thomas, J., concurring). *See also* HAMBURGER, *supra* note 12, at 191–92 (acknowledging that much proper executive and administrative activity involves applying law to facts, and that this activity does not conflict with the constitution).

[47] *See Oil States Energy*, 138 S. Ct. at 1373 (explaining that because public rights can be disposed of without judicial power, Congress has "wide latitude" to assign their adjudication to executive agencies); Nelson, *supra* note 15, at 567–68 (describing original justifications for different treatment of public rights); HAMBURGER, *supra* note 12, at 2 (explaining that executive may distribute public benefits without binding private parties and without conflicting with private rights).

[48] *See* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1150 (10th Cir. 2016) (Gorsuch, J.) (observing that the founders separated the branches into different spheres in part to "avoid the possibility of

their nature political.[49] They answered to broad constituencies and so had an incentive to please the greatest number of people.[50] That incentive made them good at designing and enforcing general rules.[51] But it also made them dangerous arbiters of individual rights.[52] The interests of the public could sometimes clash with the interests of individual people.[53] For example, while redistributive laws might be popular in a general sense, arbitrary redistribution could violate individual rights.[54] More viscerally, a heinous crime might cry out for punishment.[55] The public might demand that someone—anyone—take the blame. But that impulse could lead to arbitrary prosecution.[56]

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allowing politicized decisionmakers to decide cases and controversies"). *See also* Nelson, *supra* note 15, at 559, 624 (arguing that structural relationship among branches differed depending on which interests the government was acting on).

[49] *See* Nelson, *supra* note 15, at 571–72.

[50] *Id.*

[51] *See id.* at 597–98 (explaining that legislative power extended to regulating prospective conduct, and legislature could properly authorize agencies to issue prospective orders (e.g., cease-and-desist orders); but that different considerations came into account when imposing liability on individuals for private conduct) (citing Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287, 289 (1920); St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 50–54 (1936)).

[52] *See id.*; Appeal of Ervine, 16 Pa. 256, 268 (1851) (comparing relative competencies of legislature and judiciary and concluding that only judiciary could be trusted with protecting individual rights) ("But when individuals are selected from the mass, and laws are enacted affecting their property, without summons or notice, at the instigation of an interested party, who is to stand up for them, thus isolated from the mass, in injury and injustice, or where are they to seek relief from such acts of despotic power? They have no refuge but in the courts, the only secure place for determining conflicting rights by due course of law."). *Cf.* Mascott, *supra* note 15, at 42 (noting that presidential control over agency officials is in "tension" with the kind of impartiality we expect in judicial adjudications); HAMBURGER, *supra* note 12, at 5, 339–490 (explaining that the power to bind is dangerous when vested in the executive because it allows the executive to constrain private liberty).

[53] *See* Mascott, *supra* note 15, at 42–43 (arguing that adjudication by executive officials puts regulated parties at risk of having their rights determined according to political calculations).

[54] *See, e.g.*, Davidson v. New Orleans, 96 U.S. 97, 102 (1878) (drawing on English common law and declaring that a law taking property from A and giving it to B would violate due process); In re Smith's Est., 607, 57 A. 37, 38 (Pa. 1904) (reasoning that a special law divesting a particular person of property would violate due process); Lawrence E. Tierney Coal Co. v. Smith's Guardian, 203 S.W. 731, 736 (Ky. 1918) ("If the Legislature possessed an irresponsible power over every man's private estate . . . all inducement to acquisition, to industry, and economy would be removed.") (quoting *Ervine's Appeal*, 16 Pa. at 256); Bowman v. Middleton, 1 S.C.L. 252, 252 (1792) (finding that act purporting to transfer title to property from one private party to another was "against common right and reason, as well as against Magna Charta; therefore, *ipso facto*, void").

[55] N. Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 70 n.25 (1982) (observing that criminal matters remain at the heart of adjudication required to be performed in court by Article III).

[56] *Cf.* HAMBURGER, *supra* note 12, at 231 (noting that "where agencies adjudicate cases of a criminal nature, they tend to deny the associated constitutional rights").

There had to be an institution independent and powerful enough to resist popular will and protect individual interests.[57]

That's where courts came in.[58] Courts were competent to adjudicate private rights precisely because they were outside the political process.[59] They considered individuals as individuals.[60] Lacking external constituencies, they were free to judge cases on the merits.[61] That's why they could be trusted with judicial power.[62] They could provide the cool, independent, measured judgment needed to protect private rights.[63] And more to the point, the political branches could not.[64]

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[57] *See* Nelson, *supra* note 15, at 605 (describing criminal cases as the "paradigmatic example of a dispute that requires fully 'judicial' determination"); *N. Pipeline*, 458 U.S. at 70 n.24 ("Of course, the public-rights doctrine does not extend to any criminal matters, although the Government is a proper party.").

[58] *See* Nelson, *supra* note 15, at 562 ("When core private rights are at stake, the judiciary assumes an indispensable role.").

[59] *See* THE FEDERALIST NO. 78 (Alexander Hamilton) (explaining that the judiciary must have "complete independence" from the political branches; otherwise, "all the reservations of particular rights or privileges would amount to nothing") HAMBURGER, *supra* note 12, at 339 (explaining that the separation of judicial power from political branches protected people from interested decisionmaking).

[60] *See* Harrison, *supra* note 38, at 2517; Nelson, *supra* note 15], at 590.

[61] *See* Nelson, *supra* note 15, at 590. *See also* THOMAS M. COOLEY, TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 109 (6th ed. 1890) (explaining the role judicial independence and exclusivity of judicial power played in protecting rights of individuals).

[62] *See* Nelson, *supra* note 15, at 590; *Ervine's Appeal*, 16 Pa. at 256. *Cf. Axon*, No. 21-86, slip op. at 9 (Thomas, J., concurring) (explaining that whether Article III requires adjudication in court depends on whether private rights are at stake).

[63] *See Ervine's Appeal*, 16 Pa. at 256; HAMBURGER, *supra* note 12, at 232–34. *See also* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 848 (1986) (explaining that Article III protects judicial independence not to promote the judiciary's institutional interests, but to safeguard individual rights).

[64] *Axon*, No. 21-86, slip op. at 3–4 (Thomas, J., concurring) (explaining that Article III allows core private rights to be abridged only through adjudication by courts); *N. Pipeline Const.*, 458 U.S. at 77 ("It is, of course, true that while the power to adjudicate "private rights" must be vested in an Art. III court . . . ."); Parmelee v. Thompson, 7 Hill 77, 80, 1845 WL 4507 (N.Y. Sup. Ct. 1845) (explaining that "the legislature has no jurisdiction to determine facts touching the rights of individuals"); *Gutierrez-Brizuela*, 834 F.3d at 1149 (observing that if political branches could exercise judicial power, "[t]hey might be tempted to bend existing laws, to reinterpret and apply them retroactively in novel ways and without advance notice."). *Cf.* Thomas v. Union Carbide Agr. Prod. Co., 473 U.S. 568, 583 (1985) (rejecting "absolute" reading of Article III and concluding that Congress's authority to assign matters to agencies depends on nature of underlying rights and risks to judicial independence).

## II. AGENCY ADJUDICATION AND THE APPELLATE MODEL

That institutional model held for most of the nation's first century.[65] Article III was understood to give courts all judicial power, and judicial power was understood to mean the power to adjudicate core private rights.[66]

But the model started to fray in the late 19th century.[67] After the Civil War, the nation experienced a boom of economic and social change.[68] Society was transformed by urbanization, immigration, and industrialization.[69] These new pressures produced new problems, which in turn prompted new calls for reform.[70] Lawmakers responded with a wave of statutory and regulatory schemes—schemes that gave the nation its first glimpses of the administrative state.[71]

This new constitutional beast—a headless "fourth branch"[72]—quickly found its way into court. The earliest cases involved the Interstate Commerce

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[65] *See* Nelson, *supra* note 15, at 562 (reviewing 19th-century precedents).

[66] *See* Merrill, *supra* note 15, at 944–52; St. Antoine, *supra* note 24, at 1532. *See also* COOLEY, *supra* note 61, at 109 (stating that it was the "peculiar province" of the judiciary to "adjudicate upon, and protect the rights of individual citizens, and to that end to construe and apply the laws"). *But see* Cox & Kaufman, *supra* note 15, at 1791–94 (describing this view as formalist and questioning whether it accurately describes historical practice of courts and agencies, which were not always so neat in their categorizations).

[67] *Axon*, No. 21-86, slip op. at 4–5 (Thomas, J., concurring) ("As notions of administrative efficiency came into vogue, courts were viewed less as guardians of core private rights and more as impediments to expert administrative adjudication.").

[68] *See* JAMES W. ELY, THE CONTRACT CLAUSE: A CONSTITUTIONAL HISTORY 147 (2016) [hereinafter THE CONTRACT CLAUSE] (describing social and economic pressures that led to new and more aggressive regulatory approaches); JAMES W. ELY JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 8 (3d ed. 2007) [hereinafter HISTORY OF PROPERTY RIGHTS] (same).

[69] *See* THE CONTRACT CLAUSE, *supra* note 68, at 147 (describing increased regulatory intervention in late 19th and early 20th centuries); HISTORY OF PROPERTY RIGHTS, *supra* note 68, at 8 (same).

[70] *See* THE CONTRACT CLAUSE, *supra* note 68, at 147; HISTORY OF PROPERTY RIGHTS, *supra* note 68, at 8. *See also* HERBERT HOVENKAMP, THE OPENING OF AMERICAN LAW: NEOCLASSICAL LEGAL THOUGHT, 1870–1970, at 277 (2014).

[71] *See, e.g.*, NORMAN WARE, THE INDUSTRIAL WORKER, 1840–1860: THE REACTION OF AMERICAN INDUSTRIAL SOCIETY TO THE ADVANCE OF THE INDUSTRIAL REVOLUTION 144-47 (Ivan R. Dee ed. 1990) (describing emergence of ten-hour legislation in states like Massachusetts and Pennsylvania in late 19th century in response to concern over working conditions in industrial workplaces); HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE §§ 2.1–2.2 (5th ed. 2020) (describing development of antitrust law in response to growing political and economic power of trusts).

[72] *See* Randolph J. May, *Defining Deference Down: Independent Agencies and* Chevron *Deference*, 58 ADMIN. L. REV. 429, 451 (2006) ("And it is odd in a constitutional system with three defined

Commission, or ICC.[73] The ICC was established mainly to regulate railroads.[74] Among other things, it set rates for common carriers moving freight across state lines.[75] At first, the Supreme Court reviewed the ICC's orders closely.[76] The Court insisted that judges, as part of their constitutional duty, had to develop their own factual records.[77] They also had to exercise independent judgment over questions of law.[78] They owed the agency no deference.[79]

But in an age of progressive politics, that approach proved provocative.[80] People saw the Court as an obstacle to popular reform, and they demanded change.[81] Congress responded by passing the Hepburn Act.[82] Among other things, the Act made ICC orders self-executing if not challenged within 30 days.[83] And while it specified no standard of review, it implicitly instructed courts to take a back seat.[84]

The Supreme Court got the message. In a series of decisions in the early 20th century, it backed into what would become known as the appellate

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branches for courts to give controlling deference to agencies that, not without reason, are commonly referred to as 'the headless fourth branch.'").

[73] *See* St. Antoine, *supra* note 24, at 1532.

[74] *Interstate Commerce Commission*, U.S. NATIONAL ARCHIVES, https://www.federalregister.gov/agencies/interstate-commerce-commission (last visited Aug. 27, 2023).

[75] *See* Paul Stephen Dempsey, *The Rise and Fall of the Interstate Commerce Commission: The Tortuous Path from Regulation to Deregulation of America's Infrastructure*, 95 MARQ. L. REV. 1151, 1152 (2012).

[76] *See* ICC v. Ala. Midland Ry. Co., 168 U.S. 144, 175 (1897) (rejecting arguments that courts had to accept ICC's interpretation of the Interstate Commerce Act and that courts had no authority to supplement the ICC's evidentiary record).

[77] *Id. See also* Merrill, *supra* note 15, at 951.

[78] *See Ala. Midland Ry. Co.*, 168 U.S. at 174–75 (explaining that courts not only had the power to "inquire into whether or not the commission has misconstrued the statute," but that they could also accept "additional evidence" put forward by the parties and decide the case on "the entire body of evidence").

[79] *See id.* at 174 (explaining that the reviewing court's role was to "proceed, as a court of equity, to hear and determine the matter, and in such manner as to do justice in the premises").

[80] *See* Merrill, *supra* note 15, at 953–54 (describing the "ICC crisis" of the late 19th century).

[81] *See id.*

[82] Pub. L. 59-337, 34 Stat. 584 (1906). *See also Axon*, No. 21-86, slip op. at 5 (Thomas, J., concurring) (reciting history that led to Act's passage).

[83] *Id.* ch. 3591, § 4. *See also Axon*, No. 21-86, slip op. at 5 (Thomas, J., concurring); Merrill, *supra* note 15, at 955–56.

[84] *See Axon*, No. 21-86, slip op. at 5 (Thomas, J., concurring) (observing that Hepburn Act sent an implied message that courts should review ICC decisions less aggressively).

model.[85] The appellate model allowed the ICC to develop its own factual record.[86] Courts would limit their review to that record and treat the agency's factual findings as presumptively conclusive.[87] On legal issues, however, courts would continue to have the last word.[88] They still owed the agency no deference on questions of law.[89]

That approach received its fullest articulation in *Crowell v. Benson*.[90] *Crowell* involved not the ICC, but workers' compensation. Congress had adopted a workers'-compensation system for employees working on navigable waters.[91] The system was administered by an agency commissioner, who determined eligibility for benefits and issued binding compensation orders.[92] *Crowell* approved that approach, subject to appellate-style judicial review.[93] Courts would allow the commissioner to develop the record and determine ordinary facts.[94] But they would also supplement the record in certain respects.[95] In particular, they would consider additional evidence bearing on the commissioner's jurisdiction or an individual's constitutional rights.[96] And of course, they would still resolve all legal questions themselves.[97]

*Crowell* set the standard for judicial review going forward.[98] Its contours were absorbed into multiple statutes, including section 706 of the

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[85] *See* ICC v. Ill. Cent. R. Co., 215 U.S. 452, 470 (1910); ICC v. Union Pac. R. Co., 222 U.S. 541, 547 (1912). *See also Axon*, No. 21-86, slip op. at 5 (Thomas, J., concurring) (explaining that the Court adopted a deferential standard of review for determinations of fact, but continued to insist on exercising plenary review over determinations of law).

[86] *Axon*, No. 21-86, slip op. at 5 (Thomas, J., concurring).

[87] *Id.*

[88] *Id.*

[89] *See Ill. Cent. R. Co.*, 215 U.S. at 470 (explaining that while the Court would defer to the agency on matters within its "administrative functions," it would continue to review the agency's action to ensure it comported with the scope of congressional delegation and constitutional requirements).

[90] 285 U.S. 22 (1932).

[91] *Id.* at 36–37 (citing Longshoremen and Harbor Workers' Compensation Act, 44 Stat. 1424 (codified at 33 U.S.C. §§ 901–950)).

[92] *See id.* at 42–44 (describing duties and powers of United States Employees' Compensation Commission).

[93] *Id.* at 47–55, 62–64.

[94] *Id.* at 53–55.

[95] *Id.* at 55–60.

[96] *Id.*

[97] *See id.* at 60 ("In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function.").

[98] *See* Merrill, *supra* note 15, at 941 (pointing out that a "great preponderance" of administrative law is built on the appellate model articulated in *Crowell*).

Administrative Procedure Act.[99] It was cited hundreds of times, often for the proposition that courts reviewed questions of law de novo.[100]

But that's not to say the model was static. Over time, certain aspects changed or fell away. For example, courts mostly stopped developing their own records, even for "jurisdictional" facts.[101] They instead relied entirely on agency factfinding.[102] They also backed away from plenary review over questions of law. Rather than review those questions de novo, they increasingly deferred to agency interpretations.[103]

That trend famously reached its apogee in *Chevron USA, Inc. v. Natural Resource Defense Council*.[104] In *Chevron*, the Supreme Court announced a two-step process for reviewing agency interpretations.[105] First, the Court would determine whether the statute in question was ambiguous.[106] Second, if the Court found an ambiguity, it would defer to the agency's interpretation as long as the interpretation was "reasonable."[107]

The result was a model vastly different from the one *Crowell* envisioned. *Crowell* described the relationship between courts and agencies as something like the one between trial and appellate courts.[108] But by the end of the 20th

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[99] *See* 5 U.S.C. § 706. *See also Axon*, No. 21-86, slip op. at 5–6 (Thomas, J., concurring) (noting that the appellate model was also built into the statutes creating the FTC and SEC); Merrill, *supra* note 15, at 965 (noting that appellate model had become "entrenched" by 1930s).

[100] *See, e.g.*, *Union Carbide*, 473 U.S. at 601 (explaining that the *Crowell* vision of appellate review "preserves the judicial authority over questions of law in the present context"); Stern v. Marshall, 564 U.S. 462, 508 (2011) (Scalia, J., dissenting) (explaining that in *Crowell* "the Court assumed that an Article III court would review the agency's decision *de novo* in respect to questions of law"); *Cf.* FTC v. Gratz, 253 U.S. 421, 427 (1920) ("The words 'unfair method of competition' are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as matter of law what they include."), *overruled by* FTC v. Brown Shoe Co., 384 U.S. 316 (1966).

[101] *See* City of Arlington, Tex. v. FCC, 569 U.S. 290, 304 (2013) (rejecting "false dichotomy" between jurisdictional and nonjurisdictional issues); *Hearst Publications*, 322 U.S. at 130–31 (deferring to agency on statutory definition of "employee"—a threshold issue dictating whether the agency had jurisdiction over the case). *See also* Merrill, *supra* note 15, at 966 (observing that courts soon forgot about the supposed distinction between ordinary and jurisdictional facts).

[102] *See Robbins Tire*, 161 F.2d at 804 (Waller, J., concurring) (noting that by the late 1940s, there were "some half hundred boards and commissions" whose findings were reviewed only for substantial evidence).

[103] *See* HAMBURGER, *supra* note 12, at 117, 318, 410 (describing and criticizing modern judicial deference to agency legal interpretations).

[104] 467 U.S. 837 (1984).

[105] *Id.* at 842–43.

[106] *Id.*

[107] *Id.*

[108] Merrill, *supra* note 15, at 940.

century, that analogy no longer held. Courts accepted not only agency fact-finding, but also agency interpretations of law.[109] That is, they deferred in nearly all respects. If they weren't quite rubber-stamping agency decisions, they were doing something close to it.[110]

## III. DEFERENCE AND ITS DISCONTENTS

That shift didn't go unnoticed. As the years wore on, critics started to question the basic premises of the administrative state.[111] Much of the criticism centered on agency rulemaking and its apparent tension with Article I, which vests all legislative authority in Congress.[112] But scholars also started to question agency adjudication.[113] As the administrative state expanded, agencies often made decisions using quasi-judicial procedures.[114] They filed

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[109] *See, e.g.*, *Stephens Media*, 677 F.3d at 1250 (describing judicial deference to factual findings and legal determinations of NLRB); *Wayneview Care Ctr.*, 664 F.3d at 348 (same). *See also* Lawson, *supra* note 15, at 1247 (pointing out that overlapping review doctrines have produced near-total deference).

[110] *See, e.g.*, Loper Bright Enters., Inc. v. Raimondo, No. 21-5166, slip op. at 12-16 (D.C. Cir. Aug. 12, 2022) (deferring to agency's interpretation of statute simply because statute was ambiguous and agency's position was "reasonable"); Clark Neily et al., *Loper Bright Enterprises v. Raimondo*, CATO INST. (Dec. 9, 2022), https://www.cato.org/legal-briefs/loper-bright-enterprises-v-raimondo (pointing to D.C. Circuit's *Loper* opinion as an example of how courts now reflexively defer to agency interpretations); HAMBURGER, *supra* note 12, at 273–74 (criticizing weak judicial review of administrative orders as providing little protection against agency abuse). *Cf.* Harper, *supra* note 29, at 311 (arguing that in the 20th century, courts increasingly ignored the public/private rights distinction and accepted limitations on their power to review agency decisions).

[111] *See, e.g.*, Lawson, *supra* note 15, at 1231 ("The post-New Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution."); RICHARD EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION loc. 936 (2017) (ebook) (arguing that modern administrative state is inconsistent with classical separation of powers).

[112] *See*, U.S. CONST. art. I § 1; EPSTEIN, *supra* note 111, at loc. 936 (criticizing rulemaking by administrative agencies as a "complete inversion of the separation of powers"); HAMBURGER, *supra* note 12, at 38 (comparing agency rulemaking to Stuart crown's abuse of royal proclamations outside ordinary lawmaking process).

[113] *See, e.g.*, Merrill, *supra* note 15, at 979 ("Modern constitutional law scholars frequently suggest that the appellate review model of administrative law violates the plain meaning of Article III of the Constitution."); HAMBURGER, *supra* note 12, at 227 ("Scholars generally recognize that administrative adjudication is in tension with the Constitution's grant of judicial power to the courts and its guarantee of due process and other procedural rights.").

[114] *See* Cox & Kaufman, *supra* note 15, at 1789 (describing "enormous" amount of "judicial" work now done by agencies); Mascott, *supra* note 15, at 43 (arguing that expansion of agency adjudication has exacerbated Article III problem: "the Constitution was not intended to permit executive agencies to resolve a number of the matters before them today").

charges, took evidence, and issued binding orders.[115] Scholars struggled to square that model with Article III, which, again, vests all judicial power in courts.[116]

Some observers tried to resolve the tension by pointing to judicial review.[117] They argued that agency adjudication was constitutional as long as people still got their day in court.[118] Even if agencies made the initial decisions, courts would provide a backstop to protect individual rights.[119] That rationale made sense, however, only if you assumed that judicial review would be meaningful.[120] And as courts slipped deeper into deference, that assumption became harder to justify.[121] If courts deferred to agencies on every issue,

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[115] *See, e.g.*, 29 C.F.R. pt. 18 (describing practices and procedures for Department of Labor's Office of Administrative Law Judges); 16 C.F.R. pt. 3 (setting out rules of practice for FTC adjudicative proceedings); NLRB CASEHANDLING MANUAL PART 1, UNFAIR LABOR PRACTICE PROCEEDINGS (2023) (describing agency's procedures for investigating, prosecuting, and adjudicating unfair-labor-practice charges).

[116] *See* Mascott, *supra* note 15, at 46–47 (reasoning that if private rights can be taken away only with judicial power, agencies should not adjudicate cases involving private rights or even act as adjuncts to courts in such cases); Lawson, *supra* note 15, at 1246 (observing that although one of the primary functions of modern agencies is to adjudicate disputes, administrative law judges lack all the features of Article III judges, such as lifetime tenure and salary protection). *See also* Harper, *supra* note 29, at 309 (observing that some "prominent scholars" have suggested that judicial review of Board decisions is necessary to preserve private rights).

[117] *See, e.g.*, Richard Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 916–18 (1988); JOHN DICKENSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF THE LAW 42 (1927) ("It is sometimes said or assumed that public officers have no jurisdiction to determine questions of law and that therefore, as to these, their action is not final, but is subject to court review."); Harper, *supra* note 29, at 290, 317–18. *See also* Lawson, *supra* note 15, at 1247 (surveying views of pro-review scholars); Merrill, *supra* note 15, at 976 (attributing to Dickenson the idea that "[j]udicial review cures all").

[118] *See* Fallon, *supra* note 117, at 916–18 (arguing that Congress should have discretion over when to delegate adjudication to agencies—as long as it provides for judicial review). Harper, *supra* note 29, at 266, 317–18 (arguing that appellate-style review is not only sufficient to satisfy Article III, but even narrower review would also satisfy the Constitution).

[119] *See* Fallon, *supra* note 117, at 918 (arguing that "adequately searching appellate review of the judgments of legislative courts and administrative agencies is both necessary and sufficient to satisfy the requirements of article 11"). *Cf.* Harper, *supra* note 29, at 309 (arguing that belief that judicial review is necessary to protect individual rights and comport with Article III has influenced judicial behavior toward agencies).

[120] *See Axon*, No. 21-86, slip op. at 8–9 (Thomas, J., concurring); Lawson, *supra* note 15, at 1247.

[121] Lawson, *supra* note 15, at 1247 (arguing that the possibility of review does not cure the Article III problem because review is too deferential to be meaningful).

what backstop did they really offer?[122] Weren't agency decisions effectively final?[123]

Until recently, this debate remained cloistered in the halls of academe. It made for interesting law-review articles, but was rarely taken seriously in court.[124] Courts continued to apply the appellate model as a matter of course.[125] The discourse over agency adjudication seemed to be going nowhere.[126]

But the last few years have seen a shift. Multiple plaintiffs have challenged agency adjudication. They've targeted, among others, the Securities and Exchange Commission,[127] the Federal Trade Commission,[128] and the Department of Labor.[129] To be sure, some have only glanced at the Article III issue;

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[122] *See id.* ("Article III would certainly not be satisfied if Congress provided for judicial review but ordered the courts to affirm the agency no matter what. . . . There is no reason to think that it is any different if Congress instead simply orders courts to put a thumb (or perhaps two forearms) on the agency's side of the scale."); HAMBURGER, *supra* note 12, at 282 (criticizing judicial-review justification because judges are not "apt to do much more than defer").

[123] *See Axon*, No. 21-86, slip op. at 8 (Thomas, J., concurring) ("It is no answer that an Article III court may eventually review the agency order and its factual findings under a deferential standard of review."); Baldwin v. United States, No. 19-402, slip op. at 4 (U.S. Feb. 24, 2020) (Thomas, J., dissenting from denial of cert.) ("When the Executive is free to dictate the outcome of cases through erroneous interpretations, the courts cannot check the Executive by applying the correct interpretation of the law."). *Cf. Robbins Tire*, 161 F.2d at 805 (Waller, J., concurring) (arguing that when courts refuse to examine agency factfinding, they render judicial review "impotent").

[124] *Compare* LEWIS JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 381–89 (1965) (arguing that courts must exercise plenary review over the matters falling within their jurisdiction, making deference inappropriate), *and* Henry Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1374–86 (1953) (same), *with City of Arlington*, 569 U.S. at 304–07 (applying *Chevron* deference even to rules touching on agency's jurisdiction), *and* NLRB v. Bell Aerospace Co. Div. of Textron, 416 U.S. 267, 294 (1974) (deferring to Board's interpretation of statute as well as its judgment on what kind of procedure (rulemaking or adjudication) to use in adopting that interpretation). *See also* Harper, *supra* note 29, at 310–11 (noting that scholarly attacks on appellate model had, to that point, failed to gain traction).

[125] *See, e.g.*, *City of Arlington*, 569 U.S. at 304–07 (describing deferential, appellate-style review); *Bell Aerospace*, 416 U.S. at 294 (same).

[126] *Cf.* Lawson, *supra* note 15, at 1232 (observing that the broad outlines of the administrative state had been accepted by administrations and high-level officials in both parties).

[127] *See Jarkesy*, No. 20-61007, slip op. at 5–15.

[128] *See* Compl., FTC v. Int'l Exchange, Inc., Case No. 3:23-cv-01710 (N.D. Cal. Apr. 10, 2023), ECF No. 1. *See also* Dan Papscun, *Black Knight Sues FTC Over Constitutionality of In-House Judge*, BLOOMBERG LAW (Apr. 26, 2023), https://www.bloomberglaw.com/bloomberglawnews/antitrust/XDNUSRAC000000?bna_news_filter=antitrust#jcite (reporting on lawsuit challenging constitutionality of agency's adjudication procedures).

[129] *Sun Valley Orchards*, No. 1:21-cv-16625, 2023 BL 257772, at *6-7; Compl., *C.S. Lawn & Landscaping*, Case No. 1:23-cv-01533, ECF No. 1.

they've focused instead on the status of administrative law judges and jury-trial rights.[130] But a few have teed up the Article III problem directly.[131] They've argued that Article III vests not just some, but *all* judicial power in courts.[132] And Congress cannot circumvent that requirement by providing for only cursory judicial review.[133]

Much of this litigation is still in its early stages. For example, as of this writing, the challenges to the Department of Labor's process are still pending in district court.[134] But some lawsuits have already produced significant victories for private parties. Most notably, in 2022, the Fifth Circuit struck down some of the SEC's administrative procedures.[135] The court didn't rely on Article III per se; it focused instead on jury-trial rights and the nondelegation doctrine.[136] But its decision did show that courts are increasingly skeptical of agency adjudication.[137] And if that trend continues, it could produce even more challenges—challenges perhaps aimed at an even broader range of agencies.

## IV. PRIVATE RIGHTS, LABOR LAW, AND THE NLRB

One agency to escape these challenges has been, oddly enough, their most obvious target: the National Labor Relations Board. Established in 1935, the Board is one of the oldest "independent" agencies.[138] It consists of five presidentially appointed members, each serving a fixed term.[139] The members are charged with developing labor policy for the entire country.[140] They have statutory authority to develop that policy through rulemaking.[141] But more

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[130] *See, e.g.*, *Jarkesy*, No. 20-61007, slip op. at 5–15.

[131] *See, e.g.*, Compl., *C.S. Lawn & Landscaping*, Case No. 1:23-cv-01533, ECF No. 1.

[132] *Id.*

[133] *Id.*

[134] *See Sun Valley Orchards*, No. 1:21-cv-16625, 2023 BL 257772, at *6-7; Compl., *C.S. Lawn & Landscaping*, Case No. 1:23-cv-01533, ECF No. 1.

[135] *See Jarkesy*, No. 20-61007, slip op. at 5–15.

[136] *Id.*

[137] *See id. See also* Golde, *supra* note 19 (placing *Jarkesy* in the context of a judicial trend of skepticism toward administrative power).

[138] *See* 29 U.S.C. §§ 153–156 (describing establishment, powers, and duties of NLRB). *See also* Gould, *supra* note 20, at 1506 (describing Board's creation as an "independent agency in the executive department").

[139] 29 U.S.C. § 153(a).

[140] *Beth Israel Hosp.*, 437 U.S. at 500 ("It is the Board on which Congress conferred the authority to develop and apply fundamental national labor policy.").

[141] *See* 29 U.S.C. § 156 (authorizing the Board to issue regulations to implement NLRA).

often, they do it through adjudication.[142] They issue opinions, draw on their own "precedent," and spin out new rules as the circumstances require.[143] In other words, they mimic the methods of a common-law court.

Their decisions, of course, can be reviewed by real courts.[144] But since early in the Board's history, it has been clear that judicial review would be limited. The original National Labor Relations Act required courts to accept the Board's factual findings if supported by "evidence."[145] The statute was later amended to require "substantial evidence,"[146] but factual review remained deferential.[147] And a similar standard held for questions of law. In 1944's *NLRB v. Hearst Publications*, the Supreme Court instructed lower courts to defer to the Board's legal interpretations.[148] The Court relied on a mix of congressional intent and agency expertise to reach this conclusion. It reasoned that Congress wanted to create a uniform national labor policy.[149] And the Board, by applying the law across hundreds of industries and thousands of labor disputes, had developed a certain expertise.[150] The Board knew

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[142] *See* 29 U.S.C. § 160(c) (authorizing the Board to adjudicate unfair-labor-practice charges and issue written cease-and-desist orders); *Bell Aerospace*, 416 U.S. at 294 (recognizing that Board may develop policy either through rulemaking or adjudication); NLRB v. Wyman-Gordon Co., 394 U.S. 759, 766 (1969) (affirming Board's decision to require employers to furnish names and addresses of employees to union through adjudication rather than rulemaking); *See* James J. Brudney, *Isolated and Politicized: The NLRB's Uncertain Future*, 26 COMP. LAB. L. & POL'Y J. 221, 234 (2005) ("[O]ver its seventy year history the Board has chosen to operate virtually exclusively through adjudication, eschewing its rulemaking authority.").

[143] *See, e.g.*, Gould, *supra* note 20, at 1506 (describing the Board as a "quasi-judicial agency"); Brudney, *supra* note 142, at 234–35 (describing Board's case-by-case approach to policymaking). *Cf.* Int'l Org. of Masters, Mates & Pilots, ILA, AFL-CIO v. NLRB, 61 F.4th 169, 178 (D.C. Cir. 2023) (explaining that while Board can depart from its own "precedent," it must offer "reasoned justifications" for doing so).

[144] *See* 29 U.S.C. § 160(e), (f); 29 C.F.R. § 101.14.

[145] National Labor Relations Act, Pub. L. 74-198 § 10, 49 Stat. 449, 454 (1935). *See also* Note, *Effect of the Taft–Hartley and Administrative Procedure Acts on Scope of Review of Administrative Findings*, 26 IND. L.J. 406, 406 n.4 (1951) (discussing original standard and change made by Taft–Hartley Amendments).

[146] *See* Labor–Management Relations Act of 1947, Pub. L. 80-101, 61 Stat. 136, 148 (amending 29 U.S.C. § 160(e), (f)).

[147] *See Universal Camera*, 340 U.S. at 488–90. *See also Robbins Tire*, 161 F.2d at 804 (Waller, J., concurring) (concluding that substantial-evidence review fails to provide a real check on erroneous factfinding) ("Any evidence, however incredible, is substantial if it is adjudged to have been believed by the Examiner or the Board.").

[148] 322 U.S. at 130–31.

[149] *See id.* at 125–26 (explaining that national uniformity was essential to Congress's scheme).

[150] *Id.* at 130–31.

the kinds of issues that could come up in an organizing campaign.[151] It knew what kinds of bargaining units were manageable.[152] And it knew what kinds of conditions were most likely to cause industrial strife.[153] If courts were to respect congressional intent, they had to also respect that expertise.[154] And that meant respecting the Board's judgment about how to apply the statute.[155]

The result was an early example of agency dominance. Years before the APA and decades before *Chevron*, the Board wielded broad discretion over facts and law.[156] It had the power both to say what the law was and apply that law to private parties.[157] It was a court in all but name.[158]

Given that framework, it is hard to avoid the conclusion that the Board exercised—and continues to exercise—judicial power. Remember, the framers understood judicial power as the power to determine core private rights.[159] Among those rights were the right to private property.[160] And the Board's decisions affect private property perhaps more directly than any other agency.[161] To take just a few examples, consider the Board's rules on solicitation and distribution. The Board determines when, where, and under what circumstances union organizers can solicit employees on the employer's property.[162] Likewise, the Board determines when organizers can use an employer's

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[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] *Id.*

[155] *See id.* ("[W]here the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited.").

[156] *See id.* (deferring to Board's interpretation of "employee" under the NLRA); *Universal Camera*, 340 U.S. at 488–90 (explaining that courts must accept Board's factual findings when supported by substantial evidence). *See also* St. Antoine, *supra* note 24, at 1531–37 (tracking deference to Board's decisions before the APA and *Chevron*).

[157] *See id.*

[158] *See Robbins Tire*, 161 F.2d at 803 (Waller, J., concurring) (describing Board's procedures as "judicial, or quasi-judicial").

[159] *Axon*, No. 21-86, slip op. at 5 (Thomas, J., concurring).

[160] *Id.*

[161] *See Robbins Tire*, 161 F.2d at 803 (Waller, J., concurring) (recognizing that the Board's orders "involve the personal and property rights of citizens").

[162] *See, e.g.*, David Saxe Prods., LLC, 370 N.L.R.B. No. 103, 2021 WL 1293347, at *5 (Apr. 5, 2021) (describing Board's recent nonsolicitation precedent); UPMC, 368 N.L.R.B. No. 2, 2019 WL 2502063, at *3 (June 14, 2019) (same).

equipment for union-related activity.[163] These rules require the Board to "balance" property rights against statutory rights.[164] And indeed, that kind of balancing runs through much of the Board's internal doctrine—a doctrine that makes up most of modern labor law.[165] It is therefore nigh impossible to understand labor law without also understanding its interaction with private property rights.[166]

The same could be said for private contract rights. Among the Board's functions is certifying unions for collective bargaining.[167] And as soon as the Board certifies a union, contract rights are immediately curtailed.[168] Employers and employees can no longer bargain with each other directly.[169] Instead, an employer must bargain with the certified union.[170] And the union must bargain for all employees in the bargaining unit.[171] The resulting agreements set the terms of employment for everyone, even employees who refuse union membership.[172] That is, the collective agreement "extinguishes" the contract

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[163] *See, e.g.*, Register Guard, 351 N.L.R.B. 1110, 1114 (2007) (holding that employees had no right to access employer's email system for protected activity); Purple Commc'ns, Inc., 361 N.L.R.B 1050, 1055 (2014) (reaching opposite conclusion and overruling *Register Guard*).

[164] *See* Lechmere, Inc. v. NLRB, 502 U.S. 527, 537 (1992) (discussing Board's balancing approach concerning organizers' access to employer property).

[165] *See id. See also* Jean Country, 291 N.L.R.B. 11, 14 (1988) (balancing organizers' need to access employees against employer's property rights), *abrogated in part by Lechmere*, 502 U.S. at 536; William R. Corbett, *Awaking Rip Van Winkle: Has the National Labor Relations Act Reached A Turning Point?*, 9 NEV. L.J. 247, 257 (2009) (surveying judicial and administrative attempts to balance statutory rights with property rights).

[166] *See* Anne Marie Lofaso, *Toward a Foundational Theory of Workers' Rights: The Autonomous Dignified Worker*, 76 UMKC L. REV. 1, 27 (2007) (examining the role property rights have played in defining labor rights and attempts courts and agencies have made to balance the two).

[167] 29 U.S.C. § 159(a). *See also Hearst Publications*, 322 U.S. at 126–34 (noting that the "avowed purpose" of the NLRA was to promote collective bargaining, and that Congress delegated responsibility for advancing that purpose primarily to the Board).

[168] Vaca v. Sipes, 386 U.S. 171, 182 (1967) ("The collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee."); Emporium Capwell Co. v. W. Addition Cmty. Org., 420 U.S. 50, 62 (1975) ("Congress sought to secure to all members of the unit the benefits of their collective strength and bargaining power, in full awareness that the superior strength of some individuals or groups might be subordinated to the interest of the majority. . . ."); J.I. Case Co. v. NLRB, 321 U.S. 332, 338 (1944) (holding that direct bargaining between employers and employees in workplace with certified bargaining representative violates the NLRA).

[169] *J.I. Case*, 321 U.S. at 338.

[170] *See id.*

[171] *Vaca*, 386 U.S. at 182.

[172] *See id.*

rights of individual workers.[173] A more direct limit on contract rights is hard to imagine.

## V. THE ENIGMA OF THE STATUS QUO

In that context, the conflict between Article III and the Board seems obvious. While Article III vests all judicial power in courts, modern labor law allows judicial power to be exercised by the Board. And that conflict has existed since the Board's founding. So why has it gone overlooked for so long?

The main reason is probably adverse precedent. In the early days of the NLRA, multiple lawsuits were filed over the statute's constitutionality. Those lawsuits were by no means frivolous; earlier efforts to mandate collective bargaining had been struck down.[174] But in *NLRB v. Jones & Laughlin Steel Corp.*, the Supreme Court upheld the NLRA against a multi-pronged constitutional attack.[175] The challengers in *Jones* focused on the Interstate Commerce Clause; they argued that the NLRA was invalid because it regulated purely local (as opposed to interstate) activity.[176] Most of the Court's opinion focused on that issue as well.[177] But the challengers also made a claim under Article III: they argued that the NLRA effectively delegated judicial power to the Board, and the Board was incompetent to exercise that power.[178]

The Court disagreed—but it didn't dwell on the issue. Instead, in three thinly reasoned sentences, it dismissed the Article III argument as essentially frivolous:

> We construe the [NLRA's] procedural provisions as affording adequate opportunity to secure judicial protection against arbitrary action in accordance with well-settled rules applicable to administrative agencies set up by Congress to aid in the enforcement of valid legislation. It is not necessary to repeat these rules which have been frequently declared. None of them appears to have been transgressed in the instant case.[179]

In effect, the Court anticipated modern defenses of the appellate model. It reasoned that agency adjudication was fine as long as there was a judicial

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[173] *Emporium Capwell*, 420 U.S. at 62.
[174] *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 550 (1935).
[175] 301 U.S. 1, 47–48 (1937).
[176] *Id.* at 29.
[177] *Id.* at 29–43.
[178] *Id.* at 47.
[179] *Id.*

backstop.[180] But again, that rationale assumed that the backstop would be effective.[181] And given modern deference doctrines, it no longer is.[182] In the decades since *Jones*, courts have deferred not only to the Board's factual findings, but also to its legal conclusions.[183] Cases like *Hearst* and *Chevron* have whittled judicial review down to a rump.[184] So in the modern context, *Jones*'s conclusions about Article III make no sense. The "judicial protection" it referred to no longer exists.[185]

*Jones* aside, another reason for the Board's relative safety might be its limited remedies. Unlike some agencies, the Board cannot impose civil penalties. It can issue cease-and-desist orders, which require parties to comply in the future.[186] It can also make parties post notices admitting they violated the law.[187] And in some cases, it can impose make-whole remedies, such as backpay.[188] But it cannot levy freestanding civil fines.[189]

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[180] *See id.*

[181] *See id.* (assuming that "all questions of constitutional right or statutory authority are open to examination by the court").

[182] *See* Lawson, *supra* note 15, at 1246 (arguing that excessive deference has caused the "death of the independent judiciary").

[183] *See, e.g.*, *Beth Israel Hosp.*, 437 U.S. at 501 (describing reviewing court's role as "narrow": "The rule which the Board adopts is judicially reviewable for consistency with the Act, and for rationality, but if it satisfies those criteria, the Board's application of the rule, if supported by substantial evidence on the record as a whole, must be enforced."); King Soopers, Inc. v. NLRB, 859 F.3d 23, 37 (D.C. Cir. 2017) ("The Board is entitled to considerable deference in crafting remedies for unfair labor practices . . . .").

[184] *See* HAMBURGER, *supra* note 12, at 410 (pointing out that overlapping deference doctrines have hollowed out judicial review) ("[W]hen judges defer to administrative interpretations, it becomes difficult to take seriously the idea that the judges are authoritative expositors of the law.").

[185] *See id.*

[186] *See* 29 U.S.C. § 160(c) (authorizing Board to issue cease-and-desist orders); U.S. Postal Serv., 360 N.L.R.B. 181, 181 (2014) (issuing cease-and-desist order to remedy unfair labor practice).

[187] *See U.S. Postal Serv.*, 360 N.L.R.B. at 181 (ordering respondent to post notice of violations).

[188] *See* 29 U.S.C. § 160(c) (authorizing Board to "take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act"); Thryv, Inc., 372 N.L.R.B. No. 22, slip op. at 1 (Dec. 13, 2022) (holding that make-whole remedies for unfair labor practices should include "all direct or foreseeable pecuniary harms that . . . employees suffer as a result of the respondent's unfair labor practice").

[189] *See* Protecting the Right to Organize Act, H.R. 842, 117th Cong. (1st Sess. 2021–22) (proposing to amend NLRA to add monetary penalties); James Paretti et al., *U.S. House Poised to Add Civil Penalties to National Labor Relations Act*, LITTLER MENDELSON (Sept. 9, 2021), https://www.littler.com/publication-press/publication/us-house-poised-add-civil-penalties-national-labor-relations-act (describing failed attempt to authorize Board to impose civil penalties for unfair labor practices).

The Board's remedies have been criticized as weak.[190] But their very weakness may have helped stave off a constitutional attack. Under the Seventh Amendment, private parties have a right to a jury trial for all actions at common law over $20.[191] Whether an action is "at common law" depends on whether it mirrors some common-law action that existed in 1791.[192] Because civil penalties are monetary remedies, they resemble classic common-law actions.[193] So at least some courts have found that they trigger the Seventh Amendment.[194]

But that rationale doesn't work for the Board's remedies. Make-whole remedies like back pay are inherently equitable.[195] They do not resemble common-law damages claims.[196] They therefore do not require a jury—a fact that helps insulate the Board from a Seventh Amendment challenge.[197]

But that point does not solve the Article III problem. Even if the Board adjudicates no "actions at common law," it still adjudicates core private rights. It still has effective final say over matters related to labor, contracting,

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[190] *See, e.g.,* Steven Greenhouse, *Will Starbucks' Union Busting Stifle a Union Rebirth in the US?*, GUARDIAN (Aug. 23, 2023), https://www.theguardian.com/us-news/2023/aug/28/will-starbucks-union-busting-stifle-a-union-rebirth-in-the-us (arguing that the Board's remedies are too weak to deter companies from violating labor law); Hamilton Nolan, *It's Up to Unions to Make the NLRB Matter*, IN THESE TIMES (Aug. 28, 2023), https://inthesetimes.com/article/nlrb-abruzzo-cemex-biden-labor-unions-ulp-election (arguing that inability to impose financial penalties reduces Board's effectiveness and incentivizes companies to disregard the Board's standards).

[191] U.S. CONST. amend. VII.

[192] *See, e.g.*, *N. Pipeline Const.*, 458 U.S. at 70 n.25; *Jarkesy*, No. 20-61007, slip op. at 5–15. *See also* Margaret L. Moses, *What the Jury Must Hear: The Supreme Court's Evolving Seventh Amendment Jurisprudence*, 68 GEO. WASH. L. REV. 183, 194–217 (2000) (surveying modern Supreme Court's treatment of Seventh Amendment and the Court's search for historical analogues).

[193] *Jarkesy*, No. No. 20-61007, slip op. at 5–15.

[194] *Id.* (holding that SEC could not constitutionally impose civil penalties through administrative proceedings because defendants had a Seventh Amendment right to defend themselves in court before a jury). *But cf. Sun Valley Orchards*, 2023 BL 257772 at *7 (concluding that availability of civil remedies did not itself mean that DOL's H-2B visa program involved private rights within the meaning of Article III).

[195] Broadnax v. City of New Haven, 415 F.3d 265, 271 (2d Cir. 2005).

[196] *Id. But see* Nelson, *supra* note 15, at 602 (explaining that courts struggled with the distinction in the first half of the 20th century, with some even finding the Board's structure unconstitutional under the Seventh Amendment (citing NLRB v. Mackay Radio & Tel. Co., 87 F.2d 611, 630-31 (9th Cir. 1937)).

[197] *See Jones*, 301 U.S. at 48–49 (holding that the Board's structure did not violate the Seventh Amendment because it did not allow the Board to adjudicate any "suit at common law").

and property. So the Board's limited remedies can't be the full answer.[198] Even if the Seventh Amendment is no issue, Article III still is.[199]

A final reason may be the Board's sheer longevity. The Board has been around for nearly a century; and in that time, it has become a fixture of the legal firmament.[200] It is comparatively easy to attack an agency like the Consumer Financial Protection Bureau, which strikes some observers as both novel and dangerous.[201] But the Board is familiar; its strengths and weaknesses are well known and longstanding.[202] Its very age may seem to put it beyond question.[203]

But of course, age alone is a weak defense.[204] An error is no less an error because it has gone uncorrected for a long time.[205] The Board may predate the APA, *Chevron*, and modern anxieties about administrative creep. But it does not predate Article III. Article III assigns all judicial power to courts,

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[198] *See* Curtis v. Loether, 415 U.S. 189, 194–96 (1974) (holding that Seventh Amendment guaranteed access to jury for fair-housing claims under Civil Rights Act of 1968, even though those claims were statutory, because their monetary remedies resembled actions at common law). *But cf.* Atlas Roofing Co., Inc. v. Occupational Safety & Health Rev. Comm'n, 430 U.S. 442, 450 (1977) (suggesting that distinction drawn by *Jones* depends less on whether an agency can impose civil penalties than on the nature of the rights involved—public or private).

[199] *See Axon*, No. 21-86, slip op. at 7 (Thomas, J., concurring) (explaining that the modern appellate-review model may violate Article III because it allows agencies to effectively adjudicate core private rights).

[200] *See* JOHN HIGGINS JR., ET AL., THE DEVELOPING LABOR LAW § 1.IV (8th ed. 2022) (describing historical development of judicial regulation of labor law, the perceived inadequacies of which led to statutory solutions and administrative responsibility).

[201] *See* Amy Howe, *Supreme Court Will Review Constitutionality of Consumer-Watchdog Agency's Funding*, SCOTUSBLOG (Feb. 27, 2023), https://www.scotusblog.com/2023/02/supreme-court-will-review-constitutionality-of-consumer-watchdog-agencys-funding-cfpb/ (reporting that Supreme Court will consider constitutional challenge to CFPB's funding mechanisms in 2023–24 term).

[202] *See, e.g.*, Harper, *supra* note 29, at 313–18 (reviewing longstanding arguments for and against expanded judicial review of Board orders); Gould, *supra* note 20, at 1505 (noting that the Board has long acted as an "effective substitute" for judicial proceedings).

[203] *Cf.* OLIVER WENDELL HOLMES, THE PATH OF THE LAW 167, 186 (1920) ("[I]f we want to know why a rule of law has taken its particular shape, and more or less if we want to know why it exists at all, we go to tradition.").

[204] *See* HAMBURGER, *supra* note 12, at 11, 24, 412 (arguing that constitutional problems associated with agency power cannot be dismissed simply because courts have acquiesced in them for years).

[205] *See id.* at 488 ("Ultimately, time is no cure."). *Cf.* Merrill, *supra* note 15, at 987 (observing that to the extent the private-rights issue is a constitutional problem, it has been one and has been ignored by the court since at least 1906).

without exception.[206] If the Board's structure allows it to wield judicial power, it violates Article III—no matter how longstanding that violation may be.[207]

## VI. AN OLD PROBLEM, REBORN AND MAGNIFIED

And indeed, as the years have passed, the Board has illustrated the need for Article III more clearly than perhaps any other agency. It has modeled all the evils Article III was designed to prevent. And in some cases, it has modeled them spectacularly.

Again, the framers adopted Article III for a reason. They vested all judicial power in courts because they knew the alternative was worse.[208] They had seen the English crown abuse its power through "prerogative" courts, such as the Star Chamber and the High Commission.[209] These quasi-courts relied on flimsy evidence, enforced extra-legal standards, and required defendants to prove their own innocence.[210] Worse, they did all these things to serve political, rather than legal, ends.[211]

The Board does much the same thing.[212] It adopts one-sided presumptions, shifts the burden of proof, and imposes new rules retroactively.[213] It holds parties responsible for unannounced standards while pretending that those standards were the law all along.[214]

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[206] *Hunter's Lessee*, 14 U.S. at 330.

[207] *See Axon*, No. 21-86, slip op. at 7 (Thomas, J., concurring) (stating that the appellate-review model "may violate Article III by compelling the Judiciary to defer to administrative agencies regarding matters within the core of the Judicial Vesting Clause"). *Cf.* HAMBURGER, *supra* note 12, at 397 (reasoning that agencies cannot properly exercise judicial power, even delegated power, because "[a]t common law . . . judicial power was inalienable").

[208] *See* HAMBURGER, *supra* note 12, at 8, 55 (tracing limits on executive power to founders' fear of prerogative courts); *id.* at 132–33 (explaining that Article III "emphatically reiterated the constitutional bar to any extralegal adjudication").

[209] *Id.* at 5, 130, 133–42.

[210] *Id.* at 157–59, 249–51.

[211] *Id.*

[212] *Cf. id.* (arguing that modern administrative agencies revive many of the prerogative courts' abuses).

[213] *See, e.g.*, Raoul Berger, *Retroactive Administrative Decisions*, 115 U. PA. L. REV. 371, 385–86 (1967) ("Retroactive announcements by the NLRB of changes in existing rules respecting the jurisdiction it will exercise in the future exhibit so erratic and capricious a course as to shake confidence in its judgment that retroactivity was essential."); *The Atlanta Opera Inc.*, 372 N.L.R.B. No. 95, at *20 (requiring defendant to prove that certain workers were independent contractors, not employees—a question going to the heart of the Board's jurisdiction over a labor dispute).

[214] *See* NLRB v. Guy F. Atkinson Co., 195 F.2d 141, 148 (9th Cir. 1952) (refusing to enforce Board order reflecting a change in the Board's jurisdictional policy, which would have penalized the

Those practices would be bad enough if they weren't also infected with politics. But they are.[215] Indeed, the Board is notorious for flipping its positions from administration to administration.[216] Republican Boards reliably support management, and Democratic ones invariably support unions.[217] A particularly glaring example came during the Obama administration, when the Board reversed a series of precedents that had been in place for a combined 4,500 years.[218] The Trump Board then spent much of the next four years reverting to prior standards.[219] And now, the Biden Board is busy reversing the Trump Board's rulings and returning to Obama-era precedents.[220]

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respondent for engaging in conduct it reasonably believed was lawful at the time) ("The inequity of such an impact of retroactive policy making upon a respondent innocent of any conscious violation of the act, and who was unable to know, when it acted, that it was guilty of any conduct of which the Board would take cognizance, is manifest.").

[215] *See, e.g.*, Brudney, *supra* note 142, at 223, 243–52 (tracing criticisms of Board's politically tilted decision-making as far back as 1939 and noting an increase in politization in recent decades); St. Antoine, *supra* note 24, at 1529 (abstract) (noting that empirical studies have shown that the political backgrounds of Board members influence their decisions).

[216] *See, e.g.*, Gould, *supra* note 20, at 1506 (noting that because presidents have used their Board appointments to change labor policy quickly, observers have described the Board as a policy "see-saw"); Robert Iafolla, *NLRB Dials Back Employers' Authority to Act Unilaterally*, BLOOMBERG LAW (Aug. 30, 2023), https://www.bloomberglaw.com/product/blaw/bloomberglawnews/bloomberg-law-news/BNA%2000000186-dc14-ddd7-ab9f-fd3c89030001 (quoting Ginger Schroder, an employment lawyer representing management,, saying that "no employer or union can rely on NLRB precedent because the board is partisan and will flip-flop after control of the White House changes from party to party").

[217] *See also* MICHAEL J. LOTITO, MAURY BASKIN & MISSY PARRY, COALITION FOR A DEMOCRATIC WORKFORCE, WAS THE OBAMA NLRB THE MOST PARTISAN IN HISTORY? 3 (2016), http://myprivateballot.com/wp-content/uploads/2016/12/CDW-NLRB-Precedents-.pdf (observing that in "no case where the [Obama] Board overturned, or substantially modified, important principles did a Republican member join with the Democratic majority").

[218] LOTITO ET AL., *supra* note 217, at 1–7.

[219] *See, e.g.*, The Boeing Co., 365 N.L.R.B. No. 154, slip op. at 2 (Dec. 14, 2017) (overruling prior standards for judging lawfulness of facially neutral employer work rules); Hy-Brand, 365 N.L.R.B. No. 156, slip op. at 1 (2017) (overruling standard announced in Browning-Ferris Industries, 362 N.L.R.B. No. 186 (2015) for determining when two entities will be considered joint employers).

[220] *See, e.g.*, Miller Plastic Products Co., 72 N.L.R.B. No. 134, slip op. at 1 (Aug. 25, 2023) (reversing Trump Board's decision in Allstate Maintenance Insurance, LLC, 367 N.L.R.B. No. 68 (2019), and adopting a broader, all-relevant-circumstances standard for determining when an employee is engaged in conduct protected by the NLRA); Wendt Corp., Nos. 03–CA–212225, 03–CA–220998, and 03–CA–223594, slip op. at 1 (N.L.R.B. Aug. 26, 2023) (overruling Trump Board's decision in Raytheon Network Centric Systems, 365 N.L.R.B. No. 161 (2017), and limiting an employer's ability to make unilateral changes in accord with a past practice before a first contract takes effect or after a contract has expired); Tenocap LLC, 372 N.L.R.B. No. 136, slip op. at 1 (Aug. 26, 2023) (overruling a separate part of *Raytheon* and limiting an employer's right to make unilateral

This cycle has recurred for decades and shows no sign of slowing down. It repeats from election to election, drowning private parties in wave after wave of "policy oscillation."[221]

This is precisely the kind of political jockeying Article III was meant to avoid.[222] Article III gave judicial power to courts because individual rights should not depend on which party is in power.[223] They should depend on the law—a law declared in advance and enforced through fair procedures.[224] That, at least, is what the framers had in mind.[225] It's what they envisioned when they wrote Article III.[226] If we're serious about respecting their vision, we should reexamine how judicial power has come to be wielded by the political branches.[227] And if we're looking places to start, there would be few better than the Board.

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changes consistent with an expired management-rights clause); Stericycle, Inc., 372 N.L.R.B. No. 113, slip op. at 1–2 (Aug. 2, 2023) (reversing Trump Board's decision in *Boeing Co.*, 365 N.L.R.B. No. 154 (2017), and adopting a stricter standard for determining when a work rule will be held unlawful because it may chill protected activity).

[221] LOTITO ET AL., *supra* note 217, at 5 (noting that defenders of the Board sometimes point to policy oscillation as not only legitimate, but also a justification of the Board's shifts in doctrine). *See also* Brudney, *supra* note 142, at 227 (noting Board's "ability and willingness to so readily depart from its own precedent" in response to political pressures); Lamons Gasket Co., 357 N.L.R.B. 739, 748 (2011 (Hayes, dissenting) (arguing that the Board's decision to change its doctrine with respect to the opportunity to petition for an election after a voluntary recognition was a "purely ideological policy choice, lacking any real empirical support and uninformed by agency expertise"). *Cf.* HAMBURGER, *supra* note 12, at 433 (criticizing exercise of policy discretion by agencies on grounds that "administrative discretion leaves Americans insecure in their freedom").

[222] *Cf.* Harper, *supra* note 29, at 299 (noting that while it is hard for a president to change views of entire judiciary through appointments, it is relatively easy to do so with the Board, and pointing to that ease as a feature, not a bug).

[223] *Cf. Axon*, No. 21-86, slip op. at 8 (Thomas, J., concurring) (reasoning that the appellate-review model may violate due process because it denies people the opportunity to have their core private rights determined in court).

[224] *See id.* at 9 ("If private rights are at stake, the Constitution likely requires plenary Article III adjudication.").

[225] HAMBURGER, *supra* note 12, at 411 (explaining that structural assignment of powers to specialized branches was central to founders' idea of due process and essential to their scheme for preventing consolidation of power).

[226] *See id.* at 412 (explaining that the separation of powers reflects the founders' ideal of the rule of law: fair, due process).

[227] *See Axon*, No. 21-86, slip op. at 3–9 (Thomas, J., concurring) (observing that modern agency adjudication may violate separation of powers and, specifically, Article III).

Other Views:

- Michael C. Harper, *The Case for Limiting Judicial Review of Labor Board Certification Decisions*, 55 GEO. WASH. L. REV. 262 (1987), *available at* https://scholarship.law.bu.edu/faculty_scholarship/1621/.
- Adam B. Cox & Emma Kaufman, *The Adjudicative State*, 132 YALE L.J. 1769 (2023), *available at* https://www.yalelawjournal.org/feature/the-adjudicative-state.
- Richard Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915 (1988), *available at* https://www.jstor.org/stable/1341424.

# RELIGIOUS LIBERTY PRAGMATISM*

NICK REAVES & MATTHEW KRAUTER**

A review of THOMAS C. BERG, RELIGIOUS LIBERTY IN A POLARIZED AGE (Eerdmans 2023)

In his book *Religious Liberty in a Polarized Age*, Professor Tom Berg lays out a thorough and compelling case for religious liberty's role in helping to tame polarization in American society. After a careful review of the evidence showing increased polarization, Berg challenges the common misconception that religious liberty disputes must continue fanning the partisanship flames. Instead, Berg argues that religious liberty, properly understood, can protect diverse viewpoints, decrease fear and resentment, and channel societal conflicts into more productive discussions within our civic system.

To make this argument, Berg starts by highlighting the ways in which religious liberty is misunderstood or misused today. First, Berg addresses those who discount the importance of religion and religious identity. In part by drawing upon social science research and analogizing to other deeply held identities, Berg convincingly explains how an individual's religious beliefs are often core to their identity and, therefore, deserving of robust protection by society. Berg also turns the mirror around on "conservative Christians," calling out what he views as their failure to adequately protect the beliefs and practices of religious minorities—as well as their lack of interest in finding points of compromise and common ground when asserting their own rights.

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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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Having thoroughly chastised both sides, Berg next sketches out his understanding of religious liberty as a tool for depolarization. According to Berg, religious liberty has often played an important role in helping to ease civil conflicts throughout history. And Berg makes the case that even today, a robust conception of religious liberty could do the same. To support his claim, Berg explains how religion and religious liberty advance the common good. For example, Berg argues that without the freedom to exercise their religious beliefs in the public square, religious ministries that provide valuable social services (like foster care agencies and soup kitchens) would shutter—leaving us all worse off as a result. Berg then expands on this point, ultimately arguing that religious freedom for all is a societal value worth protecting.

But, despite recognizing the numerous benefits that religious freedom can offer, Berg ends by turning to several "principles" of religious liberty that he views as necessary to shape and constrain this right so that it can have its desired depolarizing effect. He argues that whatever protections are enshrined in law must be equally applicable to all religions, that religious liberty must be context-sensitive and consider burdens on religious exercise from all angles, and that religious liberty must be bounded by and balanced against "the rights of others and the interests of society."[1]

While these principles (at least in the abstract) are generally sensible and even laudable, Berg provides little legal or constitutional basis for them. And—perhaps as a result—when it comes to applying these principles to difficult and sensitive topics, Berg seems to be relying largely on his own notions of right and wrong as a guide.

Recognizing these largely self-imposed limitations to Berg's approach, we nevertheless commend *Religious Liberty in a Polarized Age* to all readers interested in better understanding the roots of religious liberty, its current contours, and its potential pitfalls. Berg's decades of experience and scholarship shine through as he masterfully breaks down complex legal issues in a way that is both accessible to a lay audience and insightful for those already familiar with the topic.

## I. The Problem of Polarization

Berg begins with the problem of political polarization. Drawing from a medley of social science and punditry, he argues that the self-sorting "mega-identities" of Right versus Left have usurped the place of "loose coalitions of

[1] Thomas C. Berg, Religious Liberty in a Polarized Age 173 (2023).

disparate interests" in the traditional political arena.[2] The cost of this shift isn't just a bifurcation of the nation into partisan tribes interlinked with every aspect of identity—including religiosity—but a lack of sympathy for the other side. As Berg explains, we seem to be in a polarization spiral: increasingly polarized voters elect politicians with a "confrontational approach to governing," whose actions further polarize voters in an endless feedback loop.[3]

It is precisely in such a resentful state of affairs, Berg argues, that threats to liberty run high and "protection of constitutional freedoms becomes particularly important."[4] With the stakes clear, Berg appeals "[a]cross polarized lines," challenging the notion that religious liberty "heavily favors conservatives."[5] In so doing, he first calls upon progressives to value religious freedom "as a source of security for all persons in their deep commitments."[6] He then challenges conservatives to "protect all faiths," even "those slotted into the liberal mega-identity."[7] If society can accept religious liberty as a principle, Berg suggests, religious liberty "might be the cross-cutting issue we need" to "reduce the[] sense of fear and resentment" and ultimately to counter polarization.[8]

Berg also expresses dismay at the willingness of partisans to twist religious freedom to support their own ends. As Berg makes clear, he believes neither camp is innocent in this regard. Conservatives have failed to safeguard Muslim rights, selectively averting their eyes when their policies imperil a minority faith and undermine equality under law.[9] And progressives have opposed protections for religious adherents whose beliefs conflict with liberal policies, maligning conservative religious practices as invidious and demonstrating, at best, a "callous indifference" to the importance of these deeply held beliefs.[10] If religious liberty is only in vogue when it supports one's preferred *political*

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[2] *Id.* at 26-27.

[3] *Id*. at 32, 34.

[4] *Id*. at 29.

[5] *Id*. at 32, 36.

[6] *Id*. at 32, 53.

[7] *Id*. at 32, 53.

[8] *Id*. at 33, 53 (quoting ASMA T. UDDIN, THE POLITICS OF VULNERABILITY: HOW TO HEAL MUSLIM-CHRISTIAN RELATIONS IN A POST-CHRISTIAN AMERICA 194 (2021)).

[9] *See, e.g.*, United States v. Rutherford County, No. 3:12-cv-0737, 2012 WL 2930076 (M.D. Tenn. July 18, 2012) (TRO enjoining county's refusal to process mosque's zoning permit); Trump v. Hawaii, 138 S. Ct. 2392 (2018).

[10] Berg, *supra* note 1, at 70 & n.8 (quoting Zorach v. Clauson, 343 U.S. 306, 314 (1952)). *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014); Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 140 S. Ct. 2367 (2020).

outcome, all religious liberty conflicts risk being turned into proxy wars. As experience has shown, this does not end well for the First Amendment.

Berg presents the Supreme Court's docket in October Term 2017 as a ready example of this problem. Two religious liberty cases, *Masterpiece Cakeshop* and *Trump v. Hawaii*, concerned government hostility to sincere religious beliefs.[11] In *Masterpiece,* cake baker Jack Phillips challenged a Colorado law that required him to bake custom wedding cakes expressing a message that violated his sincere religious beliefs. In *Trump*, Hawaii challenged a federal travel ban that predominantly targeted Muslim-majority countries. Yet mere weeks after Jack Phillips prevailed under the Free Exercise Clause due to government "animosity to religion," Hawaii's challenge to the "Muslim ban" under the Establishment Clause failed.[12]

This juxtaposition of outcomes, in Berg's view, mirrors the starkly divided amicus support and public polling around the two cases. In *Trump*, liberals united in support of Hawaii's Establishment Clause claims and conservatives defended the government. In *Masterpiece*, conservatives united in support of Jack Phillips, and liberals defended the government. This rank-and-file support for arguably[13] contrasting legal positions suggests to Berg that factors outside the text of the Religion Clauses influenced the party lines. It also shows that both sides can—in the right circumstances—empathize with the importance to believers of staying true to their religious identities.

## II. Is Religious Liberty Worth Defending?

Before diving into the contours of religious liberty protections, Berg starts by asking a fundamental question: why should we care about defending religious liberty at all? Understanding that some may be unmoved by the guarantees of the First Amendment alone, Berg instead appeals to the integral role

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[11] Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018); *Trump*, 138 S. Ct. 2392.

[12] *Masterpiece*, 138 S. Ct. at 1731; *Trump*, 138 S. Ct. at 2417.

[13] Berg points to the lack of amicus support for Hawaii by pro-religious liberty groups, but he notes the Becket Fund for Religious Liberty's brief in support of neither party arguing that the travel ban should be analyzed under the same rubric as was applied in *Masterpiece*: religious targeting under the Free Exercise Clause. Berg, *supra* note 1, at 3 & n.8. *See Trump*, 138 S. Ct. at 2418 (noting Hawaii's claim "differ[ed] in numerous respects from the conventional Establishment Clause claim"); *id*. at 2439 (Sotomayor, J., dissenting) (citing *Masterpiece* as basis for her conclusion that Trump's religious hostility made the travel ban unconstitutional). *But see* Brief of Plaintiffs in *International Refugee Assistance Project v. Trump* as Amici Curiae Supporting Respondents at 3-5, *Trump*, 138 S. Ct. 2392 (No. 17-965) (focusing only on Establishment Clause arguments).

religion plays in the personal identity of many believers, ordering and providing meaning to all aspects and stages of life. This central role of religion in the lives of many Americans, Berg argues, parallels the important role that other core identities—like race, gender, or sexual orientation—play for many Americans. Therefore, by recognizing in religion the same importance to personal identity, Berg hopes that secular and pious alike can better understand the "special identity-related harms" suffered by those forced to violate their religious beliefs.[14] And he suggests this can be done "without necessarily saying that those harms reflect that God or divine obligations exist."[15] Rather, avoiding needless suffering imposed by the state is justification enough.

Berg cites some examples to make his point,[16] and a few other recent court decisions further highlight the interconnected nature of religious exercise and personal identity. These decisions cement the free exercise principle that religious beliefs should not need to be checked at the door in the workplace, when gathering in public, or when faithfully serving others.

In *Singh v. Berger*, for example, adherents of the Sikh faith sought to enlist in the Marine Corps but were barred from boot camp unless they "surrender[ed] their [religious articles of] faith."[17] Sikh men are obligated by their faith to maintain unshorn hair and facial hair (*kesh*) and wear a turban (*patka*), metal bracelet (*kara*), and further articles if they've undergone initiation. A unanimous D.C. Circuit found unpersuasive the Marines' defense that their "expeditionary" nature and need to "break down recruits' individuality" warranted stripping these recruits of their religious identity.[18] The Sikh recruits' rights were violated, the Court explained, because they were "subjected to the 'indignity' of being unable to serve" for reasons unrelated to their performance and "forced daily to choose between their religion . . . and nobl[y] . . . defen[ding] . . . the nation."[19]

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[14] Berg, *supra* note 1, at 93.

[15] *Id.*

[16] *Id.* at 94-95 (citing Yang v. Sturner, 750 F. Supp. 558, 558 (D.R.I. 1990) ("regret[fully]" dismissing Hmong family's religious claim to damages over an autopsy they believed imprisoned their son's spirit); *Masterpiece,* 138 S. Ct. at 1719).

[17] Singh v. Berger, 56 F.4th 88, 110 (D.C. Cir. 2022).

[18] *Id.* at 94, 105.

[19] *Id.* at 110.

A similar conflict arose in *Groff v. DeJoy*.[20] In that case, a postal carrier, Gerald Groff, worked for USPS until the service signed a contract with Amazon to deliver packages on Sundays, which conflicted with his religious belief in faithfully observing the Sabbath. The Supreme Court in *Groff* ultimately clarified that employers can't point to just any minor cost or inconvenience when denying an accommodation; instead, they have to show an actual *undue hardship* on their business to overcome the assumption that religious exercise will be accommodated.

Both *Singh* and *Groff* lend further support to Berg's theory. In each case, the court recognized the deep personal significance of adhering to one's religious beliefs and not being forced to act in contradiction to them. These beliefs were also given great respect and weight in the courts' analyses. In both, the court even required the government to modify its operations and incur real costs—even altering military protocol—to accommodate the religious exercise.

But, as Berg argues, religious liberty isn't worth defending solely because of its centrality to personal identity. Surveying the history of religious liberty—or lack thereof—from the Reformation through the American colonies and adoption of the First Amendment, Berg argues that the entrenchment of the right to religious freedom was an intentional step taken to reduce and ameliorate civil division. In the time leading to the American founding, "governmental efforts to impose religious uniformity" utterly failed.[21] This is because religious beliefs are "important enough to die for, to suffer for, to rebel for, to emigrate for, to fight to control the government for."[22] The lesson we should draw from this history, Berg argues, is pragmatic: respecting religious beliefs and convictions, no matter who wields political power, helps reduce conflict by enabling peaceful pluralism.

Another benefit of protecting religious liberty is that it protects religion's contribution to the common good. As Berg points out, many faithful discern a call to serve others. And religious charities do a great service to their communities by providing healthcare, foster care services, and education (to name

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[20] 143 S. Ct. 2279 (2023); *see also* Nick Reaves, *Groff v. DeJoy: Hardison is Dead, Long Live Hardison!*, 2023 HARV. J.L. & PUB. POL'Y PER CURIAM 39 (2023), *available at* https://journals.law.harvard.edu/jlpp/wp-content/uploads/sites/90/2023/09/Reaves-Groff-v.-Dejoy-vf.pdf.

[21] Berg, *supra* note 1, at 121 (quoting Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 317 (1996)).

[22] *Id*.

just a few)—all contributing to the common good. Yet if laws burden religious organizations' freedom to serve and require them to violate their religious identity, faith-based charities may have no choice but to shut down. It is therefore in the service of the common good that religious exercise should be accommodated.

One example Berg points to which illustrates the value of robust religious accommodations is *Fulton v. City of Philadelphia*. In that case, Catholic Social Services (CSS) had "served the needy children of Philadelphia for over two centuries" as a well-respected foster agency providing crucial support for some of the most difficult-to-place children in the City.[23] But its license and contract were revoked after the City learned CSS would not certify and endorse same-sex couples as foster parents due to its religious beliefs. After several years of litigation, the Supreme Court ruled unanimously for CSS and held that the "refusal of [the City] to contract with CSS . . . unless it agree[d] to certify same-sex couples" "violates the First Amendment."[24] As relevant here, the Supreme Court also weighed in on the societal benefits of accommodating even politically controversial religious beliefs. Surveying the facts of the case—which showed CSS hadn't prevented a single same-sex couple from fostering and was one of over twenty foster agencies in the City—the Court concluded that providing a religious accommodation for CSS "seems likely to increase, not reduce, the number of available foster parents."[25]

Or take a very different situation that arose earlier this year—not from explicit animus, but from ignorance of religious obligations. A federal agency in Oklahoma threatened to shut down Saint Francis Health System for having a candle perpetually burning (within a glass and metal enclosure) in its chapels to alert worshippers to the presence of God in the chapel's tabernacle.[26] Until an about-face after threat of litigation, the government's actions imperiled access to healthcare for 400,000 patients annually, the employment of 11,000 Oklahomans at the state's largest hospital, and the receipt of hundreds of millions of dollars in Medicare, Medicaid, and CHIP funding, "[a]ll because Saint Francis refuse[d] to abandon its religious beliefs and extinguish

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[23] Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1874 (2021).

[24] *Id.* at 1882.

[25] *Id.*

[26] *BREAKING: Feds see the light, give up attack on Catholic hospital's sanctuary candle*, The Becket Fund for Religious Liberty (May 5, 2023), https://perma.cc/N6ZY-4MZM.

the sanctuary lamp."[27] The cost of failing to accommodate religious exercise is far from trivial.

## III. Putting Principles into Practice

Having articulated *why* he believes religious liberty is worth protecting, Berg turns to *how* he believes religious liberty should be protected. To start, he posits that religious liberty must have some limits if this freedom is to be respected in the long term. Berg articulates three principles that give shape and bounds to his understanding of the proper scope of religious freedom today. First, Berg asserts that religious liberty claims must be balanced with "the rights of others and the interests of society."[28] Second, he advocates for "practical reali[sm]" (a position he admits is not grounded in the Constitution), and "cautions religious claimants" to temper their accommodation requests if it comes at the expense of the "common good."[29] If accommodating religion comes at too high a cost, he says, "decision makers [will be less likely] to weigh . . . religious freedom heavily in the balance."[30] Third, he posits that the right to free exercise must protect against threats to religious freedom from all angles: "outright hostility" to religion, governments "[t]reating religious exercise less well than . . . other activities," and "unnecessary burdens on religious exercise."[31]

Berg next applies these principles in three circumstances to show how they might work in practice.

### *A. COVID-19*

The selective burdening of religion became a flash point during the COVID-19 pandemic when public-health restrictions (like social distancing) burdened in-person religious gatherings more than comparable secular gatherings. Most notably, in *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Supreme Court enjoined enforcement of a New York City ordinance that

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[27] *Id*.; Letter from Lori Windham, Vice President and Senior Counsel, The Becket Fund for Religious Liberty, to Hon. Xavier Becerra, Secretary, Dep't of HHS, et al. 3 (May 2, 2023), https://perma.cc/Z2KM-QT8R.

[28] Berg, *supra* note 1, at 173.

[29] *Id*. at 174.

[30] *Id*. at 174.

[31] *Id*. at 188-89; *see also* Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ., No. 22-15827, 2023 WL 5946036, at *16 (9th Cir. Sept. 13, 2023) (en banc) (similarly "[d]istill[ing] . . . three bedrock requirements of the Free Exercise Clause" from *Fulton*, *Tandon*, and *Masterpiece*).

"singled out houses of worship for especially harsh treatment," limiting their gatherings to either 10 or 25 worshippers while permitting "hundreds of people shopping" at neighboring "essential" businesses.[32] New York's rule, the Court explained, didn't treat religious exercise as well as other forms of comparable activity, so the restriction could only survive if it was narrowly tailored to serve a compelling government interest.[33]

Berg praises the Supreme Court for carefully scrutinizing claims that religious worship was treated worse than comparable secular activities. New York's disregard for the centrality of worship to the religious identity of those who attend "Mass on Sunday or services in a synagogue on Shabbat," Berg agrees, was indefensible in the face of lax restrictions on activities (like shopping at Macy's) that lacked anything close to the same level of significance and meaning.[34] But Berg also criticizes the Court for not deferring more to public-health considerations. As Berg points out, in the same breath, the Court both chastised New York's COVID response and admitted that "[m]embers of th[e] Court are not public health experts."[35] Public health is a weighty and complex societal interest, which, to Berg, suggests that courts should exercise restraint, consider impacts on third parties, and pragmatically exercise deference when it comes to assessing whether "comparable" activity presents similar transmission risks.

*B. "Minority" Faiths*

If religious liberty is to fulfill its goal of decreasing polarization, Berg argues, it must defend all faiths in both practice and principle. Berg echoes his prior discussion of *Masterpiece* and *Trump* by calling upon conservative Christians to support minority religious identities and by urging liberals to recognize that in some circumstances, conservative Christians *are themselves* a minority identity.

When addressing Christians, Berg makes a pragmatic argument: religious liberty for Christians (whether they like it or not) is dependent on the good *and* the bad precedent created by litigants of minority faiths. It is therefore beneficial for everyone that a wide range of religious minorities continue to successfully obtain legal protection in the courts. In *Singh*, the Sikh Marine recruits' articles of faith were accommodated precisely because the D.C.

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[32] 141 S. Ct. 63, 66-67 (2020).
[33] *Id.*
[34] *Id.* at 67.
[35] *Id.* at 68.

Circuit recognized that "whatever line is drawn [on external indicia] cannot turn on whether those indicia . . . reflect the faith practice of a minority."[36] The Religion Clauses aren't neatly divided into "rights for Christians" and "rights for others."

Instead, these rights intertwine and overlap constantly: Relying on the Religious Freedom Restoration Act—the same federal statute that had protected the Little Sisters of the Poor from being required to provide insurance covering contraceptives—a Native American religious leader won back his ceremonial eagle feathers seized by federal agents because he "demonstrate[d] their religious need."[37] And—citing *Hobby Lobby*, which protected Christian business owners—the Supreme Court in *Holt v. Hobbs* protected a Muslim inmate's right to grow a half-inch beard "in accordance with his religious beliefs."[38] Christians, Berg argues, should celebrate these wins—if for no other reason (though there are many other good ones) than because they expand their own right to free exercise.

Berg also takes an expansive view of who today qualifies as a minority. Though a majority of Americans, Congress, and even the Supreme Court identify as Christian, Berg argues that traditional Christian beliefs can still qualify as a minority identity depending on the circumstance. In many parts of the country, Berg acknowledges, conservative Christians are already "a minority or are unpopular, at least among people in power."[39] This dynamic—that status as a minority entity often changes across time and geographic space—counsels in favor of "adopting constitutional rules that protect minority rights *whoever* the minority happens to be."[40]

For Berg, recent efforts to advance Native American free exercise rights provide a model for garnering bipartisan support to protect religious minorities. When thinking about Native American religious exercise generally, Berg urges special care and "imaginative[] empath[y]" to avoid imposing "thresholds or exclusionary rules" that devalue religious practices which may look different than those more frequently the subject of First Amendment cases.[41]

As Berg points out, First Amendment rights don't disappear on government property. For example, religious exercise remains protected in both the

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[36] *Singh*, 56 F.4th at 103.

[37] McAllen Grace Brethren Church v. Salazar, 764 F.3d 465, 477 (5th Cir. 2014).

[38] Holt v. Hobbs, 574 U.S. 352, 355-56 (2015).

[39] Berg, *supra* note 1, at 235.

[40] *Id*. at 239.

[41] *Id*. at 250, 256.

prison and military contexts, where the government wields a high degree of coercive control.[42] Similar arguments should hold sway for Native American religious exercise on government land.

Berg criticizes the last half-century of Native American religious liberty law for failing to grapple with the true requirements of Native American spiritual practice. It is impossible to dispute that "Native Americans . . . are 'dependent on government's permission and accommodation' for their religious exercise, tied as it is to specific lands."[43] Yet the Supreme Court in *Lyng* completely ignored this dynamic, defining "'burdens' on religion by the baseline of property ownership . . . [and] wholly disregard[ing] the concrete need of Native American practitioners to worship at specific [government-owned] sites."[44]

Lower courts have felt constrained to follow suit. For example, the government's destruction of a Native American sacred altar to make room for a highway turn lane (when numerous less destructive alternatives were available) went unchecked in *Slockish v. U.S. Federal Highway Administration* because the court discounted these precise harms, finding no "threat of sanctions or . . . government benefit [wa]s being conditioned upon conduct that would violate their religious beliefs."[45] This same misunderstanding arose in another Ninth Circuit case, where the panel applied *Lyng* to hold that "no matter how . . . burdensome" turning a Native American sacred site into a "two mile[] wide and 1,100 f[oot] deep" copper mine may be to the Western Apache, it's not a "penalty or den[ial] of benefit" because the land is government-owned.[46]

As numerous First Amendment scholars have since pointed out, the failure to recognize that religious exercise can look *very different* when dealing with minority faiths leads to unfortunate and unprincipled outcomes. As Professor Stephanie Barclay noted, the Ninth Circuit's justification for destroying sacred land in *Apache Stronghold* would be astonishing if translated into more familiar religious terms: "[i]f the government bulldozed a cathedral, nothing

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[42] *Id*. at 253.

[43] *Id*. at 251 (quoting Cutter v. Wilkinson, 544 U.S. 709, 721 (2005)).

[44] *Id*. (citing Lyng v. N.W. Indian Cemetery Protection Assn., 485 U.S. 439, 448, 451 (1998)).

[45] Slockish v. U.S. Fed. Highway Admin., No. 3:08-cv-01169, at *1 (D. Or. June 11, 2021), *aff'd*, Slockish v. U.S. Dep't of Trans., No. 21-35220, 2021 WL 5507413 (9th Cir. Nov. 24, 2021), *petition for cert. withdrawn per settlement*, No. 22-321 (dismissed Oct. 10, 2023).

[46] Apache Stronghold v. United States, 38 F.4th 742, 755 (9th Cir. 2022), *vacated, en banc review granted*, 56 F.4th 636.

would prohibit [adherents] from still visiting that site and saying prayers . . . atop a pile of rubble."[47]

Dismayed by these outcomes, Berg praises the recent "[p]rincipled conservative support for Native American claims" that he sees in direct representations and amicus support.[48] In *Apache Stronghold*, for example, a diverse coalition of religious organizations—demonstrating a "healthy atmosphere of freedom for all"—supported the free exercise rights of Native Americans before the en banc Ninth Circuit.[49]

*C. LGBTQ Rights*

The intersection of LGBTQ rights and religious liberty is a Gordian knot, but Berg thinks it could at least "be confined to fewer situations and a lower decibel level."[50] According to Berg, this can be done by recognizing three things: First, that "protecting both sides means combining nondiscrimination laws with meaningful religious exemptions."[51] Second, that "[t]he unique prominence and destructiveness of racism in American history" distinguishes invidious race discrimination from religious accommodations to other nondiscrimination requirements.[52] And third, that LGBTQ interests justify boundaries on religious liberty protections—most significantly by narrowing protections for business owners when there are no ready alternatives.[53]

When the Supreme Court "stepped into the void" and created a constitutional right to same-sex marriage, Berg explains, it "protected both sides."[54] But the balance of religious liberty and nondiscrimination is not a zero-sum game. In *Fulton*, for example, protecting Catholic Social Services' right to continue serving kids in need didn't prevent a single same-sex couple from fostering or adopting. Indeed, Berg takes pains to clarify that protecting religious exercise is compatible with the recognition "that gay persons . . . cannot be treated as social outcasts or as inferior in dignity and worth."[55] While *Obergefell* acknowledged a constitutional right to same-sex marriage, it also

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[47] Stephanie Hall Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 HARV. L. REV. 1294, 1359 (2021).

[48] Berg, *supra* note 1, at 253.

[49] *Id.* at 253, 256; *see Diverse coalition urges federal appeals court to protect Oak Flat*, The Becket Fund for Religious Liberty (Jan. 10, 2023), https://perma.cc/C7FD-WNR8.

[50] Berg, *supra* note 1, at 260.

[51] *Id.*

[52] *Id.* at 276.

[53] *Id.* at 260.

[54] *Id.* at 258.

[55] *Id.* at 278 (quoting *Masterpiece*, 138 S. Ct. at 1727).

recognized that "many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises[.]"[56]

How does this play out in practice? Though Berg demonstrates his strong commitment to religious freedom, he emphasizes that there are "uncertainties and limits."[57] He therefore advocates for policies to "limit the scope of exemptions" as a means to reduce harms to third parties and decrease civil conflict.[58] For example, he argues that businesses owned by religious individuals (like Masterpiece Cakeshop) should be afforded religious accommodations only if they're "small" (in terms of staff and volume), "give notice" of their beliefs, and are not the only provider of a generally available good or service in town.[59]

## IV. Religious Liberty According to Berg

*Religious Liberty in a Polarized Age* does a lot well. Berg covers significant ground in a short and accessible book, while still providing a thorough and engaging discussion of nearly all of today's most important religious liberty questions. He also doesn't hold back when challenging the entrenched assumptions of both conservatives and liberals—getting to the heart of the shortcomings on both sides. And he persuasively articulates the value of strong religious liberty protections in a way that should appeal to believers and non-believers alike. Indeed, his comparison between religious identity and other deeply held values should give pause to anyone who doubts the personal significance of religious beliefs.

Berg also articulates a justification for religious liberty *for all* that cuts across traditional party lines, attempting to bring conservatives and liberals together to support minority religious practices—whether that entails the protection of Native American sacred sites in Arizona or the freedom of conservative Christians to dissent from modern views on sexual ethics.

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[56] Obergefell v. Hodges, 576 U.S. 644, 672 (2015); *see also Fellowship of Christian Athletes*, 2023 WL 5946036, at *23 ("Anti-discrimination laws and policies serve undeniably admirable goals, but when those goals collide with the protections of the Constitution, they must yield—no matter how well-intentioned.").

[57] Berg, *supra* note 1, at 286.

[58] *Id.* at 295.

[59] *Id.*; *see also* 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2315 (2023) (recognizing distinction between "innumerable goods and services that no one could argue implicate the First Amendment" and services that involve private speech).

Berg's principles can be seen at work in the most recent Supreme Court term. As if on cue, the two blockbuster religious liberty cases of the 2022 term provide ready-made exemplars for Berg's principles. In *Groff*, the Supreme Court doubled down on the personal significance of religious belief, explaining that de minimis burdens on an employer's business are not sufficient to deny employees' religious accommodations; instead, an employer's hardship must be truly undue before an employee's right to religious accommodation under Title VII can be overcome. And the Court, à la Berg, recognized in *303 Creative* that protections for religiously motivated speech can exist alongside the right of LGBTQ individuals to "acquir[e] whatever products and services they choose on the same terms and conditions as are offered to other members of the public."[60]

But Berg's theory of religious liberty seems to suffer from a few *limitations*—a term we use intentionally because they are not necessarily *flaws* so much as inevitable and necessary compromises that come with seeking to make religious liberty palatable to a diverse society. At a conceptual level, Berg's argument falls into the same trap he 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. This becomes clear, for example, in Berg's argument that protections for religious liberty must be balanced against competing interests; he says this argument is not based on an underlying theoretical or constitutional principle, but on a pragmatic necessity to achieve depolarization. Rather than treat depolarization as a beneficial *effect* of greater religious liberty, Berg seems to treat it as the primary goal.

By viewing religious liberty in this way, Berg introduces his own distortions into the doctrine. For example, rather than grapple with the weighty history and tradition that suggest religious liberty interests likely outweigh a government's interest in enforcing a nondiscrimination requirement under the First Amendment, Berg elevates asserted interests in preventing dignitary harms to the same level as constitutional rights without a principled justification (just a practical one). In the same way, many of Berg's policy prescriptions (like where to draw the line between respecting First Amendment rights and deferring to public health experts) come not from the Constitution or

[60] *303 Creative*, 143 S. Ct. at 2303.

case law, but from his own intuitions about where an appropriate line *should* be drawn.

None of this is to say, however, that Berg's approach lacks depth or wisdom. Few scholars have studied, debated, and grappled with religious liberty to the extent that Berg has. And Berg's principles, taken on their own terms—namely, that they come from his decades of experience and are not an attempt to plumb the depths of the Constitution's original meaning—are certainly worth careful consideration. Indeed, they should serve as both a guidepost and gut check for anyone litigating, writing about, or even just seeking to better understand the many complex religious liberty questions of our age.

Other Views:

- Andrew Koppelman, *The Increasingly Dangerous Variants of the 'Most-Favored-Nation' Theory of Religious Liberty*, 108 IOWA L. REV. 2237 (2023), *available at* https://ilr.law.uiowa.edu/volume-108-issue-5/2023/07/increasingly-dangerous-variants-most-favored-nation-theory-religious-liberty.
- Paul Horwitz, *Against Martyrdom: A Liberal Argument for Accommodation of Religion*, 91 NOTRE DAME L. REV. 1301 (2016), *available at* https://scholarship.law.nd.edu/ndlr/vol91/iss4/2.
- Emily London & Maggie Siddiqi, *Religious Liberty Should Do No Harm*, CENTER FOR AMERICAN PROGRESS REPORT (Apr. 11, 2019), https://www.americanprogress.org/article/religious-liberty-no-harm/.
- Brian Leiter, *Why Tolerate Religion?*, 25 CONST. COMMENT. 1 (2008), https://conservancy.umn.edu/bitstream/11299/170389/1/25_01_Leiter.pdf.

# THE FALSE DOCTRINE OF INHERENT SOVEREIGN AUTHORITY*

ROBERT G. NATELSON**

This essay examines the hypothesis that the federal government and its departments and officials hold powers unenumerated in the Constitution because those powers are inherent in the federal government's sovereignty. This hypothesis is called the "doctrine of inherent sovereign authority." It should not be confused with a similarly-named theory—not at issue here—that applies to states and Indian tribes.[1]

The federal doctrine's advocates usually begin with the premise that states were never severally sovereign, because upon issuance of the Declaration of Independence (or even before), sovereignty vested in the Continental Congress, representing the Union. From that premise, they argue that sovereignty passed to the Confederation Congress and then to the federal government, unimpaired by the restrictions on central power imposed by the Articles of Confederation or the Constitution.

James Wilson popularized the doctrine of inherent sovereign authority in 1785 in an effort to liberate the Confederation Congress from the restrictions imposed by the Articles. Yet even he did not apply it to the new federal government erected by the Constitution. Moreover, in 1907, the Supreme Court firmly rejected the doctrine, pointing to its clear inconsistency with both the Constitution's enumerated-power scheme and the explicit language of the Tenth Amendment.

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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* Stephen A. Simon, *Inherent Sovereign Powers: The Influential Yet Curiously Uncontroversial Flip Side of Natural Rights*, 4 ALA. C.R. & C.J. L. REV. 133 (2013) (discussing the state and tribal doctrine).

Yet the doctrine has displayed remarkable resilience. After its rejection by the Court, it re-surfaced again and again as if the rejection had never occurred. The doctrine of inherent sovereign authority played the lead role in an important Supreme Court decision in 1936, then appeared in supporting roles in cases issued in 2004, 2012, and 2023. Commentators continue to resort to it, and one recently argued that it should be used (under another name) to render the national government virtually omnipotent.

One way to explain this resilience is that the doctrine justifies powers the Justices or commentators would like the federal government to have, but that they believe, rightly or wrongly, are unsupported by the Constitution's text.

This essay concludes that arguments in favor of the doctrine are based on the logical fallacy of petitio principii—begging the question. It also examines the documentary and historical narratives justifying the doctrine and finds them contradicted by the facts. The essay concludes that the doctrine has no reasonable basis, is inconsistent with both the Constitution's text and the rule of law, and should be abandoned.

## I. A SHORT HISTORY OF THE DOCTRINE OF INHERENT SOVEREIGN AUTHORITY

In 1781, the Confederation Congress chartered a central bank, the Bank of North America. Congress's action was controversial, both because of the subject matter and because the Articles of Confederation had granted Congress no express or implied power to charter corporations. The Articles also provided that "Each state retains . . . every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled."[2] In other words, incorporation was a state, not a Confederation, prerogative.

James Wilson of Pennsylvania—who, it must be said, invested personally in the bank and benefitted from its loans[3]—defended the institution's legitimacy in a pamphlet published in 1785. The pamphlet's title was *Considerations on the Bank of North America*.[4] After conceding the language of

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[2] ARTS. OF CONFED., art. II. Compare the later-adopted Tenth Amendment of the Constitution. *See infra* note 10 and accompanying text.

[3] John K. Alexander, *James Wilson,* AMERICAN NATIONAL BIOGRAPHY, https://doi.org/10.1093/anb/9780198606697.article.0200340 (2000).

[4] James Wilson, *Considerations on the Bank of North America* (1785), *in* 1 COLLECTED WORKS OF JAMES WILSON 60 (Kermit L. Hall & Mark David Hall eds. 2007).

the Articles, Wilson enunciated what became known as the inherent sovereign authority doctrine:

> Though the United States in congress assembled derive *from the particular states* no power, jurisdiction, or right, which is not expressly delegated by the confederation, it does not thence follow, that the United States in congress have *no other* powers, jurisdiction, or rights, than those delegated by the particular states.
>
> The United States have general rights, general powers, and general obligations, not derived from any particular states, nor from all the particular states, taken separately; but resulting from the union of the whole . . .
>
> To many purposes, the United States are to be considered as one undivided, independent nation, and as possessed of all the rights, and powers, and properties, by the law of nations incident to such.
>
> Whenever an object occurs, to the direction of which no particular state is competent, the management of it must, of necessity, belong to the United States in congress assembled. There are many objects of this extended nature. The purchase, the sale, the defence [sic], and the government of lands and countries, not within any state, are all included under this description. An institution for circulating paper, and establishing its credit over the whole United States, is naturally ranged in the same class.[5]

Wilson then supported his contention by referring to the Declaration of Independence:

> The act of independence was made before the articles *of* confederation. This act declares that "*these United Colonies*," (not enumerating them separately) "are free and independent states; and that, as free and independent states, *they* have full power to do *all* acts and things which independent states may, of right, do."
>
> The confederation was not intended to weaken or abridge the powers and rights, to which the United States were previously entitled. It was not intended to transfer any of those powers or rights to particular states, or any of them. If, therefore, the power now in question was vested in the United States before the confederation; it continues vested in them still. The confederation clothed the United States with many, though, perhaps, not with sufficient powers: but of none did it disrobe them.[6]

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[5] *Id.* at 65-66 (italics in original).

[6] *Id.* at 66.

In other words, Wilson argued that upon adoption of the Declaration of Independence, the Second Continental Congress assumed full sovereignty over all matters in which individual states were not competent. The Confederation Congress inherited this sovereignty from the Second Continental Congress. The states did not reserve authority over such matters when they ratified the Articles, because the states did not have that authority to reserve; it already was vested in Congress.

Once the Constitution had been reported to the states for ratification, however, Wilson sought to defuse any suspicion that he might apply his theory to claim unenumerated powers for the new federal government. In his famous October 6, 1787, State-House Yard speech he said:

> When the people established the powers of legislation under their separate governments, they invested their representatives with every right and authority which they did not in explicit terms reserve . . . But in delegating federal powers, another criterion was necessarily introduced, and the congressional authority is to be collected, not from tacit implication, but from the positive grant expressed in the instrument of union. Hence it is evident, that in the former case everything which is not reserved is given, but in the latter the reverse of the proposition prevails, and everything which is not given, is reserved.[7]

Throughout the debates over the Constitution, its advocates frequently echoed the point Wilson made in his State-House Yard speech: If the Constitution was ratified, the government it erected would be restricted to the powers granted in the document. Illustrative was the comment at the Virginia ratifying convention by a young lawyer named John Marshall:

> Has the Government of the United States power to make laws on every subject? . . . Can they go beyond the delegated powers? If they were to make a law not warranted by any of the powers enumerated, it would be considered by the Judges as an infringement of the Constitution which they are to guard:—They would not consider such a law as coming under their jurisdiction.—They would declare it void.[8]

It was because of such representations that the Constitution was ratified.[9]

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[7] James Wilson, *Speech in the State House Yard*, Oct. 6, 1787, *in* 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 167-68 (John P. Kaminski et al. eds., 1976-2023) [hereinafter DOCUMENTARY HISTORY].

[8] John Marshall, *Remarks to the Virginia Ratifying Convention*, June 20, 1788, *in* 10 *id.* at 1431.

[9] *See* Robert G. Natelson, *The Enumerated Powers of States*, 3 NEV. L.J. 469 (2003); Robert G. Natelson, *The Founders Interpret the Constitution: The Division of Federal and State Powers*, 19

To resolve any lingering uncertainty, Congress proposed and the states approved the Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[10] In 1819, John Marshall, now Chief Justice of the United States and writing for a unanimous Court in *McCulloch v. Maryland,* reaffirmed that the federal government was limited to enumerated powers.[11]

Yet in the years following the ratification of the Tenth Amendment, some continued to insist on applying Wilson's Confederation-era theory to the Constitution.[12] Then, in 1889, the Supreme Court came close to adopting it by ruling that congressional immigration restrictions were "an incident of sovereignty belonging to the government of the United States."[13] Although the Court added that this "incident of sovereignty" was "delegated by the constitution,"[14] it failed to identify the specific enumerated power by which the Constitution granted the federal government authority over immigration. Arguably, this was harmless error, because the Constitution's Define and Punish Clause does grant Congress authority to restrict immigration[15]—a fact of which the Justices seemingly were unaware.

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FEDERALIST SOC'Y REV. 60 (2018); Robert G. Natelson, *More News on the Powers Reserved Exclusively to the States*, 20 FEDERALIST SOC'Y REV. 92 (2019) (all collecting the numerous Federalist representations to the ratifying public of the limited and enumerated scope of federal powers under the Constitution).

[10] U.S. CONST. amend. X.

[11] McCulloch v. Maryland, 17 U.S. 316, 405 (1819):

> This government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent, to have required to be enforced by all those arguments, which its enlightened friends, while it was depending before the people, found it necessary to urge; that principle is now universally admitted.

[12] *E.g.*, ALEXANDER ADDISON, ANALYSIS OF THE REPORT OF THE VIRGINIA ASSEMBLY 20-21 (1800) ("The declaration of Independence, which raised the United States to the rank of a nation, gave to any government, which the people of the United States should establish with the charge of common defence and foreign intercourse, all the rights which the law of nations gives to every sovereign government.").

[13] Ping v. United States, 130 U.S. 581, 609 (1889).

[14] *Id.*

[15] Robert G. Natelson, *The Power to Restrict Immigration and the Original Meaning of the Constitution's Define and Punish Clause*, 11 BRIT. J. AM. LEG. STUDIES 209 (2022). The Define and Punish Clause states in relevant part, "The Congress shall have Power . . . To define and punish . . . Offenses against the Law of Nations." U.S. CONST. art. I, § 8, cl. 10.

Counsel for the federal government promoted the inherent sovereign authority doctrine in the 1907 case of *Kansas v. Colorado*.[16] The Court, relying in part on *McCulloch*,[17] rejected it:

> But the proposition that there are legislative powers affecting the nation as a whole which belong to [the Union], although not expressed in the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the Constitution, independently of the Amendments . . . This natural construction of the original body of the Constitution is made absolutely certain by the 10th Amendment . . . which was seemingly adopted with prescience of just such contention as the present . . .[18]

Still, the doctrine continued to surface. In 1936, the Court entirely disregarded its 1907 holding and employed inherent sovereign authority as the basis for its ruling in *United States v. Curtiss-Wright Export Corporation*.[19] That case tested the constitutionality of a presidential order, issued pursuant to a congressional resolution, banning the sale of arms into a war zone.

The congressional resolution was clearly justified as a regulation of foreign commerce, and the executive order was within the incidental authority granted to the President by Article II.[20] Yet the Court unnecessarily relied on inherent sovereign authority to uphold the order. Specifically, the Court ruled that the Constitution's enumeration of powers applied only to domestic matters, not to foreign affairs. Justice George Sutherland wrote the opinion for the Court, and his summary of the doctrine remains its most authoritative description. He began with the Declaration of Independence:

> By the Declaration of Independence, "the Representatives of the United States of America" declared the United (not the several) Colonies to be free and independent states, and as such to have "full Power to levy War, conclude Peace, contract Alliances, establish Commerce and to do all other Acts and Things which Independent States may of right do."[21]

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[16] 206 U.S. 46 (1907).

[17] *Id.* at 82.

[18] *Id.* at 89-90.

[19] 299 U.S. 304 (1936).

[20] ROBERT G. NATELSON, THE ORIGINAL CONSTITUTION: WHAT IT ACTUALLY SAID AND MEANT 159-61 (3d ed. 2015) (explaining that one intended effect of the President's enumerated powers was to give him wide authority over foreign affairs).

[21] *Curtiss-Wright*, 299 U.S. at 316.

From this, he argued that foreign affairs sovereignty was inherent in the Union from that time—and perhaps from even before:

> As a result of the separation from Great Britain by the colonies, acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America. Even before the Declaration, the colonies were a unit in foreign affairs, acting through a common agency—namely, the Continental Congress, composed of delegates from the thirteen colonies. That agency exercised the powers of war and peace, raised an army, created a navy, and finally adopted the Declaration of Independence. Rulers come and go; governments end and forms of government change; but sovereignty survives. A political society cannot endure without a supreme will somewhere. Sovereignty is never held in suspense. When, therefore, the external sovereignty of Great Britain in respect of the colonies ceased, it immediately passed to the Union . . . . That fact was given practical application almost at once. The treaty of peace, made on September 3, 1783, was concluded between his Brittanic Majesty and the "United States of America." . . .
>
> The Union existed before the Constitution, which was ordained and established among other things to form "a more perfect Union." Prior to that event, it is clear that the Union, declared by the Articles of Confederation to be "perpetual," was the sole possessor of external sovereignty, and in the Union it remained without change save in so far as the Constitution in express terms qualified its exercise. The Framers' Convention was called and exerted its powers upon the irrefutable postulate that though the states were several their people in respect of foreign affairs were one.[22]

Since 1936, the Supreme Court sometimes has returned to its earlier recognition that the federal government is limited to its enumerated functions,[23] but it also has sporadically invoked inherent sovereign authority.

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[22] *Id.* at 316-17. Judges and commentators frequently claim that the Constitution left the federal government with all foreign affairs powers and the states with none. *See, e.g.*, *Ping*, 130 U.S. at 605; CALVIN MASSEY, AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES 248 (2009) (claiming "the [Supreme] Court has consistently declared that only the federal government has the power to conduct foreign affairs") (citing Perez v. Brownell, 356 U.S. 44 (1958)). But this claim is false. *See, e.g., infra* Part II.C.2. (discussing state war powers); *infra* note 34 and accompanying text.

[23] *E.g.*, National Federation of Independent Business v. Sebelius, 567 U.S. 519, 535 (2012) (relying on *McCulloch*); Afroyim v. Rusk, 387 U.S. 253, 257 (1967).

The doctrine surfaced in a 1958 case (since overruled),[24] and more recently as a possible basis for federal authority over immigration[25] (once again overlooking the Define and Punish Clause) and for plenary congressional power over Indian affairs.[26]

Some commentators have relied on the doctrine to supply what they see (sometimes erroneously) as omissions in the Constitution's enumeration of federal powers. They have resorted to the doctrine to concede to Congress plenary governance of immigration[27] and Indian affairs[28]—and, in one instance, of almost everything else imaginable.[29]

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[24] *Perez*, 356 U.S. at 57, *overruled by Afroyim*, 387 U.S. at 257.

[25] Arizona v. United States, 567 U.S. 387, 395 (2012) (referring to the federal government's "inherent power as sovereign to control and conduct relations with foreign nations").

[26] Haaland v. Brackeen, 143 S. Ct. 1609, 1628 (2023) (arguing that "we have posited that Congress's legislative authority might rest in part on 'the Constitution's adoption of preconstitutional powers necessarily inherent in any Federal Government'"); United States v. Lara, 541 U.S. 193, 201 (2004) (claiming that "at least during the first century of America's national existence," Congress's legislative authority over Indian affairs might rest in part "upon the Constitution's adoption of preconstitutional powers necessarily inherent in any Federal Government").

[27] *E.g.*, RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE 786 (2007).

[28] *E.g.*, FELIX COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 397-98 (LexisNexis 2005); Matthew L.M. Fletcher, *Same-Sex Marriage, Indian Tribes, and the Constitution*, 61 U. MIAMI L. REV. 65-66 (stating that federal Indian law is "derived in large part from the Indian Commerce Clause, treaties with Indian tribes, and a 'pre-constitutional' federal authority to deal with Indian tribes").

[29] John Mikhail, *The Original Federalist Theory of Implied Powers*, 46 HARV. J.L. & PUB. POL'Y 56, 59 (2023). Mikhail states:

> Those implied powers include, but are not limited to:
>
> 1. All the powers to which any nation would be entitled under the law of nations, such as foreign affairs, Indian affairs, immigration, and other incidents of national sovereignty;
> 2. All the powers that Blackstone and other writers had explained were tacitly possessed by any legal corporation, including the power to own property, make contracts, sue and be sued, operate under a seal, and enact by-laws, along with other corporate powers, such as the power to remove officers for good cause;
> 3. The power to legislate on all issues that affect the general interests or harmony of the United States, or that lay beyond the competence of the states . . . .
> 4. Finally, the power to fulfill all the purposes for which the Government of the United States was formed, including, but not limited to, those ends enumerated in the Preamble and General Welfare Clause.

*See also* John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045 (2014).

## II. WEAKNESSES IN THE DOCTRINE

### *A. Begging the Question*

The arguments supporting the inherent sovereign authority doctrine suffer from logical fallacies. An example from Justice Sutherland's opinion in *Curtiss-Wright* is the claim that "Sovereignty is never held in suspense. When, therefore, the external sovereignty of Great Britain in respect of the colonies ceased, it immediately passed to the Union."[30] This language embodies a non sequitur: Even if the premise were true that sovereignty is never held in suspense (and it is demonstrably false; domestic chaos may interrupt it), sovereignty could have passed to the states rather than to the Union.[31]

However, the central fallacy in the doctrine of inherent sovereign authority is petitio principii—that is, begging the question. To beg the question is to rely on one or more premises that take for granted the truth of the conclusion.

In arguing for their conclusion that the federal government has inherent sovereign authority, the doctrine's advocates assume that when the Founders divided sovereignty between the states and the central government, they vested authority over all matters of common interest in the central government. This assumption (their premise) contains the very conclusion these advocates purport to prove: the federal government has inherent sovereign authority because the Founders must have given it such authority—so if it isn't in the Constitution it must be somewhere else.

It is true that the Virginia Plan would have granted the central government power over all matters of interest to more than one state[32]—a scheme

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[30] 299 U.S. at 317.

[31] In fact, during period leading up to adoption of the Constitution, some writers compared the then-current relationship among American states to a "state of nature." *E.g.*, Charles Nisbet to the Earl of Buchan, Dec. 25, 1787, *in* 15 DOCUMENTARY HISTORY, *supra* note 7, at 87, 88 ("it is much preferable to a State of Nature, which prevails at present"); "Aristides" (Alexander Contee Hanson), Remarks on the Proposed Plan of a Federal Government, Jan. 31–Mar. 27, 1788, *in id.* at 517, 544 (asserting that the states ceding certain powers to the new federal government are "just as reasonable as in a state of nature"); David Daggett, Oration Delivered in New Haven, Jul. 4, 1787, *in* 13 *id.* at 160, 163 ("and the same principle which induced men, while in a state of nature, to enter into compacts, will soon compel these states to a change of government").

[32] 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 21 (Max Farrand ed., 1937) (May 29, 1787) (James Madison) [hereinafter FARRAND] (reproducing part of the Virginia Plan as providing, "the National Legislature ought to be impowered to enjoy the Legislative Rights vested in Congress by the Confederation & moreover to legislate in all cases to which the separate States

modern scholars call "externality federalism." But the Constitution as finally adopted embodied a scheme very different from externality federalism. Unlike the Virginia Plan, it featured a list of enumerated federal powers that left the states with authority over many matters of common interest—presumably because the perceived risks of centralized power were greater than any perceived benefits from central coordination.

Thus, while granting Congress governance of interjurisdictional commerce, the Constitution left other economic matters of common interest (manufacturing, for example) to the states.[33] The framers even made the considered decision to allow states (subject to federal preemption) to impose their own embargoes against foreign nations.[34] The Constitution also left the states with the power to wage defensive war[35] and, with congressional consent, to enter interstate compacts over questions of common interest.[36]

Merely assuming an issue should be resolved centrally does not demonstrate that the federal government somehow received power to resolve it.

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are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation").

[33] Robert G. Natelson, *The Legal Meaning of "Commerce" In the Commerce Clause*, 80 ST. JOHN'S L. REV. 789, 841-45 (2006) (explaining that the Founders left most economic legislation to the states despite acknowledging the interactive nature of the national and international economy); Robert G. Natelson, *The Meaning of "Regulate Commerce" to the Constitution's Ratifiers*, 23 FEDERALIST SOC'Y REV. 307 (2022).

[34] 2 FARRAND, *supra* note 32, at 440-41 (Aug. 28, 1787) (Madison):

> Mr. Madison moved to insert after the word "reprisal" (art. XII) the words "nor lay embargoes". He urged that such acts <by the States> would be unnecessary—impolitic—& unjust—
>
> Mr. Sherman thought the States ought to retain this power in order to prevent suffering & injury to their poor.
>
> Col: Mason thought the amendment would be not only improper but dangerous, as the Genl. Legislature would not sit constantly and therefore could not interpose at the necessary moments—He enforced his objection by appealing to the necessity of sudden embargoes during the war, to prevent exports, particularly in the case of a blockade—
>
> Mr Govr. Morris considered the provision as unnecessary; the power of regulating trade between State & State, already vested in the Genl— Legislature, being sufficient.

[35] U.S. CONST. art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress . . . keep Troops, or Ships of War *in time of Peace* . . . or engage in War, *unless actually invaded, or in such imminent Danger as will not admit of delay*") (italics added).

[36] *Id.*

*B. Textual Problems*

As the Court in *Kansas v. Colorado* pointed out, the doctrine of inherent sovereign authority is in obvious tension with the Constitution's structure as a document of enumerated powers.[37] As the Court further pointed out, the doctrine starkly contradicts the explicit language of the Tenth Amendment.[38]

Professor John Mikhail has made one of the few efforts—perhaps the only serious one—to reconcile the notion of unenumerated powers with the Constitution's text. He points out that the Necessary and Proper Clause[39] mentions three categories of powers: (1) "the foregoing Powers" (i.e., those granted in Article I, Section 8), (2) those "vested by this Constitution . . . in any Department or Officer" of the United States, and (3) those "vested by this Constitution in the Government of the United States." He observes that category 3 "cannot be equated *either* with the enumerated Article I powers of Congress or with the other powers vested by the Constitution in any Department or Officer of the United States."[40]

However, he finds no enumerated powers encapsulating grants to "the Government of the United States." He (quite properly) is reluctant to treat the third category as surplusage[41] or as a drafting error. It follows, then, he argues, that the third category "necessarily refers to certain implied or unenumerated powers that the Constitution vests in the Government of the United States itself."[42] Even if his analysis is not quite the same as the doctrine of inherent sovereign authority, it is closely akin to that doctrine. Moreover, his catalogue of unenumerated federal powers is vast.[43]

Professor Mikhail's argument is intriguing. But even if one assumes that he is correct that the Constitution conveys no enumerated powers to "the Government of the United States," his solution creates more textual problems than it solves. The scope of his implied unenumerated powers at least equals the scope of those enumerated—which raises the question of why the

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[37] *Kansas*, 206 U.S. at 89.

[38] *Id.*; U.S. CONST. amend. X.

[39] U.S. CONST. art. I, § 8, cl. 18 ("The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

[40] Mikhail, *Necessary and Proper, supra* note 29, at 1050.

[41] *Id.* at 1058.

[42] *Id.* at 1050.

[43] *Supra* note 29.

Constitution's framers bothered to enumerate at all. Further, his interpretation rescues a few words from being consigned as surplus at the cost of treating massive portions of the Constitution—most of the specific enumerations—as surplus.

Just as importantly, his interpretation is not required to prevent the Necessary and Proper Clause's third category from becoming surplus. This is because he is wrong to assume that the Constitution grants no enumerated powers to "the Government of the United States." Three grants appear in Article IV and one or two (depending on how one counts) in Article VI.

Article IV, Section 4 requires "the United States"—meaning the U.S. government—to (1) guarantee each state a republican form of government, (2) protect states from invasion, and (3) upon due request, quell domestic violence.[44] Similarly, Article VI imposes an obligation on "the United States" to (1) pay all "Debts contracted" and (2) honor all "Engagements entered into, before the Adoption of this Constitution."[45] It is, of course, elementary that the imposition of a mandate includes a grant of power to carry it out, if that power has not been otherwise granted.[46] If Jill has not previously received authority to supervise her company's contracts but her boss tells her to "take care of the Smith contract," she thereby receives authority to do so. When the Constitution commands the President "take Care that the Laws be faithfully executed," that command carries with it power to do so.

The Constitution's imposition of specific obligations on the government may enlist powers enumerated elsewhere, but it may also require supplemental authority. For example, the Constitution does not otherwise grant authority to quell garden-variety riots ("domestic Violence") that do not impede execution of federal laws or rise to the level of invasion or insurrec-

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[44] U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.").

[45] *Id.* art. VI, cl. 1 ("All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.").

[46] Founding-era legal maxims made a similar point: Quando aliquid conceditur, conceditur et id sine quo res ipsa uti non potest (When something is granted, that without which the thing cannot be done is also granted) and Quando lex aliquid alicui omnia incidentia concedit, tacite conceduntur, sine quibus res ipsa esse non potest (When the law grants all the incidents to someone, all the powers without which the thing cannot exist are tacitly granted). *See* 24 CHARLES VINER, AN ABRIDGMENT OF LAW AND EQUITY (index volume, unpaginated) (2d ed., 1794).

tion. The government (and thus its functionaries) receive the necessary supplemental authority from Article IV.[47]

*C. Flaws in the Doctrine's Historical Narrative*

As outlined by exponents such as Justice Sutherland,[48] the historical narrative underpinning the doctrine of implied sovereign authority is as follows:

- From the time Independence was declared—and, indeed, possibly even before—the Continental Congress was sovereign in war and foreign affairs, and perhaps in other areas of public interest;
- upon final ratification of the Articles of Confederation, this sovereignty passed seamlessly to the Confederation Congress; and
- upon ratification of the Constitution, it passed seamlessly again to the federal government.[49]

This narrative is flawed in several respects. First, it does not take account of the numerous representations as to the limited scope of federal powers made during the ratification debates and relied upon by the ratifiers. Second, it does not comport with changes made by the Constitution's framers that actually increased state war powers from what they had been under the Confederation. Third, it is based on misunderstandings and misrepresentations of certain key documents, including the Declaration of Independence, the Articles of Confederation, and the 1783 Treaty of Paris. Finally, it presents a tale of seamless transition from one historical stage to another that is at odds with historical fact.

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[47] The authority conveyed by other Article IV and Article VI mandates also exceeds that previously granted to specific officers and agencies. For example, Congress received power to incur (and, of course, pay) new debt, and it received power to tax for the purpose of paying both new debt and Confederation debt. U.S. CONST. art. I, § 8, cls. 1 & 2. But, properly construed, those clauses did not actually authorize *payment* of Confederation debt. *See* Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding,* 52 U. KAN. L. REV. 1 (2003). That power came from Article VI. Similarly, the Constitution elsewhere granted no general power to enforce "Engagements," other than, perhaps, the President's authority to enforce formal treaties.

[48] *Supra* notes 20-22 and accompanying text.

[49] *See, e.g.*, *Curtiss-Wright,* 299 U.S. at 317:

> The Union existed before the Constitution . . . Prior to that event, it is clear that the Union, declared by the Articles of Confederation to be "perpetual," was the sole possessor of external sovereignty, and in the Union it remained without change save in so far as the Constitution in express terms qualified its exercise.

1. The Federalist Representations

During the ratification debates, numerous Federalist spokesmen responded to Antifederalist concern about the prospective powers of the new government by emphasizing its limited scope and enumerating in detail some of the many areas of governance that would belong exclusively to the states.[50] These representations were authoritative—most were issued by leading lawyers—and supported by the Constitution's text. The ratifiers had every reason to rely on them.

The belief that statesmen such as James Madison, Edmund Pendleton, John Marshall, James Wilson, and Tench Coxe were all fraudfeasors trying to sneak something past an unsuspecting public is, to put it mildly, not supported by the record. And even if it were true, as a matter of documentary interpretation, the ratifying public would not be bound by the sponsors' hidden intent but entitled to rely on their representations of meaning.

2. Changes in State War Powers From the Articles to the Constitution

If foreign affairs powers were seamlessly transferred from the Confederation Congress to the new federal government, then we would expect that neither the Articles nor the Constitution would recognize any war powers reserved in the states. Alternatively, if some state war powers were reserved under the Articles, then the Constitution would reserve the same or fewer to the states.

In fact, however, the Articles recognized substantial reserved state war powers, and the Constitution, on balance, *increased* them.

Article VI of the Articles of Confederation, while imposing many restrictions, still recognized some reserved state power to wage defensive naval war and very significant power to wage defensive land war.[51] Under the

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[50] *Supra* note 9.

[51] ARTS. OF CONFED. art. VI provided in part:

> No vessel of war shall be kept up in time of peace by any State, except such number only, as shall be deemed necessary by the United States in Congress assembled, for the defense of such State, or its trade; nor shall any body of forces be kept up by any State in time of peace, except such number only, as in the judgement of the United States in Congress assembled, shall be deemed requisite to garrison the forts necessary for the defense of such State; but every State shall always keep up a well-regulated and disciplined militia, sufficiently armed and accoutered, and shall provide and constantly have ready for use, in public stores, a due number of filed pieces and tents, and a proper quantity of arms, ammunition and camp equipage.

Constitution, the states lost their prerogative to issue letters of marque or reprisal against an enemy upon whom Congress had declared war.[52] On the other hand, the Constitution recognized increased state war powers in at least four ways. First, it did not require a congressional declaration of war for states to build ships; it required only de facto war, and it did not require that the war be one waged by the federal government.[53] Second, the Constitution deprived Congress of the veto it formerly enjoyed over state naval actions against pirates.[54] Third, it eliminated the Articles' requirement that a state consult with Congress when waging defensive war.[55] Fourth, the Articles had permitted state preemptive strikes against imminent invasions only by Indians, but the Constitution permitted them against all invasions.[56]

This calculated readjustment in the state-federal balance is inconsistent with the view that the federal government merely inherited plenary external affairs powers from the Confederation Congress.

3. The Facts about Documents and Times

The third and fourth flaws in the historical narrative behind the doctrine of inherent sovereign authority consist of misunderstandings and misrepresentations of documents and events. We shall consider these together.

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> No State shall engage in any war without the consent of the United States in Congress assembled, unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of a delay till the United States in Congress assembled can be consulted; nor shall any State grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the United States in Congress assembled, and then only against the Kingdom or State and the subjects thereof, against which war has been so declared, and under such regulations as shall be established by the United States in Congress assembled, unless such State be infested by pirates, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the United States in Congress assembled shall determine otherwise.

[52] U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . grant letters of marque and reprisal . . .").

[53] *Id.* art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress . . . keep Troops, or Ships of War in time of Peace . . . or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.").

[54] *Id.*

[55] *Id.* Earlier drafts of the Constitution retained the consultation language, but it was dropped on Sept. 15, 1787, two days before adjournment. The reasons were not specified. 2 FARRAND, *supra* note 32, at 626.

[56] U.S. CONST. art. I, § 10, cl. 3 ("unless actually invaded, or in such imminent Danger as will not admit of delay").

Since Justice Sutherland's account mentions pre-Independence events, we shall begin with the First Continental Congress. The First Continental Congress was an inter-colonial convention[57] that met for a few months in 1774. It exercised no power; it merely "recommended" that colonial congresses and conventions undertake certain actions.[58] On October 25, 1774, it went out of existence,[59] and nothing immediately replaced it.

The Second Continental Congress (1775-81) also operated without any formal grant of power, both before and after Independence. Its de facto authority rested solely on the terms of the commissions each colony and, later, each state gave to its delegates.[60] It did what agents of the states told it to do. This reality was reflected in the most important document produced by the Second Continental Congress: the Declaration of Independence. Contrary to Justice Sutherland's cherry-picked account in the *Curtiss-Wright* case,[61] the Declaration did not purport to issue from a sovereign government. Rather, it sprung from "the *thirteen* united [small "u"] States of America."[62] It referred repeatedly to "these states" and ended with the proclamation that "these United Colonies are . . . *Free and Independent States* . . . and that as *Free and Independent States*, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which *Independent States* may of right do."[63]

The Second Continental Congress expired on March 1, 1781, the first effective day of the Articles of Confederation. By the Articles, the state legislatures created the Confederation Congress and conveyed some powers to it.

Modern Americans often misunderstand the nature of the Articles of Confederation, referring to them as "our first constitution" and treating the

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[57] Robert G. Natelson, *Founding-Era Conventions and the Meaning of the Constitution's "Convention for Proposing Amendments,"* 65 FLA. L. REV. 615 (2013) (discussing the First Continental Congress among other conventions of colonies and states held during the Founding era).

[58] 1 J. CONT. CONG. 75, 80 (Oct. 20, 1774).

[59] *Id.* at 104 (recording the last day of the Congress).

[60] *E.g.*, 26 J. CONT. CONG. 15-16 (Jan. 13, 1784) (reciting presentation of Connecticut delegates' credentials).

[61] *Supra* note 21 and accompanying text.

[62] DEC. OF INDEP. (italics added).

[63] *Id.* (italics added). The succession of the phrases "United Colonies" and "Free and Independent States," if it suggests anything, implies that while the colonies were united under the single sovereignty of the British Crown, the newly independent states were less so.

The Declaration's assertion that Americans were "one people" was true only in the sense that Koreans or Arabs are one people today, or that Germans were one people between 1945 and 1990—that is, a distinct ethnic, cultural, and linguistic group divided into separate sovereignties. Those sovereignties were the ultimate repositories of all foreign affairs powers at the time.

Confederation Congress as a "central government."[64] But that was not how the founding generation understood the Articles. Most contemporaneous dictionaries defined "confederation" as an alliance or league.[65] For example, Nathan Bailey's 1783 *Universal Etymological Dictionary* defined it as "an alliance between Princes and States, for their defence against a common enemy."[66] The Constitution uses the word in the same way.[67] In *Federalist* No. 43, James Madison described the Articles as "A compact between independent sovereigns, founded on ordinary acts of legislative authority [with] no higher validity than a league or treaty between the parties . . . ."[68]

Rather than a "constitution" in the modern sense, a closer analogue to the Articles would be the North Atlantic Treaty Organization—NATO—with Congress playing a deliberative role comparable to that of the North Atlantic Council. In both arrangements, the member states delegated some sovereign authority to a central assembly. Or one might say that the member states retained complete sovereignty but put some of their powers out on loan. Whichever way it is characterized, the ultimate power remained in the member states, because, like the signatories of any treaty, they could (if they were willing to bear the cost) withdraw at any time.

The Articles themselves were categorical about their limited scope: They explicitly defined the "United States" as a "league."[69] They affirmed that

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[64] *E.g.*, National Constitution Center, *On this day, the Articles of Confederation are approved*, https://constitutioncenter.org/blog/on-this-day-our-first-flawed-constitution-went-into-effect (referring to the Articles as "the first American constitution" and Congress as a "central government").

[65] *E.g.*, SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (8th ed. 1786) (unpaginated) (defining "Confederation" as "League; alliance"); THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1789) (unpaginated) (same definition).

[66] NATHAN BAILEY, A UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (25th ed. 1783) (unpaginated) (defining "confederation").

[67] U.S. CONST. art. I, § 10, cl. 1 ("No State shall enter into any Treaty, Alliance, or Confederation"). As "Treaty" and "Alliance" demonstrate, the three terms were used in an overlapping manner.

[68] THE FEDERALIST NO. 43 (James Madison) *in* 15 DOCUMENTARY HISTORY, *supra* note 7, at 439, 445-46. *Accord* 1 JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 362-63 (1787) (stating that the Confederation Congress was "not a legislative assembly, nor a representative assembly, but only a diplomatic assembly"). *See also* David Golove, *The New Confederalism: Treaty Delegations of Legislative, Executive, and Judicial Authority*, 55 STANFORD L. REV. 1697, 1706 (2003).

[69] ARTS. OF CONFED. art. III:

> The said States hereby severally enter into a firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other,

"Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled."[70] By conveying only powers "expressly delegated" and reserving the remainder in the states, the Articles specifically *negated* any inference that the Confederation Congress inherited authority from the Second Continental Congress.

Promoters of the implied sovereign authority doctrine sometimes point to the Articles' statement that they were of perpetual duration, concluding therefore that the Articles were intended to create a national union.[71] But during the 18th century, recitals of perpetual duration were common in treaties.[72] They meant only that there was no fixed expiration date. These recitals impaired neither the ultimate sovereignty of the states nor the prerogative of any state to withdraw at any time if it was willing to bear the cost of doing so.[73]

The documents by which Britain recognized American independence also reflected the subordinate position of the Confederation to the states.[74] The provisional peace agreement was denominated "articles of peace and reconciliation between Great Britain and *the American States*."[75] Although the title of the final treaty stated that the parties were his Britannic Majesty and the United States of America,[76] the substantive provision acknowledging American Independence enumerated all thirteen states by name and proclaimed them "free, sovereign, and independent states."[77] Article V of the treaty engaged merely that Congress would "recommend" certain measures "to the legislatures of the respective states,"[78] and Article VII antic-

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> against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretense whatever.

[70] ARTS. OF CONFED. art. II.

[71] *E.g.*, *Curtiss-Wright*, 299 U.S. at 317.

[72] *See generally* A COLLECTION OF TREATIES BETWEEN GREAT BRITAIN AND OTHER POWERS 528 (George Chalmers ed., 1790) (2 vols.) [hereinafter COLLECTION] (showing over 60 appearances in the covered treaties of the term "perpetual" and its variations).

[73] *See, e.g.,* Whitney v. Robertson, 124 U.S. 190 (1888) (holding that Congress can enact legislation that contradicts a prior treaty).

[74] 2 COLLECTION, *supra* note 72, at 528-38 (containing the text of the provisional peace agreement and the final treaty).

[75] *Id.* at 528.

[76] *Id.*; *Curtiss-Wright*, 299 U.S. at 317.

[77] 2 COLLECTION, *supra* note 72, at 529-30.

[78] *Id.* at 532.

ipated "a firm and perpetual peace between his Britannic Majesty *and the said States.*"[79]

In still other ways, the states and Congress recognized that ultimate sovereignty lay with the states. Between 1776 and 1781, states held several "conventions of states" to coordinate their own responses to issues that overlapped those entrusted to Congress.[80] In 1788, the Confederation Congress "recommended to the several states to pass proper laws for preventing the transportation of convicted malefactors from foreign countries into the United States."[81] A Congress with exclusive inherited foreign affairs power could have enacted its own measure on the subject.

The unique histories of several states further buttress the conclusion that, before the Constitution was ratified, ultimate sovereignty remained in the member states. When the federal government began operations, North Carolina was not part of the new Union, for she had not yet ratified the Constitution. Nor was she part of the Confederation, for the Confederation had lapsed. North Carolina was, at least de facto, an independent nation, with power to adopt her own war and foreign policies. It was not until November 21, 1789, that North Carolina ratified the Constitution and thus joined the Union.[82] The same analysis applies to Rhode Island, which remained independent even longer—until May 29, 1790.[83]

Several other states also joined the Union only after periods of independence. The "Vermont Republic," for example, lasted from 1777 until admission to the Union on February 18, 1791;[84] New York, it is true, claimed Vermont for most of that time, but that did not diminish the fact that Vermont was self-governing.[85] Texas, of course, remained an independent republic for nine years; and California for several weeks. Hawaii became a multi-island kingdom in 1795, more than a century before its annexation. During their periods of independence, all these states enjoyed the same foreign affairs and war powers any other sovereignty enjoyed. The purported

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[79] *Id.* at 533.

[80] *See generally,* Natelson, *Founding-Era Conventions, supra* note 57 (discussing the agendas and activities of Founding-era interstate conventions).

[81] 34 J. CONT. CONG. 528 (Sept. 16, 1788). *See* GERALD L. NEUMAN STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 21 (1996) (discussing the background).

[82] 30 DOCUMENTARY HISTORY, *supra* note 7, at xxxii (setting forth Founding-era chronology).

[83] *Id.*

[84] *Id.*

[85] *Vermont Republic,* Ballotpedia, https://ballotpedia.org/Vermont_Republic.

transfer of sovereign authority from the Confederation Congress to the federal government could have had no effect on them.

Finally, even if one assumes the Confederation Congress was in some ways sovereign, a significant temporal gap prevented a seamless transfer of its power to the new federal government. The Confederation Congress mustered its last quorum on October 10, 1788, after which it ceased operations. The federal government did not begin to function until six months later—in April 1789. In the interim, any congressional sovereignty necessarily relapsed to the member states.

Thus, the historical narrative behind the doctrine of inherent sovereign authority—that the central government of the Union assumed broad sovereign powers at the time of Independence and never gave them up—is gainsaid by historical fact. The narrative is contradicted by authoritative representations of the scope of federal powers issued by the Constitution's supporters during the ratification debates. It is contradicted by the terms of the Declaration of Independence, the Articles of Confederation, and the Treaty of Paris. It is contradicted also by time gaps that rendered impossible the seamless transfer of pre-constitutional power to the current federal government.

## III. CONCLUSION

The doctrine of inherent sovereign authority violates the rules of logic and is grounded neither in the Constitution's text nor in the facts of history. In its application, it also violates the rule of law, for its lack of grounding leaves its scope and effect to the predilections of courts and commentators.

It should be abandoned.

Other Views:

- John Mikhail, *The Original Federalist Theory of Implied Powers*, 46 HARV. J.L. & PUB. POL'Y 56 (2023), *available at* https://journals.law.harvard.edu/jlpp/wp-content/uploads/sites/90/2023/02/46_1_5-Mikhail-Final.pdf.
- Haaland v. Brackeen, 143 S. Ct. 1609 (2023), *available at* https://www.supremecourt.gov/opinions/22pdf/21-376_7l48.pdf.
- United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936), *available at* https://supreme.justia.com/cases/federal/us/299/304/.

# A DEEPER ORIGINALISM: FROM COURT-CENTERED JURISPRUDENCE TO CONSTITUTIONAL SELF-GOVERNMENT*

JOHNATHAN O'NEILL**

Originalism has substantially reoriented constitutional discourse since it first reemerged in response to the Warren Court of the 1960s. A measure of its success is that today interpretation is typically treated as the process of discerning what the constitutional text meant to those who created it—no longer do we much hear that interpretation is fundamentally something else. Originalism has also come to better acknowledge that original meaning will not always be clear or available to answer contemporary questions. The theory has arrived at this point due to several now well-recognized developments from the last few decades that need only be briefly restated here. After having done so, this article will consider the challenges originalism currently faces and the resources in the contemporary theoretical environment it might call on to become a more fully constitutional theory that reaches beyond lawyers, judges, and courts. A deeper originalism points toward constitutionalism as form of political order that is oriented toward deliberative self-government. If originalism is to move in this direction, it must avoid the exploitation of judicial discretion as the entrée to judicial supremacy, first by reining in judicial "construction," and then by revisiting the merits of intentionalism in interpretation. Finally, originalists should move beyond jurisprudence to rediscover the legislative virtues and to contribute more directly to the reform of Congress.

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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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A deeper, more constitutional originalism would avoid overstating what can be achieved by originalist methods or courts as institutions. This direction would reconnect originalism with the opposition to judicial overreach characteristic of earlier figures such as Raoul Berger and Robert Bork. To be sure, originalist jurisprudence has made large advances on their pioneer efforts, but its initial goal was always to limit courts so that basic public policy on controversial issues would be made in legislatures, as the American founders originally intended. By better acknowledging its own limits given the Constitution's separation of powers, this originalism would better consolidate the reorientation of legal interpretation it has achieved and simultaneously allow more constitutional space for legislatures as the primary forums for democratically legitimate decision making.

## I. A SUMMARY OF CONTEMPORARY ORIGINALISM

The version of originalism that is currently ascendant is called "new originalism." New originalism developed in response to perceived weaknesses in and continual attacks on the older originalism associated with figures such as Berger and Bork.[1] A primary shift was from the earlier focus on the "intent" of the drafters (or ratifiers) of the Constitution as the object of interpretation to the "original public meaning" (OPM) of the text when it was enacted—how it would have been understood by a reasonably informed reader at the time. This move was seen as necessary to avoid the seemingly impossible task of "summing" multiple individual intentions or recapturing the mental states of historical actors. Equally important was the emergence of the "interpretation-construction" distinction. To *interpret* was to ascertain the original meaning of words in the text, while *construction* was the creative, political activity of building or elaborating constitutional meaning when the text was underdetermined (for whatever reason). Judges engaged in construction employ discretionary choice to address constitutional problems in ways that are

[1] This paragraph draws on the overviews presented in Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599 (2004); Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375 (2013); Lawrence B. Solum, *What is Originalism? The Evolution of Contemporary Constitutional Theory*, *in* THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 12-41 (Grant Huscroft & Bradley W. Miller eds., 2011); DONALD L. DRAKEMAN, THE HOLLOW CORE OF CONSTITUTIONAL THEORY: WHY WE NEED THE FRAMERS 11-18 (2020); LEE J. STRANG, ORIGINALISM'S PROMISE: A NATURAL LAW ACCOUNT OF THE AMERICAN CONSTITUTION 26-33, 34-42 (2019). The earlier history of originalism through the 1990s is treated in JOHNATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY (2005).

consistent with the text but not settled by it. The interpretation-construction distinction emerged in recognition of the reality that original meaning would sometimes "run out" and be unable to answer very specific or distinctly modern questions. Finally, new originalists have deemphasized judicial restraint and judicial deference to legislatures in comparison to their predecessors. New originalists are more likely to affirm judicial "fidelity" to the original constitutional meaning when it can be known, not a posture of automatic deference to lawmakers. On this view, a duty to abide by recoverable constitutional meaning overcomes any mere tradition of deference to the legislature.

Numerous versions of originalism have proliferated amid these general trends. Theorists differ in their understanding of how precisely to define the original meaning being sought, the appropriate methodology for finding it, and the normative justification for doing so at all, however originalism might be defined or practiced. One response to the issue of quick growth and sometimes incompatible variety has been offered by Lawrence B. Solum, a leading new originalist. He has proposed that the originalist enterprise be understood as a "family" of related theories that can have both resemblances and differences along a number of metrics, but that almost universally agree on two core claims: the ideas (or theses) of "fixation" and "constraint." Most contemporary originalist theories, whatever their differences, affirm 1) that the meaning of the Constitution was fixed and thus limited at the time of its enactment, and 2) that this meaning should contribute to and constrain the legal and constitutional doctrines of later interpreters who act under its authority.[2] Abjuration of the fixation and constraint theses likely indicates that a theory is on the "living constitution" end of the judicial-philosophical spectrum usually associated with progressive liberalism, not originalism.[3]

Despite widespread acceptance of the ideas of fixation and constraint, theoretical developments and new originalist labels continually appear. Some originalists argue that meaning can be delimited by appealing to the interpretive rules that the Constitution's creators would have applied to it, an approach termed "original methods originalism."[4] Another originalist theory

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[2] Solum, *supra* note 1, at 32-37. These theses are accepted as the core of originalism in Whittington, *Critical Introduction*, *supra* note 1, at 378, and STRANG, *supra* note 1, at 41-42.

[3] Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243 (2019).

[4] 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 (2009). *See also* The Legal

and neologism, "original law originalism," emerged from analysts who mapped onto the existing discourse aspects of the long-standing debate between legal positivism and natural law, particularly their disagreement about the source of law and how it is legitimately changed.[5] Originalist natural lawyers are returning to the Thomistic concept of determinatio to establish limits on judicial authority amid the larger goal of reconciling natural law with the written Constitution. Their core idea is that one can both affirm the substantive morality of the natural law tradition while also insisting that, according to the legitimate allocation of legal authority in the Thomistic sense, judges in the American constitutional system cannot rightfully decide cases based on their own views of morality over and against those of the political community as stated in its law.[6]

But other serious thinkers of both the natural law conservative type and the libertarian type claim the mantle of originalism to urge courts on to vigorous—should we say activist?—exercises of power. Witness now calls for "common good originalism" and a "better originalism" that invoke the teachings of Harry Jaffa and Abraham Lincoln. And there is also libertarian "judicial engagement" that would have courts measure statues against a conception of individual-sovereignty-as-autonomy that is very robust indeed. Likewise, we have progressive "living originalism" in versions that can accept *Griswold*, *Roe*, and *Obergefell*. (These several developments are addressed in more detail in the next two sections.)

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Turn, LAW & LIBERTY FORUM (Apr. 2, 2018), https://lawliberty.org/forum/legal-turn-constitution-originalism-original-methods-law/.

[5] *Compare* Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817 (2015) *and* William Baude, *Is Originalism Our Law?* 115 COLUM. L. REV. 2349 (2015) *with* Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 GEO. L.J. 97 (2016). Solum raises questions about the relationship of "original methods originalism" and "original law originalism" to the principles of fixation and restraint. Solum, *Originalism Versus Living Constitutionalism*, *supra* note 3, at 1286-88, 1296.

[6] Pojanowski & Walsh, *supra* note 5, at 121 n.40, 121-22; STRANG, *supra* note 1, at 234-36, 268-70; J. Joel Alicea, *The Moral Authority of Original Meaning*, 98 NOTRE DAME L. REV. 1, 22, 29, 56, 57 (2022). Retrieved by the influential scholarship of John Finnis, the concept of determinatio seems to have been first brought into the originalism debate by Robert P. George. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 284-90 (1980); ROBERT P. GEORGE, IN DEFENSE OF NATURAL LAW 108, 110 (1999). *See also* Russell Hittinger, *Natural Law in the Positive Laws: A Legislative or Adjudicative Issue?*, 55 REV. OF POL. 5 (1993).

For some time now, it has been unclear whether this level of activity indicates a fecund theory that is advancing toward some as-yet-unrealized coherence, or whether it constitutes utter disarray and chaotic incompatibility.[7] No attempt is made here to add to or adjudicate the various forms of contemporary originalist theory. There is no denying that today originalism is a large and active endeavor being conducted by many very intelligent people. It shows no signs of abating. This is certainly a significant change from the dominant themes of constitutional discourse in 1937, or 1965, or 1985.

Despite its marked success and ongoing development, originalism is now being attacked by a new set of critics. Some analysts—who might be termed Catholic rejectionists—condemn American constitutionalism for having encouraged a morally bankrupt modern culture of materialism and radical individualism, one beyond repair by originalism or any other jurisprudence. On this view, the Constitution is a mere "Lockean" document (not a compliment) born of the Enlightenment. The Constitution's "privatiz[ation]" of religion made it into a matter of individual choice that reflected John Locke's conception of the "autonomous individual." America's early, Christian culture initially had fostered virtue and shared norms, but the Constitution's modern liberal template had fostered the demise of all that.[8] The advance of progressive liberalism and the kind of society it had produced could not be redeemed by "Conservatism's tale that American greatness will be restored when we reclaim the governing philosophy of our Constitution." On the contrary, the Constitution had proceeded from fundamentally modern liberal premises and thus encouraged a "liberal society—one that commends self-interest, the unleashed ambition of individuals, an emphasis on private pursuits over a concern for public weal." The result was profound self-involvement that was antithetical to the authentic human bonds of family and community.[9] A notable response to this predicament was the promulgation of the "Benedict option." It consisted of withdrawal from the corruption of main-

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[7] Steven D. Smith, *That Old-Time Originalism*, *in* CHALLENGE OF ORIGINALISM, *supra* note 1, at 223-45; Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713 (2011).

[8] ROD DREHER, THE BENEDICT OPTION: A STRATEGY FOR CHRISTIANS IN A POST-CHRISTIAN WORLD 36 (quotes), 37 (2017).

[9] PATRICK DENEEN, WHY LIBERALISM FAILED 18, 165 (2018). *See also id.* at 101-02, 162-66, 173.

stream American society and the politics encoded by its too-liberal Constitution, and then small-scale, countercultural renewal of community at the local level.[10]

While such thinking might seem far distant from constitutional discourse as such, it grounded Harvard Law professor Adrian Vermeule's subsequent call to move "beyond originalism" to "common good constitutionalism."[11] This project and the massive critical response it generated cannot be fully engaged here, but Vermeule made plain his view that originalism had "outlived its utility." It was now "an obstacle to the development of a robust, substantively conservative approach to constitutional law and interpretation." Common good constitutionalism would no longer be "content to play defensively within the procedural rules of the liberal order." Instead, it would reorient American constitutionalism toward "substantive moral principles that conduce to the common good," according to Vermeule's reading of natural law and the classical legal tradition he said it informed. To reach this goal, "officials (including but by no means limited to, judges) should read into the majestic generalities of the written Constitution" the proper morality—for example via the "general welfare" clause or the Preamble.[12] Although Vermeule well understood that the natural law itself did not determine which specific institutions or offices might be authorized to operationalize its general principles, he valorized the administrative state as defender of the common good, alienating the many conservatives and originalists who had been attacking its constitutional legitimacy for decades. Indeed, in jettisoning originalism, Vermeule was far more concerned to anchor common good constitutionalism in premodern sources of law than in the distinctive achievement of the American founding and the written Constitution it produced. He treated originalism as a spent force because its defining orientation toward historical and textual limitations on judges had not adequately delivered the substantive moral results conservatives wanted.

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[10] DREHER, *supra* note 8; DENEEN, *supra* note 9, at 191-98. For an example of a more traditionally conservative response to what he describes as the "'radical' Catholic critique," see Vincent Phillip Muñoz, *Defending American Classical Liberalism*, NAT'L REV. (June 11, 2018), https://www.nationalreview.com/2018/06/american-classical-liberalism-response-to-radical-catholics/.

[11] Adrian Vermeule, *Beyond Originalism*, THE ATLANTIC (Mar. 31, 2020), https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/; ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (2022).

[12] Vermeule, *Beyond Originalism*, *supra* note 11 (all quotes).

Such intense theoretical activity and root-and-branch criticism raise questions about the overall health and direction of originalism. In its first iteration, originalism was a claim about what the Constitution originally meant and an attempt therewith to limit judges' interpretive discretion to overturn the acts of legislative majorities. Thus understood, it presented empirical-historical claims about the content of original meaning, and then a series of normative propositions about how specifically or generally that meaning should be restated and applied in the present—and by what institutions and political actors. But the concern now is that originalism may be either exhausted, or morphing into a pro-judicial doctrine meant simply to encourage judges to reach conservative or libertarian—or maybe even progressive liberal—ends. Let us now turn to some recent developments that highlight the problems and opportunities originalism faces should it attempt to become something more than what lawyers and judges say about the Constitution.

## II. JUDICIAL SUPREMACY AND CONSTITUTIONAL CONSTRUCTION

Today, judicial supremacy is well entrenched. Even though it is not constitutionally required and has been famously contested at various points, Americans today usually assume that what the Supreme Court says about the Constitution is equivalent to the thing itself. Judicial decisions are treated as binding on citizens and officeholders not before the court. It is abundantly clear that this is the way the Supreme Court understands its role. Likewise, citizens and elected officials now accept that nearly every major legal or policy question will eventually end up at the Supreme Court. As judicial supremacy has become normal, the old idea that there are "political questions" insusceptible to judicial resolution has all but disappeared.[13]

Here we need not trace the full history of this development or explicate the several reasons for it, which include the post-*Brown v. Board of Education* heroic image of the Court as defender of civil rights, and the reality that elected officials often prefer to avoid making their own constitutional judgments and to defer to those of the Court.[14] Testimony to the seeming insuperability of judicial supremacy is further confirmed by the recent report of

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[13] Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy,* 102 COLUM. L. REV. 237 (2002).

[14] PAUL D. MORENO, HOW THE COURT BECAME SUPREME: THE ORIGINS OF AMERICAN JURISTOCRACY (2022); KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY (2007).

the Presidential Commission on possible reform of the Supreme Court, which concluded that the effort was fraught with uncertainty and likely to be resisted as both illegitimate and impractical.[15] American history contains several examples of such challenges to the Court that have been transitory, contested, and unsuccessful.[16]

In the context of entrenched and secure judicial supremacy, theorists normally assume and defend it—as if obeisance to the Supreme Court was the only thing necessary for the maintenance of constitutional government. Supposedly if courts are properly armed with the theorist's preferred interpretive method, "constitutional maintenance becomes a bloodless and technical enterprise best conducted by the legal intelligentsia."[17] Indeed, prominent originalists of both the intentionalist and OPM varieties have explicitly defended judicial supremacy.[18] While such arguments valorize settlement by an ultimate arbiter as crucial to a sound legal system, it is clear enough that the American founders did not originally intend to create a regime of judicial supremacy.[19] Nevertheless, libertarian-originalist "judicial engagement," with its "presumption of liberty," urges the Court to superintend acts of the legislature in the name of the autonomous individual.[20] Quasi-Straussian/natural law "common good originalism" calls for the Court to act as our "republican

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[15] PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES, FINAL REPORT, chap. 4 (2021).

[16] WILLAM G. ROSS, A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890-1937 (1994); GARY L. MCDOWELL, CURBING THE COURTS: THE CONSTITUTION AND THE LIMITS OF JUDICIAL POWER (1988).

[17] WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY, *supra* note 14, at 26. *See also* Richard H. Fallon Jr., *Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age*, 96 TEX. L. REV. 487, 544 (2018).

[18] Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997); Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMMENT. 455 (2000); Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?* [book review], 118 HARV. L. REV. 1594 (2005); Michael Ramsey, *Originalism and Judicial Supremacy*, THE ORIGINALISM BLOG (May 29, 2015), https://originalismblog.typepad.com/the-originalism-blog/2015/05/originalism-and-judicial-supremacymichael-ramsey.html.

[19] This problem is highlighted in William Baude, *The Court, or the Constitution? in* MORAL PUZZLES AND LEGAL PERPLEXITIES: ESSAYS ON THE INFLUENCE OF LARRY ALEXANDER 260-70 (Heidi M. Hurd ed., 2019).

[20] *See especially* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004); RANDY E. BARNETT, OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE (2016); CLARK M. NEILLY III, TERMS OF ENGAGEMENT: HOW OUR COURTS SHOULD ENFORCE THE CONSTITUTION'S PROMISE OF LIMITED GOVERNMENT (2013).

schoolmaster" in effectuating timeless principles of justice beneath or beyond the Constitution, or perhaps from its Preamble.[21] These two approaches, though strongly politically opposed to one another, agree in wanting an assertive Court to exercise judicial review for their preferred ends, and against the constitutional judgments of others (legislatures most especially).[22]

Here we should pause briefly to state the well-known but still grave pathologies of judicial supremacy. In addition to undermining the republican understanding that power must be accountable and limited, judicial supremacy erodes constitutional self-government. By violating the separation of powers to make law without constitutional warrant, the Court truncates political deliberation about the application of shared principles for the public good—deliberation that should take place in legislatures and civil society. Today, decisions about the nation's most pressing issues are typically made by an unrepresentative and unaccountable judicial elite based on its recondite and putatively more enlightened insights. Citizen-subjects are meant simply to obey, while their elected representatives are further encouraged to evade their own responsibilities for constitutional judgment and political choice.[23] Judicial supremacy surely realizes moral and political victories for some (and losses for others), but only by furthering the decline of the nation's capacity for deliberative self-government under the rule of law.

Some originalists have carefully noted that the logic of their theory does not directly address judicial supremacy. As a claim about the meaning of the

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[21] *See especially* HADLEY ARKES, BEYOND THE CONSTITUTION (1990); Hadley Arkes, Josh Hammer, Matthew Peterson, & Garrett Snedeker, *A Better Originalism*, THE AMERICAN MIND, (Mar. 18, 2021), https://americanmind.org/features/a-new-conservatism-must-emerge/a-better-originalism/; Josh Hammer, *The Telos of the American Regime*, THE AMERICAN MIND (Apr. 7, 2021), https://americanmind.org/features/a-new-conservatism-must-emerge/the-telos-of-the-american-regime/.

[22] An insightful treatment that puts Barnett, Neilly, and Arkes squarely in the camp of judicial supremacy is GREG WEINER, THE POLITICAL CONSTITUTION: THE CASE AGAINST JUDICIAL SUPREMACY (2019). The most recent theories promoting judicially-led natural law originalism have been described as "Flight 93 Jurisprudence," a call for judges to save the country from the brink of moral doom after the fashion of its supposed savior in the presidential election of 2016. John G. Grove, *Against a Flight 93 Jurisprudence*, LAW & LIBERTY (Mar. 31, 2021), https://lawliberty.org/against-a-flight-93-jurisprudence/.

[23] These themes are forcefully elaborated in WEINER, *supra* note 22. *See also* WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY, *supra* note 14, at 294, 295; Christopher L. Eisgruber, *Judicial Supremacy and Constitutional Distortion, in* CONSTITUTIONAL POLITICS: ESSAYS ON CONSTITUTION MAKING, MAINTENANCE, AND CHANGE 70-90 (Sotirios A. Barber & Robert P. George eds., 2001).

text and the nature of legitimate interpretation, originalist jurisprudence cannot determine the proper role of the Court any more that it can say what should be done when original meaning is exhausted, or remains vague or ambiguous.[24] But it does seem that many new originalists accept that the Court will rule the nation on the most important topics. This marks a substantial shift in orientation from the first wave of originalism. A consideration of originalism's relationship to the much discussed "construction zone" will further clarify this development.

The distinction between interpretation as central and construction as a supplement or aid to it existed earlier in nonconstitutional contexts, primarily in the realm of contracts. There is some disagreement about how deeply rooted it was there, as well as whether that context gave it any relevance to constitutional law.[25] The distinction was initially reworked and made central to originalist constitutional theory by Keith E. Whittington. He defined it as "the method of elaborating constitutional meaning in this political realm" beyond courts, a realm separate from the one where "judges are assumed to possess a monopoly on constitutional understanding and deliberative capacity." Constitutional constructions showed "the degree to which the Constitution operates through and with elected officials and their actions."[26] Only briefly and in passing did Whittington acknowledge that courts too might undertake construction.[27] But the entire thrust of his enterprise was to contrast interpretation—the legal-jurisprudential discovery of the text's meaning by courts—with construction—the building and elaboration of meaning by nonjudicial actors. Construction was an "essentially political task" for whatever institution conducted it, and it was repeatedly distinguished from "jurisprudential interpretation." Constructions did not "pursue a preexisting if deeply hidden meaning in the founding document; rather, they elucidate[d] the text in the interstices of discoverable interpretive meaning, where the text

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[24] Whittington, *Critical Introduction*, *supra* note 1, at 400, 401, 403, 406; ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE 26 (2011) (Solum's argument in his chapter entitled, *We Are All Originalists Now*); Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65, 69-70, 72 (2011).

[25] Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 103-10 (2010); Richard Kay, *Construction, Originalist Interpretation, and the Complete Constitution*, 19 U. PA. J. CONST. L. ONLINE 1, 3-7 (2017).

[26] KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 1, 2-3 (1999).

[27] KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 10-11, 224 n.29 (1999); WHITTINGTON, CONSTITUTIONAL CONSTRUCTION, *supra* note 26, at 16, 237-38 n.43.

is so broad or underdetermined as to be incapable of faithful but exhaustive reduction to legal rules."[28] In another sense, constructions stood in for the action of the sovereign people unless and until they formally amended the Constitution. Constructions filled in legal gaps with political judgments beyond and external to the text, and such "action in areas of indeterminacy can only be regarded as contingently legitimate . . . The introduction of this external element indicates the political nature of the task and the inappropriateness of its pursuit by the judiciary with its limited access to external sources of authority."[29] Finally, Whittington pointedly rejected the judicial supremacy so entrenched in American political culture and so readily assumed in the realm of lawyers and courts.[30] His version of the interpretation-construction distinction sought to open up more space for constitutional deliberation outside that realm.

But originalists of various descriptions soon turned construction to their own purposes. Randy E. Barnett quickly seized on it as a way to make constitutional law more protective of individual rights. "Ambiguous terms should be given the meaning that is most respectful of the rights of all who are affected and rules of construction most respectful of these rights should be adopted to put general constitutional provisions into legal effect."[31] In his fully developed theory, the "presumption of liberty" was the central rule of construction that courts should use to restore the "lost constitution" from the statist growth that the "presumption of constitutionality" had fostered via deference to legislatures.[32] For his part, Jack M. Balkin saw construction as a way to draw originalism closer to progressive living constitutionalism. He regarded the original meaning of the text as quite sparse and said that the Constitution was a framework that allowed broad space for construction by judges, other officials, and citizens. They could use a variety of sources, including general principles underlying the text, contemporary public opinion, or the objectives of social and political movements.[33] The "resources for constitutional construction" included not only familiar lawyerly modalities of argument, but also the "national ethos" and "narrative understandings of the

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[28] WHITTINGTON, CONSTITUTIONAL CONSTRUCTION, *supra* note 26, at 6, 5.

[29] WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 27, at 158.

[30] WHITTINGTON, CONSTITUTIONAL CONSTRUCTION, *supra* note 26, at 1, 209, 228; WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 27, at 12, 171-74, 211-12, 218-19.

[31] Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 646 (1999).

[32] RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION, *supra* note 20, at 5, 411.

[33] JACK M. BALKIN, LIVING ORIGINALISM 4-6, 10-12, 21-23 (2011).

trajectory and meaning of national history."[34] Even more recently, the natural law-oriented call for a "better originalism," which holds that "moral truth is inseparable from legal interpretation," sees judges as "republican schoolmasters" who have work to do in the "'construction zone.'"[35] It is no overstatement to observe that the "possibilities of constitutional construction" are "wide" indeed.[36]

Lawrence B. Solum somewhat redirected the interpretation-construction distinction, which he agreed was integral to originalism. He urged that construction be defined as the activity of giving legal effect to a portion of the constitutional text. It might happen immediately upon interpretation of a precise or settled text, or it might take place once interpretation was undertaken and there still remained vagueness, ambiguity, or other imprecision. Understood in this way, judges undertook construction every time they applied the text as law, as they or other officials also did when acting on or applying terms that were unclear.[37] Such constructions were necessary because originalism—which insists that interpretation be an effort to comprehend original meaning—could not resolve the question of what should be done, and by whom, when that meaning was exhausted. Therefore, theories of construction ultimately were normative. But this did "not entail the conclusion that individual judges have discretion to make decisions based on their own views of political morality."[38] That might be a position advanced by a particular normative theory of construction, but it was also possible to advocate one based on "canons of construction or default rules that constrain judicial discretion."[39] As described below, Solum carefully acknowledged that containment of judicial discretion in the construction zone via judicial deference to the choices of elected officials—perhaps along the lines associated with James Bradley Thayer—was itself a construction with both a long tradition and able advocates. Thus, judges in the construction zone, now admitted there more or less automatically, should be guided by a normative theory. This was a notable alteration of Whittington's original formulation, in which

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[34] *Id.* at 256. *See also* ERIC J. SEGALL, ORIGINALISM AS FAITH 92, 96-97 (2018).

[35] Arkes et al., *A Better Originalism*, *supra* note 21, at 7, 8, 10.

[36] Kay, *Construction, Originalist Interpretation, and the Complete Constitution*, *supra* note 25, at 11 (quotes), 24.

[37] Solum, *The Interpretation-Construction Distinction*, *supra* note 25, at 103-04; Solum, *All Originalists*, *supra* note 24, at 3-4.

[38] Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 523 (2013). *See also* Solum, *The Interpretation-Construction Distinction*, *supra* note 25, at 104-05.

[39] Solum, *Originalism and Constitutional Construction*, *supra* note 38, at 523.

construction was a definitively political task undertaken almost exclusively by elected officials or other nonjudicial actors. Originalists concerned about the latitude involved in judicial construction have rightly noted that the term has shifted meaning.[40]

Indeed, despite Solum's own careful conceptual distinctions, he also suggested judges and courts normally would be the ones doing the constructing, and toward whom theories of construction would be properly directed.[41] To his credit, Solum saw the potential problem in normalizing judicial construction: "if originalists allow judges to make law in the construction zone," they might simply "reintroduce the problem of ideological judging driven by the personal morality and politics of individual judges," perhaps even to the extent "that the difference between originalists and living constitutionalists [would be] only a matter of degree."[42]

When later revisiting the concept of construction, Whittington himself accepted more of a role for courts than he had at first, but he continued to so do with caution. Judges' "particular expertise and institutional authority" was "undoubtedly lessened when operating in the zone of construction than when on the firmer, traditionally legal ground of interpretation." As a matter of empirical fact, judges did undertake construction, but normatively the "arguments that justify judicial review on the basis of interpretation are not satisfactory to demonstrate that the courts should also exercise judicial review on the basis of constitutional constructions." Even more fundamentally, just as the concept of interpretation could not dictate how construction was to be done once interpretation ran out, neither could the concept of construction settle who was to undertake it and for what reasons. Whittington concluded:

> There is nothing about the idea of constructions that settles the issue of whether judges, for example, should engage in them. Distinguishing between interpretation and construction does focus attention on such important normative questions as whether (and under what circumstances)

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[40] Richard Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703, 721, 721 n.76 (2009); JOHN O. MCGINNIS & MICHAEL RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 139-41, 254 n.5, 255 n.7 (2013); DRAKEMAN, *supra* note 1, at 153; STRANG, *supra* note 1, at 31-33.

[41] Solum, *All Originalists*, *supra* note 24, at 69-70; Solum, *Originalism Versus Living Constitutionalism*, *supra* note 3, at 1279-80; Solum, *Originalism and Constitutional Construction*, *supra* note 38, at 523, 535.

[42] Solum, *All Originalists*, *supra* note 24, at 151, 150.

> judicial judgments should trump legislative judgments when constitutional meaning is indeterminate or about how constitutional gaps are to be filled.[43]

Originalism will have gone seriously awry if its notion of construction is transmogrified into just another thing that judges do—and everyone else obeys—under cover of supposed constitutional authority. As the intentionalist-originalist Richard Kay has noted, in an era of judicial supremacy, robust judicial construction augurs a form of constitutionalism "substantially committed to a series of fresh political choices made by judges in the court of last resort."[44] This potential is real insofar as "by definition binding decisions emerging from constitutional construction must be founded on considerations *not* exclusively derivable from the original constitution."[45] Anti-originalists too made this point with relish. Judicial construction appeared to license the vast discretion that could enable putatively originalist judges to reach results not based on the Constitution—that is, the very problem that originalism first arose to contest.[46]

Consequently, another insightful critic urged that, if and when originalists conceded that apprehensible original meaning could resolve few modern cases, they likely would have to "attach a high priority to the elaboration of fuller theories of constitutional construction."[47] Prominent originalists are indeed attending more carefully to how judicial discretion might be disciplined within the construction zone, though it is worth pondering the extent to which such efforts again simply assume judicial supremacy instead of challenging it. Solum has suggested that to constrain judicial discretion in affirmation of democratic legitimacy and the rule of law, originalists might advocate judicial deference to democratic institutions via a "Thayerian default rule." They might also develop more detailed methods of "sorting borderline cases" for coverage or exclusion from a vague portion of text, or perhaps rely

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[43] Keith E. Whittington, *Constructing a New American Constitution* 27 CONST. COMMENT. 119, at 128, 127, 135-36 (2010).

[44] Kay, *Construction, Originalist Interpretation, and the Complete Constitution*, *supra* note 25, at 25 (quote), 8, 10-13.

[45] *Id.* at 13 (emphasis in original).

[46] SEGALL, *supra* note 34, at 89-102; Colby, *Sacrifice of the New Originalism*, *supra* note 7, at 771, 777.

[47] Richard H. Fallon, Jr., *The Chimerical Concept of Original Public Meaning*, 107 VA. L. REV. 1421, 1481 (2021).

on "precedent and historical practice" to settle meaning in the face of vagueness or ambiguity.[48]

A more elaborate effort by Randy E. Barnett and Evan D. Bernick also responded directly to the problem of judicial discretion in the construction zone, acknowledging that it "ought to be deeply troubling to anyone who values the rule of law."[49] Their solution was to draw from contract law and analogize judges to fiduciaries vis à vis citizens. Adapting this framework to the constitutional context, judges owed citizens a duty of good faith in exercising their discretion in accord with the original purpose of particular textual provisions, and with the overall structure and function of the Constitution at the time of its enactment. Applied in this way, the established doctrine of "good-faith performance" would prohibit "parties from using the discretion accorded them under the letter (the text) of the agreement to defeat the spirit (the original purpose) of the agreement."[50] Judges undertaking construction to formulate a doctrine or rule that implemented and specified a textual provision were duty-bound to inquire into its original purpose, as revealed by historical investigation into its context. A good-faith construction accounted for the "text, structure, and history of the provision" to explain the function it was originally meant to have. It sought to avoid "rendering the text a nullity, of little or no practical significance, thereby eliminating it as a constraint on the fiduciary agents of the people."[51] This approach aimed to bring the constraining logic and historical method of originalism into the practice of construction: "an originalist theory of constitutional construction."[52] If judicial construction was inevitable, some such effort is required to prevent originalism from devolving into another form of judicially-updated living constitutionalism.

It is notable that some originalists concerned about judicial discretion in the construction zone have cautioned that historical research might reveal that construction was unnecessary. A textual provision might have a sufficiently precise meaning that could be identified by interpretation alone. Whether the bare text confronted by a 21st century reader was in fact vague or ambiguous, by design or in the absence of evidence, was at least initially a

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[48] Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 295 (2017). *See also* Solum, *Originalism Versus Living Constitutionalism*, *supra* note 3, at 1279-80.

[49] Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO L.J. 1, 16 (2018).

[50] *Id.* at 26 (quote), 32.

[51] *Id.* at 34-37, quotes at 36, 37 (italics removed).

[52] *Id.* at 5.

matter for historical investigation. Historical evidence might show that some provisions were written with the intention that interpreters would fill in the details; or it might show "that the Framers used language that appears ambiguous to us, at least on its face, but, in fact, was expected to convey a particular decision that resulted from negotiations over ends and means, even in those cases where we may initially think that the language can speak for itself."[53] Judicial movement into the construction zone was illegitimate prior to a showing that historical evidence required that it be done.[54]

Even more explicit concern with the separation of powers and the associated limitations on judges was apparent in Lee J. Strang's treatment of construction. In fact, he said, the fundamental principles of the constitutional order meant that there was "no authority for judicial review in the construction zone." The Constitution was the only legitimate basis for the Court to overturn an act of Congress, the institution charged by the Constitution with deliberating about the common good and legislating to advance it. "When the Constitution's original meaning is underdetermined, federal courts have no authority to second guess congressional actions . . . Congress's determination of what the common good requires—its construction—prevails because there is nothing in the Constitution that is superior to and inconsistent with it."[55] This "deference conception of construction" envisioned courts as legitimately empowered only to undertake interpretation. They had no legitimate authority to make law in the vast realm of contested policy options pertaining to the common good in the construction zone. The separation of powers reserved that role to Congress.[56]

Originalist concern about how to constrain construction is clearly growing. Even if the practice is inevitable, originalists need not assume that it is automatically or even legitimately the responsibility of judges. On the contrary, to the extent that originalists allow judges to monopolize or manipulate construction, their theory will have reversed its original goal of limiting and disciplining judicial discretion.

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[53] DRAKEMAN, *supra* note 1, at 153. *See* Barnett & Bernick, *supra* note 49, at 33.

[54] Other originalists concerned about judicial discretion argued that construction could be eliminated entirely by recourse to the interpretive methods and rules that the founders would have understood as applicable to the Constitution they created. MCGINNIS & RAPPAPORT, *supra* note 40, at 139-53.

[55] STRANG, *supra* note 1, at 84, 87.

[56] *Id.* at 87-88.

## III. THE REVIVAL OF INTENT

The interpretation-construction distinction (and its problems) became central to originalism just as OPM originalism also ascended. But OPM never entirely effaced intentionalist originalism. A small but determined band of originalists continued to develop and defend it, both amid the rise of OPM in the 1990s, and now in the current era of OPM's dominance.[57] In fact, intentionalism appears to be experiencing something of a renaissance. Just as OPM responded to criticism of old-style intentionalism, new-style intentionalism is now addressing concerns that OPM originalism, particularly when aligned with judicial construction, gives interpreters too much discretion. This return to and refurbishment of intentionalism shows that originalism remains a vibrant body of jurisprudence despite the vulnerabilities of OPM. It is worth considering this development in some detail.

Intentionalists (old and new) hold that writing, like speech, is an attempt to communicate. The goal of an author or speaker is to convey meaning to a reader or hearer. Texts do not spring up ex nihilo—their authors choose words they think capable of expressing their intended meaning. To be sure, communication always occurs in a social-historical context and against a background of linguistic conventions, and speakers or authors sometimes fail to communicate their intended meaning. But interpretation can be nothing other than an inference about what the author or speaker intended within the surrounding context and convention, themselves things that might be manipulated or abandoned better to convey intended meaning. Moreover, a text that is a law cannot have authority as such if its content does not carry the meaning that the legitimate lawgiver intended. Such understandings stood behind the many centuries of English jurisprudence that accepted—as did its inheritors in the American founding—that the aim of legal interpretation was to understand and apply the intent (or will) of the lawgiver as found primarily but not exclusively in the text.

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[57] For the 1990s, see O'NEILL, *supra* note 1, at 194-98. A few more recent and admirably direct statements are Larry Alexander, *Originalism, the Why and the What*, 82 FORDHAM L. REV. 539 (2013); Larry Alexander, *Simple-Minded Originalism*, *in* CHALLENGE OF ORIGINALISM, *supra* note 1, at 87-98; Richard Ekins, *Objects of Interpretation*, 32 CONST. COMMENT. 1 (2017). Ekins's article transports into the American constitutional context his extensive defense of intentionalism in RICHARD EKINS, THE NATURE OF LEGISLATIVE INTENT (2012). *See especially id.* at 193-96, 205-11. *See also* Richard Ekins & Jeffrey Goldsworthy, *The Reality and Indispensability of Legislative Intentions*, 36 SYDNEY L. REV. 39 (2014).

From this basic view, intentionalists insist that "public meaning originalism is mistaken about the nature of meaning and language use." The reality about human language use is that "if there is no agent, then what appears to be language use (say, marks on the beach or shapes in the clouds) is not."[58] OPM's hypothesized reader was beside the point. Although one could intelligibly impose "on a form of words some meaning that a possible or imagined language user might use the words to convey . . . in such imposition the nominal interpreter is in truth the speaker or author."[59] The rather limited truth of OPM was that "linguistic conventions that prevail at that time [of the promulgation of a document] help frame the formation and inference of intended meaning."[60] But OPM was incorrect to think that semantic or conventional meaning was the object of interpretation because "particular instances of language use do not have a public meaning in any sense other than the best inference about intended meaning."[61]

Equally important, intentionalists argued that OPM has what we might call "authority issues" vis à vis the Constitution as law. In dispensing with the notion that the text is a deliberate act of lawmaking by identifiable human authors, OPM cannot explain why the Constitution should be recognized and obeyed as law. In identifying meaning with how a hypothetical reader would have understood the text, OPM faced "the puzzle [of] why anyone would find a constitution imbued with that denatured meaning—one worked out without considering the real historical circumstances of the text's creation—to have normative force."[62] In reality, the authority of a governing text exists because the people subject to it accept the legitimacy of those who created it. Hence the absurdity of attempting to interpret and abide by the proverbial constitution "'put together by a tribe of monkeys with quills.'"[63] OPM failed in this way because it "sever[ed] the connection between the Constitution's rules and the authority that makes us care about those rules in

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[58] Ekins, *Objects of Interpretation*, *supra* note 57, at 9.

[59] *Id.*

[60] *Id.* at 9-10.

[61] *Id.* at 9 (quote), 17. *See also* DRAKEMAN, *supra* note 1, at 40. Very similar arguments "on the nature of texts" as those in this paragraph are contained in Alexander's summary of his own work. Larry Alexander, *Conclusion: Appreciation and Responses*, *in* MORAL PUZZLES AND LEGAL PERPLEXITIES, *supra* note 19, at 415-17.

[62] Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, *supra* note 40, at 718.

[63] *Id.* (quoting Walter Benn Michaels). *See also* DRAKEMAN, *supra* note 1, at 27-30.

the first place."[64] Only intentionalist originalism was "authority-preserving" because "any meaning [the text] is given other than its authorially intended meaning renders nonsensical the idea of designating its authors as having the authority to determine norms to govern us."[65]

Intentionalists have also pointed out that discerning the meaning supposedly understood by OPM's hypothetical reader of the Constitution is not as straightforward as its advocates claim. There are a variety of criticisms here. Probably the deepest is that the conventional semantic meaning of a text, its literal or sentence meaning, is frequently underdetermined in ways that cannot be resolved without knowing something more about authorial intent in its broader context. Richard Ekins described this point as widely held in the philosophy of language and gave numerous illustrations from everyday language and statutory drafting. Texts can use ambiguous terms, imply something literally unstated, involve compressed content, or refer to their circumstances to assert more meaning than is written.[66] Interpreters must investigate the context and purpose of the text's creation in order to know its intended meaning, "but context does not settle meaning. The context grounds inference as to what the speaker intends."[67] Neither the most frequent conventional usage of a word nor the context of its usage necessarily determines what an author or speaker intended to convey by using it.

A version of this challenge, as Donald Drakeman has emphasized, emerged when historical research into original public meaning revealed that a word or phrase in the Constitution was used or understood in multiple ways. For example, was the annual tax on ownership of a carriage at issue in *Hylton v. U.S.* an "excise"—essentially a tax on sales or consumption that need only be uniform—or a "direct" tax that, according to Article I, section 8, must be apportioned by population? At the time of the framing, "excise" was being used and understood in ways that could support either result. Sim-

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[64] Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, *supra* note 40, at 714.

[65] Alexander, *Conclusion: Appreciation and Responses*, *in* MORAL PUZZLES AND LEGAL PERPLEXITIES, *supra* note 19, at 417; Alexander, *Why and What*, *supra* note 57, at 540. *See also* Ekins, *Objects of Interpretation*, *supra* note 57, at 22, 23, 24-25; Larry Alexander, *Connecting the Rule of Recognition and Intentionalist Interpretation: An Essay in Honor of Richard Kay*, 52 CONN. L. REV. 1515 (2021).

[66] EKINS, LEGISLATIVE INTENT, *supra* note 57, at 196-205.

[67] *Id.* at 208 (quote), 209. *See also* Ekins & Goldsworthy, *Reality and Indispensability*, *supra* note 57, at 58; Keith E. Whittington, *Dworkin's "Originalism": The Role of Intentions in Constitutional Interpretation*, 62 REV. OF POL. 197, 212 (2000).

ilarly, did "establishment respecting religion" mean only a statutorily mandated creed and ritual, or did it also include nondenominational taxes in support of various sects? Again, both understandings were in use at the time.[68]

The same problem was magnified in OPM's recent turn to corpus linguistics, the computer-based "big data" assembly and querying of multiple historical texts to count the frequency of word usage as a supposedly data-driven and thus objective way to establish meaning. While this project had some utility for historical research, it also had several problems. The sample of digitized texts was skewed sociologically toward elites and geographically toward the Northeast, while it also included multiple reprintings of the same text (a frequent occurrence in the 18th century) that therefore were not unique usages. Nor could the mere existence of a term or phrase in a text establish the way it was being used. That required a researcher's subjective judgment. More fundamentally, simply counting the most frequent usage of a term among multiple usages was not proof that it had been used in that way in the Constitution.[69] Only investigation of and recurrence to the intended meaning of the text could resolve such problems.

Finally, OPM's imagined reader presented problems of its own, namely that this "hypothetical person cannot be nonarbitrarily constructed: Is the person a he or a she? Does he or she live in the city or the country? How much education and of which kind has he or she had? How much information does he or she possess about the law in question and the reasons behind its promulgation, etc.?"[70] OPM had no shared definition of this reader, let alone any method for "averaging" the views of various types of readers or determining how their "representative" qualities would yield agreement on the meaning of the text. Consequently, the device licensed a good deal of discretion in the contemporary "interpreter's" discernment of meaning. As Richard Kay put it, "it would not be surprising if a judicial interpreter were to hit upon a reasonable speaker who might view the relevant language as

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[68] DRAKEMAN, *supra* note 1, at 99-114. *See also* Joel Alicea & Donald L. Drakeman, *The Limits of New Originalism*, 15 J. CONST. L. 1161 (2013).

[69] DRAKEMAN, *supra* note 1, at 115-36.

[70] Alexander, *Why and What*, *supra* note 57, at 541 (quotes); Alexander, *Simple-Minded Originalism*, *supra* note 57, at 89, 89 n.6. For an anti-originalist historian's statement of the point, see Jack N. Rakove, *Joe the Ploughman Reads the Constitution, or, The Poverty of Public Meaning Originalism*, 48 SAN DIEGO L. REV. 575, 584-86 (2011).

supporting a rule that the interpreter thinks a proper constitution ought to have."[71]

Intentionalists thus criticized both OPM's understanding of the nature of language use and its attempt to establish textual meaning and authority without reference to authorial intention. Nevertheless, a major reason for the rise of OPM in the first place had been the rejection of intentionalism understood as a group mental state somehow aggregated from the individual intentions of a multimember body like the Philadelphia or state ratifying conventions (often referred to as the "summing" problem).[72] The very notion of group authorship was dismissed as impossible and absurd. That view has now been jettisoned and group intent reconceptualized in Richard Ekins's 2012 book, *The Nature of Legislative Intent*, a major contribution to jurisprudence that originalism has only begun to account for.[73]

Ekins built on Thomas Aquinas's classical understanding of social action as coordinated group activity for a defined end, plus allied ideas in the modern philosophy of action. On his view, a group formed for a purpose takes that purpose as its definitive end. The individuals who compose the group intend to act for themselves and with others in the group to realize the group's end, and individuals in the group recognize this fact about one another. Their individual intentions thus "interlock" as they adopt and cohere subplans and institute procedures designed to achieve the overall end of the group. "The joint intention on which the group acts is the plan of action that coordinates and structures the joint action of the members of the group."[74] Individual intentions are not aggregated into some phantasmagorical group mind; rather, each group member's individual intention is to adopt the joint plan of action to realize the group's purpose. Another way to state the idea is in terms of means and ends: the group intention "is a plan of joint action adopted by all members as a means to the shared end that defines the group."[75]

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[71] Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, *supra* note 40, at 722. For an anti-originalist elaboration of this point, see Fallon, *supra* note 47, at 1465-71.

[72] Whittington, *Critical Introduction*, *supra* note 1, at 380-82.

[73] EKINS, LEGISLATIVE INTENT, *supra* note 57. *See also* Donald L. Drakeman, *Charting a New Course in Statutory Interpretation: A Commentary on Richard Ekins'* The Nature of Legislative Intent, 24 CORNELL J.L. & PUB. POL'Y 107 (2014). The contribution of Ekins and related work as a "potential solution to the summing problem" is briefly discussed in Barnett & Bernick, *supra* note 49, at 50-51. *See infra*, text associated with note 86.

[74] EKINS, LEGISLATIVE INTENT, *supra* note 57, at 47 (quote), 52-57.

[75] *Id.* at 52.

Conceived in this way, a legislature is a group whose "standing" intention—its definitive purpose—is to create new law for the common good of the political community. Its "particular" intention is deliberately to change the state of the law, when there are good reasons to do so, by means of a reasoned proposal open to all members. This plan, in the form of a statutory text, is created through procedures that structure and focus deliberation about its content. The product is the joint action of the members of the group—the reasoned choice of the group as an agent—in the form of the statute that the legislature makes.[76]

Drakeman has recently adapted Ekins's arguments to the American constitutional context, offering a powerful rejoinder both to the OPM understanding of the source of authoritative constitutional meaning, and to the earlier dismissal of group intent that had undergirded the shift from intentionalism to OPM. The Framers at the Philadelphia convention created and proposed a text that contained a process by which the ratifiers would adopt the Constitution as law on behalf of the people, whose delegates they were. Once it is fully appreciated that a group can have a shared intention as expressed primarily in the text, Drakeman urged, further evidence surrounding its creation (akin to legislative history) should be consulted to illuminate its content as the reasoned choice of means to its creators' shared ends. He was aware of the dangers of selection and bias inherent in using the drafting history of a text, particularly an old one, but was more willing to do so than Ekins. Drakeman argued that the various records from the founding era were where "we need to look for the best evidence that tells us what the Framers actually understood the provision to mean—what were its ends and means." The records of the Philadelphia convention, evidence from the ratifiers, *The Federalist*, as well as other sources were germane because they documented "the issues, disagreements, debates, negotiations, and decisions" on the way to production of the final text. "Looking for what the Framers, acting together *as a group*, understood regarding the meaning of the text is the goal of interpretation."[77] Moreover, as noted above with respect to "excise" tax and "respecting an establishment of religion," "the multiple candidates for the

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[76] *Id.* at 218-24, 242-43. In response to the "summing" of mental states conception of intent, Solum affirms the basic idea of group agency as acting on a shared and deliberated plan—and then states pointedly, "I am not an original-intentions originalist, and these remarks are not intended as an endorsement of the intentionalist approach to constitutional interpretation." Lawrence B. Solum, *Living with Originalism, in* CONSTITUTIONAL ORIGINALISM, *supra* note 24, at 161-63, quote at 163.

[77] DRAKEMAN, *supra* note 1, at 45, 48 (emphasis in original).

original public meaning represent the universe of choices the Framers might have made, and the evidence from the speeches and debates show which one of those choices is correct."[78] The search for the Framers' intent as the "end-means choice" aimed not to dispense with original public meaning tout court, but to allow "interpreters to identify which of the multiple viable semantic possibilities actually represents the Framers' constitutional choice."[79] Neither the meaning of the Constitution nor its authority could be derived from or reduced to the various ambient meanings that surrounded it.

The reassertion and elaboration of the intentionalist position has been accompanied by attempts to reconcile it with other forms of originalism, at least at a practical and operational level, if not at a wholly integrated theoretical level.[80] One aspect of this development is the claim, made by both intentionalists and OPM advocates, that in practice the methods are highly likely to reach the same conclusions about constitutional meaning.[81] Ultimately, that question is empirical, and investigation cannot say which meaning to abide by if and when they diverge. Other prominent originalists have argued that original intent and OPM can be unified by basing the overall theory on the "original methods" of legal interpretation inherited from England at the time of the founding. On this view, intentionalists could be understood as holding that "each enactor intends that the provision have the meaning that it would have under the applicable interpretive rules," while OPM "would use the conventionally applicable legal interpretive rules" that "were then thought to apply to" the Constitution to establish how informed readers would have understood it.[82] In this theory, the two versions still differently conceive the object of interpretation, but the hope was for a "truce rooted in the original interpretive rules."[83]

A version of original intent also had a place in Barnett and Bernick's "unified theory of originalism" as it sought to discipline the discretion of judges

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[78] *Id.* at 137.

[79] *Id.* at 138.

[80] *See* Whittington, *Critical Introduction*, *supra* note 1, at 396 (stating that the goal has not been achieved).

[81] Solum, *What is Originalism?*, *supra* note 1, at 38; Lawrence B. Solum, *Simple-Minded Originalism? Simply Wrong! in* MORAL PUZZLES AND LEGAL PERPLEXITIES, *supra* note 19, at 199; Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, *supra* note 40, at 712.

[82] John O. McGinnis & Michael B. Rappaport, *Unifying Original Intent and Original Public Meaning*, 113 NW. U. L. REV. 1371, 1385, 1373 (2019).

[83] *Id.* at 1418. *See also* MCGINNIS & RAPPAPORT, *supra* note 40, at 121-38. Strang appreciates the relevance of original intent in the context of "original methods." STRANG, *supra* note 1, at 61-62, 56. *See also* DRAKEMAN, *supra* note 1, at 16.

who undertook constitutional construction (described above). These authors disclaimed any loyalty to what they called "proto-originalism" and defined as a "*counter*-factual thought experiment" that in essence asked "'What would the Framers do?'" Instead, they advocated adherence to empirically verifiable facts about "the original functions of the Constitution's provisions and structural design elements" that could be found in "private as well as publicly available evidence."[84] This "'Framers-as-Designers' approach" attended carefully to the evidence they left because "they had unique insight into the functioning of the system they helped design."[85] Pushing this analogy further, the authors also deployed recent developments in philosophy about how to understand group agency and jointly made artifacts. Without recapitulating the analysis above, the tentative judgment of these originalists was that now there was a

> potential solution to the summing problem. Those who gathered at Philadelphia can be said to have organized themselves so as to constitute a group agent. The intentions of the Convention, the group agent, can be understood as the functions of the artifact they designed, the Constitution, as a whole and of its constituent parts (rather than the personal motives of each individual designer).[86]

As intimated here, the group agency conception of intent may be considered a solution to the summing problem that for so long undergirded the rejection of intentionalism and the turn to OPM. Recent attempts pragmatically to integrate these two versions of originalism, or to subsume intentionalism within still other versions, may be early steps toward a more fully rendered theoretical reconciliation.

## IV. A MORE RESTRAINED AND HUMBLE COURT

Whether or not intentionalism and OPM can be reconciled, or the various other components of contemporary originalism integrated into a fully unified structure, the theory's overall limitations should be forthrightly acknowledged. Interpretation as the restatement of original meaning (however defined) necessarily entails that the resulting meaning is limited—and thus that originalism can fail to settle or even address issues of current concern. What originalists should avoid is "constitutional perfectionism," whereby original

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[84] Barnett & Bernick, *supra* note 49, at 46 (emphasis in original).

[85] *Id.* at 47.

[86] *Id.* at 51.

meaning is ignored or "skewed" to reach favored political results. The Constitution is not perfect, and "originalism as a method of constitutional interpretation cannot be expected always to produce constitutional law or applications of constitutional law that win plaudits from conservative political actors."[87] Of course, the concern that underdetermined meaning would be unable to answer modern questions is what helped produce the idea of "construction" in the first place. But as noted above, construction has developed in a way that tends to keep all important questions in the hands of judges and courts. Construction in this form replays the perfectionist fallacy and tends toward a conservative-libertarian version of the living constitution that assumes and exploits judicial supremacy.

Nevertheless, the kinds of arguments that justify originalist constitutional interpretation do not justify judicial restraint or a posture of deference to elected officeholders. This is because they cannot establish what should be done in instances of interpretive indeterminacy or disagreement.[88] While first-wave originalists did often run together claims about interpretation with claims about the judicial role, recent originalists have rejected that conflation. Yet originalism directly implicates questions about the role of judges because, in asserting that the Constitution contains recoverable but limited meaning that courts apply as law, it points to the distinction between law and politics that is so central to the separation of powers. That distinction was crucial to John Marshall's defense of judicial review and explication of its limits in *Marbury v. Madison*. From that distinction and that defense came the classic conception of judicial restraint, although subsequently modern epistemological skepticism transformed it into mere "self-restraint."[89] Rejecting that weak reed, the new originalism initially clarified that courts should apply the Constitution as law according to its original meaning. And, it said, citizens and elected officials should undertake construction outside the courts, debating constitutional principles and political issues that are open to a range of reasonable and defensible meanings. Defenders of judicial review—or judicial construction—who assume judicial supremacy, including originalists, bear

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[87] Keith E. Whittington, *Is Originalism Too Conservative?*, 34 HARV. J.L. & PUB. POL'Y 29, 36, 37 (2011).

[88] Whittington, *Critical Introduction*, *supra* note 1, at 391-94, 406, 408.

[89] EVAN TSEN LEE, JUDICIAL RESTRAINT IN AMERICA: HOW THE AGELESS WISDOM OF THE FEDERAL COURTS WAS INVENTED 4-11, 18, 41-58 (2011).

the burden of explaining "why constitutional politics is better conducted in the courthouse than in the legislature."[90]

Having pushed matters to this fundamental point, originalism now should question more directly the judicial supremacy it has too often acquiesced in or affirmed. "Originalism as a political theory,"[91] buoyed by its influence in the realm of jurisprudence, should advance a more modest, humble role for judges of the kind long associated with the concept of judicial restraint. That role would be more truly in keeping with both the founding principle of republican consent, and with the political science of separation of powers central to the founders' Constitution. Judicial restraint has a long and principled history in American constitutionalism, even though appeals to it are often dismissed as a matter of "whose ox is being gored." It has remained attractive and enduring because the ideas "associated with judicial restraint are firmly rooted in the philosophy of the constitution."[92]

An originalism that affirms more restrained courts characterized by judicial modesty and humility? One could scarcely name more untimely virtues amid modern American culture and the era of judicial supremacy. They even seem out of place in "new" and "better" originalism, let alone in libertarian judicial engagement and progressive living constitutionalism. But this complex of ideas has garnered some renewed attention, and it is worth briefly considering a few recent arguments. A basic point is that the founders had a far more realistic and limited conception of politics than do proponents of the various ideological enthusiasms that abound today. For them, prudent governance and reasonable accommodation were possible, but human nature could not be perfected through a constitution, and courts had a concomitantly modest role that did not include policymaking or social reform.[93]

Judicial humility need not be understood as purely negative—automatic deference to others or self-abnegating restraint that declines to exercise con-

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[90] Keith E. Whittington, *The Death of the Legalized Constitution and the Specter of Judicial Review*, *in* COURTS AND THE CULTURE WARS 39 (Bradley C.S. Watson ed., 2002); Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 848-51 (2002).

[91] Whittington, *Is Originalism Too Conservative?*, *supra* note 87, at 38.

[92] Stanley C. Brubaker, *Judicial Self-Restraint*, *in* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 543 (2d ed., Kermit L. Hall ed., 2005). *See generally*, LEE, *supra* note 89.

[93] Michael P. Federici, *Judicial Power and Modest Republicanism*, *in* THE CULTURE OF IMMODESTY IN AMERICAN LIFE AND POLITICS: THE MODEST REPUBLIC 49-62 (Michael P. Federici, Richard M. Gamble, & Mark T. Mitchell, eds., 2013).

stitutionally mandated authority. Indeed, a recent theoretical advance on earlier efforts conceptualizes judicial humility as a disposition of character, one that is sensitive both to the judge's own human limitations and to the judge's institutional position in relation to others. Such humility is a "virtue of moderation" in a generally Aristotelian sense, a "mean between judicial hubris and judicial servility."[94] While asking judges to accept their inevitable fallibility and the limited role of courts alongside other offices, this version of judicial humility still "prompts judges to act on their legal knowledge and to exercise the constitutional authority that they do possess."[95]

While it is no excuse for shirking judicial duty, the "epistemological humility" appropriate to judges urges "an awareness of limitations regarding one's ability to acquire knowledge."[96] Judges have no particular competence in the vast realms of knowledge that a case might involve, nor can they rule on the basis of knowledge they lack. Caution is appropriate in such cases, as it is where longstanding precedent or a divided court are at issue, and when determining how widely or narrowly the ground of a decision should be stated. Judicial humility as epistemological humility "presses judges to remain within the confines of their legal expertise."[97]

Another aspect of judicial humility is relational: "institutional humility" asks judges to appreciate their own limited role in relation to the Constitution itself and the authority of other actors who operate under it. Judges who claim an "outsized role in the constitutional order" risk "improperly interfering with the people's self-governance and distorting the order as a whole."[98] Again, the proper judicial role does not always dictate deference or restraint—it depends on the situation. But it is clear that judicial humility is incompatible with contemporary judicial supremacy. The operation of both aspects of humility together make the point: "epistemological humility (the awareness of one's proneness to error) coalesces with institutional humility (the awareness of one's limited place in the constitutional order) to foster an attitude of caution in overturning the decisions of other constitutional actors."[99]

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[94] Zachary K. German & Robert J. Burton, *Constitutional Humility: The Contested Meaning of a Judicial Virtue*, 10 AM. POL. THOUGHT 238, 245, 251 (2021). *See also* Amalia Amaya, *The Virtue of Judicial Humility*, 9 JURIS. 97 (2018).

[95] German & Burton, *supra* note 94, at 253.

[96] *Id.* at 254

[97] *Id.* at 258.

[98] *Id.* at 259

[99] *Id.* at 262.

This analysis raises anew consideration of James Bradley Thayer's seminal work, which oriented the 20th-century tradition of judicial restraint prior to its defenestration by the Warren Court.[100] Thayer famously argued that American thought and practice supported the rule that courts should only disregard a law "when those who have the right to make laws have not merely made a mistake, but have made a very clear one,—so clear that it is not open to rational question."[101] This view was based on the primacy of the legislature in lawmaking in America's separation of powers system and a recognition that, within that context, people could in good faith reasonably disagree about what the Constitution required or permitted. The work of modern courts proceeded amid problems of governance that presented "great, complex, ever-unfolding exigencies." But in reviewing legislative acts, "the courts are revising the work of a co-ordinate department, and must not, even negatively, undertake to legislate."[102] Amid this reality, Thayer's rule accepted that

> much which will seem unconstitutional to one man, or body of men, may reasonably not seem so to another; that the constitution often admits of different interpretations; that there is often a range of choice and judgment; that in such cases the constitution does not impose upon the legislature any one specific opinion, but leaves open this range of choice; and that whatever choice is rational is constitutional.[103]

This approach would have courts less frequently opposing or revising the constitutional judgments of legislatures. Indeed, Thayer concluded that, in his time, legislatures seemed *too* willing to cede to courts questions of law, justice, and right, and that his announced rule could help avert this trend's threat to self-government:

> The safe and permanent road towards reform is that of impressing upon our people a far stronger sense than they have of the great range of possible harm and evil that our system leaves open, and must leave open, to the

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[100] James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893); Wallace Mendelson, *The Influence of James B. Thayer Upon the Work of Holmes, Brandeis, and Frankfurter*, 31 VAND. L. REV. 71 (1978); *One Hundred Years of Judicial Review: The Thayer Centennial Symposium* 88 NW. U. L. REV. 1 (1993). Thayer's relevance to the project of judicial humility is limned but not developed in German & Burton, *supra* note 94, at 264.

[101] Thayer, *supra* note 100, at 144.

[102] *Id.* at 144, 150.

[103] *Id.* at 144.

> legislatures, and of the clear limits of judicial power; so that responsibility may be brought sharply home where it belongs.[104]

Thayer has been subjected to a variety of criticisms, especially because his position was said to depend on an unrealistically rosy conception of legislatures. Legislatures did not always deliberate about the public good or consistently and conscientiously consider the constitutionality of the statutes they passed. Matthew J. Franck has sought to restore Thayer's case for judicial restraint in part by responding that Thayer's critics confused an "argument about constitutional principles (answering the question, what does a particular constitution establish by way of institutional authority?) with an argument about institutional performance in practice (answering the question, does the legislature in fact take constitutionality seriously?)."[105] Thayer's position did not depend on universal constitutional rectitude from legislators. But the reality, said Franck, was that "every constitution that calls a legislature into being and empowers it to pass laws necessarily presumes that the legislature will pass laws it has the authority to pass, and no others. The legislature's conformity with this expectation is a rebuttable presumption."[106]

Franck further argued that a deeper understanding of the importance of a "presumption" in Thayer's thought would clarify Thayer's overall claim. A presumption was not an argument or evidence, but it located where the burden of proof should be placed. The amount or type of evidence necessary to overcome a presumption (the weight of the burden) was itself a separate question. Thayer's presumption of constitutionality for acts of the legislature did not claim to be based on any evidence about what the legislature had done in any particular instance; it "simply mark[ed] the beginning of all reasoning on the matter before the court."[107] And the presumption of constitutionality, rebuttable to be sure, was quite sensible given that the legislature was created to empower elected representatives to legislate for the objects authorized by the Constitution.[108] Thus, Thayer's doctrine accepted that there was a sub-

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[104] *Id.* at 156.

[105] Matthew J. Franck, *James Bradley Thayer and the Presumption of Constitutionality: A Strange Posthumous Career*, 8 AM. POL. THOUGHT 393, 403 (2019). Another longstanding criticism of Thayer is that judicial deference to legislatures improperly imperils individual rights. This evaluation of Thayerian restraint is not the exclusive preserve of progressive liberals or living constitutionalists. *See* Steven G. Calabresi, *Originalism and James Bradley Thayer*, 113 NW. U. L. REV. 1419 (2019).

[106] Franck, *supra* note 105, at 405.

[107] *Id.* at 408.

[108] *Id.* at 409.

stantial range of valid opinion about constitutionality and that the legislature's action may not have been premised on what *judges* would take to be the best argument for constitutionality. Nevertheless, the question was: "'Is this law grounded in a reasonably defensible interpretation of the constitution?'" That "is the kind of question Thayer believes courts should ask."[109] Expressed in this way, there appears to be a substantial affinity between Thayer's core position and the newer doctrine that combines epistemological humility (accepting that there is a range of reasonable interpretation on which judges do not have a monopoly) with institutional humility (not claiming an outsized role in the constitutional system and being willing to defer to other actors in cases of reasonable doubt). A return to this kind of thinking would be necessary if judicial supremacy is ever to be pared back to allow more space for legislative decision making.

But, to repeat, a more modest and constitutionalist conception of the judicial role that better respects the authority and responsibility of Congress does not entail judicial abnegation or automatic deference to whatever other institutional actors might do. This point is well illustrated by the ongoing reconsideration of the role of courts in relation to the administrative state. This huge subject can only be touched upon here, but originalist thinking about the judicial role must contend with it.

At the most basic level, some delegation is inevitable insofar as Congress is not built for regularly administering the myriad details of what it may constitutionally legislate. For over a century, Congress has delegated portions of its legislative authority to regulatory bureaucracies of its own creation. As Chief Justice John Marshall put it long ago, "The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details."[110] Currently, there is a lively originalist dispute about the nature and extent of congressional delegation at the founding and its bearing on the modern administrative state.[111] Just how much authority can be legitimately delegated to bureaucracies, and how much courts should defer to them, is continually disputed. And the positions

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[109] *Id.* at 413.

[110] Wayman v. Southard, 23 U.S. 1, 43 (1825).

[111] *Compare* Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490 (2021) *with* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021).

of liberals and conservatives have shifted over time. In the 1980s, conservatives often endorsed judicial deference to agencies on the model elaborated from *Chevron*.[112] This was in response to aggressive judicial supervision and even direction of agencies in the 1960s and 1970s, whereby judges mandated generally liberal policy results whose legal bases conservatives found suspect. Institutionally, this conservative call for deference was nearly indistinguishable from the position held by Progressives and New Dealers when they created the modern administrative state in part to circumvent judicial resistance to regulation in the early 20th century.[113]

Today, positions have again shifted, with conservative criticism of judicial deference having markedly increased in the past decade or so. Conservatives now argue that deference has enabled politically unaccountable bureaucracies to rule on many momentous subjects by permitting them to exploit overly vague delegations. Given this circumstance, a defense of the originally intended separation of powers requires courts to limit the reach of agencies in the hope of impelling Congress to act. Such "judicial fortitude" is directed ultimately at stimulating democratically accountable decision making in the legislature so that, in Thayer's words, "responsibility may be brought sharply home where it belongs."[114] This cannot be equated with the kind of judicial power originalism historically arrayed itself against. A court seeking to limit the reach of bureaucratic discretion for the sake of legislative responsibility is not the same as one that invents new rights to seize controversial issues from legislative control, nor one that routinely equates its own contestable interpretation of the Constitution with the thing itself.

This is the appropriate perspective for understanding the growing conservative criticism of *Chevron* deference and the current Supreme Court's willingness to reconsider it. To take only one recent example, in *West Virginia v. Environmental Protection Agency*, the Court considered an agency claim that the Clean Air Act empowered it to make significant policy changes.[115] It decided that the EPA had leaned too heavily on obscure and supposedly vague statutory provisions in seeking to transform the domestic energy industry by

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[112] Chevron USA v. National Resources Defense Council, 467 U.S. 837 (1984).

[113] *See generally* JOSEPH POSTELL, BUREAUCRACY IN AMERICA: THE ADMINISTRATIVE STATE'S CHALLENGE TO CONSTITUTIONAL GOVERNMENT (2017).

[114] PETER J. WALLISON, JUDICIAL FORTITUDE: THE LAST CHANCE TO REIN IN THE ADMINISTRATIVE STATE (2018); Thayer, *supra* note 100, at 156.

[115] 597 U.S. __ (2022).

making the use of coal cost-prohibitive. The Court rejected this interpretation and invalidated the agency's action because such a "major question" with such far-reaching effects could not legitimately rest on such a flimsy interpretive foundation. A change of this magnitude would require more direct authorization from Congress.

While critics allege that the Court invented the major questions doctrine out of whole cloth to obstruct good public policy, it is really trying to get Congress to take more responsibility for directing the administrative state. In the *West Virginia* decision, Chief Justice John Roberts said the doctrine "refers to an identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted."[116] This seems an apt statement of the situation. To the extent that the Court is reasserting itself to claw back some of the power it ceded to agencies in the recent era of deference, it is doing so in the name of limited and accountable government and as a prod to the democratic legitimacy of Congress.[117]

## V. DEFENDING LEGISLATURES

Even though judicial supremacy has largely displaced the older tradition of judicial deference and restraint, it has been challenged intermittently by presidents and by conceptions of "departmental" review and constitutional "dialogue."[118] Deeper engagement with such thinking might persuade our lawyerly originalists that constitutionalism need not reduce to whatever the Supreme Court says. Rather, it is a system of institutions whose purposes, interactions, and contestations facilitate and order a political community's self-government. But today's originalism remains almost entirely directed to judges and courts, largely ignoring theoretical treatment of legislatures and

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[116] *Id.*, slip op. at 20.

[117] *See infra*, Section VII, for a discussion of how Congress might reform itself internally to become a more responsible and deliberative body that could better govern and better control the administrative state.

[118] LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS A POLITICAL PROCESS (1988); NEAL DEVINS AND LOUIS FISHER, THE DEMOCRATIC CONSTITUTION (2004); GEORGE THOMAS, THE MADISONIAN CONSTITUTION (2008); WEINER, *supra* note 22.

historical attention to Congress.[119] Having achieved some success in countering the jurisprudence of progressive living constitutionalism cum judicial supremacy, originalism is in danger of becoming just another judicial tool to achieve certain results. In doing so, it would profit from and encourage judicial supremacy's continued corruption of the constitutional order. Or it could change course and broaden its conception of constitutionalism, continuing to discipline the reach of courts so that Congress can regain its footing as the nation's primary institution of republican self-government. Arguing recently along these lines, Yuval Levin observed that "the Right's court-centered constitutionalism was born to free Congress to act, but in practice it has too often under-emphasized the importance of Congress." Meanwhile, "Republicans have taken every opportunity to cut Congress down and keep it under-resourced and have taken very little interest in reforms that might modernize the institution and strengthen it in relation to the other branches."[120] Here is the crossroads at which originalism's successes and limitations have arrived.

What might originalists see if they paid more attention to legislatures in general, to Congress in particular, and to constitutionalism as a form of political order that extends beyond mere jurisprudence? A fuller inquiry into this topic would entail at least the following: a richer appreciation of Congress as the place where representation, deliberation, and compromise make legislating possible amid the disagreement inherent in a free society; examination of historical and recent episodes in which Congress has successfully acted in accord with these norms of sound legislation; and consideration of proposals for how Congress might be reformed and strengthened better to fulfill its constitutional functions.[121]

Despite the founders' concerns about majority faction and democratic inconstancy, they intended for Congress to make law by conciliating and accommodating competing interests for the sake of the common good. As such, it was made to be the place where representatives gathered to deliberate and compromise.[122] This view places Congress, though made for a modern liberal

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[119] Joel Alicea, *An Originalist Congress?*, NAT'L AFFAIRS, Winter 2011, at 31; Joel Alicea, *Forty Years of Originalism*, 173 POL'Y REV. 69 (2012). Keith E. Whittington is an exception, defending originalism but opposing judicial supremacy.

[120] Yuval Levin, *The Future of Conservative Constitutionalism*, NAT'L REV. (Sept. 17, 2021), https://www.nationalreview.com/2021/09/the-future-of-conservative-constitutionalism/.

[121] The following discussion is informed by the best recent defense of Congress, PHILLIP A. WALLACH, WHY CONGRESS (2023).

[122] Greg Weiner, *'The Cool and Deliberate Sense of the Community:'* The Federalist *on Congress*, *in* THE CAMBRIDGE COMPANION TO THE FEDERALIST 400-25 (Jack N. Rakove & Colleen A.

republic, well within the Aristotelian conception of politics. People assemble to discuss and debate, fashioning from their varied interests laws that stand as legitimate general rules—rules that are comprehensible and serviceable, though inevitably imperfect. There is no expectation of universal agreement, yet rule by mere force is inadmissible.[123] Such anti-utopian realism about the nature and limits of politics has long recommended itself to people who expect government to act for the common good and to provide a modicum of peace and stability, but not perfect justice.

The most sustained philosophical defense of legislation, undertaken by Jeremy Waldron, accepts ineliminable disagreement as constitutive of the political. We need not adopt Waldron's confidence in popular rule unto complete rejection of judicial review in order to appreciate his insights. Underscoring the inevitability of disagreement, he argues that the elected, relatively large representative assembly is the central lawmaking institution in a free society of equal citizens. Only this kind of legislature is suitable for representing, debating, and accommodating society's numerous and conflicting interests and beliefs. Presuming the disagreement it encompasses, the legislature orders its procedures and formalities to produce law as a written text that embodies the agreement that can be reached. While rarely attaining unanimity, the process produces law that is rightly accepted as legitimate and authoritative. Understood in this way, legislation constitutes a remarkable, often delicate, and typically imperfect act of collective self-government.

Waldron well understood that the fact of moral disagreement was not proof of moral relativism—a doctrine he disavowed—yet that it did constitute the "circumstances of politics" in which legislation must be fashioned. The core problem of lawmaking, then, was one of legitimacy and authority. "Any laws that we enact must do their work in a community of people who do not necessarily agree with them and who will therefore demand that something other than the merits of their content—something about the way they were enacted—be cited in order to give them an entitlement to respect."[124]

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Sheehan eds., 2020); JOSEPH M. BESSETTE, THE MILD VOICE OF REASON: DELIBERATIVE DEMOCRACY AND AMERICAN NATIONAL GOVERNMENT 1-39 (1994).

[123] David Resnick, *Justice, Compromise, and Constitutional Rules in Aristotle's* Politics, *in* NOMOS XXI: COMPROMISE IN ETHICS, LAW, AND POLITICS 69-86 (J. Roland Pennock & John W. Chapman eds., 1979); BERNARD CRICK, IN DEFENCE OF POLITICS 17-18 (4th ed., 1993); JEREMY WALDRON, THE DIGNITY OF LEGISLATION 98, 106-07, 115-18 (1999).

[124] JEREMY WALDRON, LAW AND DISAGREEMENT 101-2 (1999); JEREMY WALDRON, POLITICAL POLITICAL THEORY 166 (quote). For a similar but more abstract argument that likewise emphasizes the distinction between legitimacy and justice (though not in the context of legislation),

Waldron has done much to explain why and how legislation answers the need for general rules with legitimate authority amid the diversity and disagreement characteristic of a free society. Political realists should welcome his core argument that the legislature is an instrument of self-government in the everyday world of political contestation, not something made for the anti-political utopia of universal consensus.

Waldron emphasizes that it is the output of the legislature's fair processes that establishes legal legitimacy. He denies that the legislature can aggregate the intentions of its members in a statute; rather, he claims that individual legislators simply vote—whatever their reasons—to enact the text's conventional meaning. We have seen above how Richard Ekins responded directly to the supposed "summing" problem of group intent in legislation. In reconceptualizing legislation as a form of joint action based on reasons and purposes held in common—the interlocking and coordinating of individual intentions to adopt a shared plan in the form of a text—Ekins brings into sharper relief the centrality of deliberation and compromise among elected representatives who together agree on a text that stands as law.[125] Representatives' identification and discussion of problems to be addressed, and the subsequent drafting, debating, and revision of a proposed text into a form acceptable to a majority—a majority that represents a variety of interests and beliefs about the common good as understood at the time—all require legislators to deliberate and compromise as a matter of course. Only in this way can the text as their joint action be brought into existence.

Indeed, representation, deliberation, and compromise must be philosophically defended and consciously practiced if legislation for the public good is to emerge amid political disagreement. Of course, these ideas were central to *The Federalist*'s treatment of Congress and in its famous theory of faction. Scholars too have plumbed them at length and from a variety of perspectives, often at the level of abstract theory and with sometimes hairsplitting attention to conceptual definition. Here is not the place for a detailed engagement with these arguments, but we can aver some of their principal findings. Lawmaking by elected representatives can indeed elevate the quality of political deliberation above mere advocacy of localism or self-interest, and toward reasoning

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see Steven Wall, *Political Morality and Constitutional Settlements*, 16 CRITICAL REV. INT'L SOC. & POL. PHIL. 481 (2013).

[125] EKINS, LEGISLATIVE INTENT, *supra* note 57, at 13, 93, 102, 146-54, 161, 175, 223, 240, 241.

and compromise for the common good.[126] Congress has proven itself capable of such deliberation, in different ways and to various degrees.[127] And Congress has likewise legislated via compromise, a political activity its members and their constituents typically support despite its increased difficulty in the current era of polarization.[128] Accepting the reality that Congress cannot create political agreement where there is none, we should acknowledge that, in every era, it has legislated based on its members' ability to deliberate and compromise.

## VI. FOCUS ON COMPROMISE

While representation and deliberation have long concerned political theorists (though mostly without direct reference to legislatures or Congress), the philosophical definition and specification of compromise has lately received increased attention. Relevant points from this often recondite literature can illuminate evaluation of compromise in the American constitutional experience. Compromise can be understood as both a process of reaching agreement and the content of the agreement reached. It seems unrealistic to

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[126] BERNARD MANIN, THE PRINCIPLES OF REPRESENTATIVE GOVERNMENT (1997); WALDRON, POLITICAL POLITICAL THEORY, *supra* note 124, at 125-44; Nadia Urbinati, *Representation as Advocacy: A Study of Democratic Deliberation*, 28 POL. THEORY 758 (2000); David Weinstock, *Compromise, Pluralism, and Deliberation*, 20 CRITICAL REV. OF INT'L SOC. & POL. PHIL. 636 (2017).

[127] BESSETTE, *supra* note 122, chs. 4, 5, 6; GARY MUCCIARONI & PAUL J. QUIRK, DELIBERATIVE CHOICES: DEBATING PUBLIC POLICY IN CONGRESS (2006); ARTHUR MASS, CONGRESS AND THE COMMON GOOD (1983); ESTEEMED COLLEAGUES: CIVILITY AND DELIBERATION IN THE U.S. SENATE (Burdett A. Loomis ed., 2000); J. MITCHELL PICKERILL, CONSTITUTIONAL DELIBERATION IN CONGRESS: THE IMPACT OF JUDICIAL REVIEW IN A SEPARATED SYSTEM (2004); Jane Mansbridge, *Motivating Deliberation in Congress*, *in* E PLURIBUS UNUM: CONSTITUTIONAL PRINCIPLES AND THE INSTITUTIONS OF GOVERNMENT 59-86 (Sarah Baumgartner Thurow ed., 1988); Daniel Palazzolo, *A Return to Deliberation? Politics and Lawmaking in Committee and on the Floor*, *in* IS CONGRESS BROKEN? THE VIRTUES AND DEFECTS OF PARTISANSHIP AND GRIDLOCK 57-83 (William F. Connelly Jr., John J. Pitney Jr., & Gary J. Schmitt eds., 2017).

[128] BARRY JAY SELTSER, THE PRINCIPLES AND PRACTICE OF POLITICAL COMPROMISE: A CASE STUDY OF THE UNITED STATES SENATE (1984); AMY GUTMANN & DENNIS THOMPSON, THE SPIRIT OF COMPROMISE: WHY GOVERNING DEMANDS IT AND CAMPAIGNING UNDERMINES IT (2012); JOSH M. RYAN, CONGRESSIONAL ENDGAME: INTERCHAMBER BARGAINING AND COMPROMISE (2018); JENNIFER WOLAK, COMPROMISE IN AN AGE OF PARTY POLARIZATION (2020); Sarah A. Binder & Frances E. Lee, *Making Deals in Congress*, *in* POLITICAL NEGOTIATION: A HANDBOOK 91-117 (Jane Mansbridge & Cathie Jo Martin eds., 2015); SARAH E. ANDERSON, DANIEL M. BUTLER, & LAUREL HARBRIDGE-YONG, REJECTING COMPROMISE: LEGISLATORS' FEAR OF PRIMARY VOTERS (2020).

reify this distinction in the context of legislation. In practice, legislators establish the content of the law by negotiating (and bargaining and deliberating, which can be conceptually distinguished). More generally, most definitions hold that a compromise is an agreement in which the parties make mutual concessions so that they may act together despite their disagreement, which to some extent always remains and endures. The compromise agreement is not the best (morally or politically, or both) that could be imagined, but it is what the parties can accept. Thus, compromises are inherently suboptimal from the perspective of each of the parties to them, and they are always open to moral or political criticism, and to abandonment or renegotiation. Yet, paradoxically, parties to a compromise have both reasons to agree to its content and reasons not to be fully satisfied with it. Moreover, compromise as a political activity is highly contextualized, so there is no way to say precisely and ahead of time whether and to what extent one should be undertaken.[129] Compromise is valuable—it might even be morally defensible despite its inherent imperfections—if it ensures peace or avoids greater evil. Likewise, compromise can enlarge the set of people who have varying reasons to regard an agreement as a justifiable course of action from their particular perspectives. Law resulting from this kind of compromise is likely to have wider acceptability and thus conduce to social stability and peace.[130] Finally, a recurrent theme among students of compromise is that, whatever its shortcomings, it is an unavoidably necessary means of democratic governance under conditions of pluralism and disagreement. If a political community of any

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[129] COMPROMISE AND DISAGREEMENT IN CONTEMPORARY POLITICAL THEORY (Christian F. Rostbøll & Theresa Scavenius eds., 2017); COMPROMISES IN DEMOCRACY (Sandrine Baume & Stéphanie Novak eds., 2020); GUTMANN & THOMPSON, *supra* note 128; AVISHAI MARGALIT, ON COMPROMISE AND ROTTEN COMPROMISES (2010). *See also* Patrice Canivez, *Democracy and Compromise*, *in* APPROACHES TO LEGAL RATIONALITY 97-118 (Dov M. Gabbay et al. eds., 2010). Helpful earlier works include MARTIN BENJAMIN, SPLITTING THE DIFFERENCE: COMPROMISE AND INTEGRITY IN ETHICS AND POLITICS (1990); J. PATRICK DOBEL, COMPROMISE AND POLITICAL ACTION: POLITICAL MORALITY IN LIBERAL AND DEMOCRATIC LIFE (1990); NOMOS XXI: COMPROMISE, *supra* note 123; RICHARD BELLAMY, LIBERALISM AND PLURALISM: TOWARDS A POLITICS OF COMPROMISE 93-114 and *passim* (1999). Alin Fumurescu traces the genealogy of compromise in European thought in COMPROMISE: A POLITICAL AND PHILOSOPHICAL HISTORY (2013) and seeks to apply this framework to America in COMPROMISE AND THE AMERICAN FOUNDING: THE QUEST FOR THE PEOPLE'S TWO BODIES (2019).

[130] This view is defended in Fabian Wendt, *Compromise and the Value of Widely Accepted Laws*, *in* COMPROMISE AND DISAGREEMENT, *supra* note 129, at 50-62; FABIAN WENDT, COMPROMISE, PEACE AND PUBLIC JUSTIFICATION (2016).

complexity is to endure, the collective action required to address the problems it confronts will make compromise indispensable.[131]

Of course, the Philadelphia convention of 1787 wrote several famous compromises into the Constitution. The idea of compromise was consciously practiced and affirmed throughout the gathering.[132] Likewise, compromise was a valued political norm throughout the antebellum era, and as in Philadelphia, several compromises accommodated slavery to preserve the union.[133] Now that compromise is receiving more attention in our era of polarization, we might ask whether the constitutional system that fostered and facilitated compromise with slavery was thereby delegitimized and in need of refounding or rejection.[134] At stake in this question, as in the assessment of any momentous compromise, is the exercise of prudence to judge political decisions made in circumstances that are never ideal and often unjust.

This point can be clarified with one example from among many that might be chosen from our history: Daniel Webster's defense of the Compromise of 1850 in his "Seventh of March" speech. Webster, a legislator, expressed what he viewed as the proper standard of judgment precisely in the morally fraught context of slavery. Webster had long publicly condemned slavery as a moral evil and had opposed its westward expansion. Yet he accepted that, per the Compromise, New Mexico was allowed to determine the question for itself according to the doctrine of popular sovereignty. This was partly because he doubted slavery would be economically viable there, and partly because he did not want to antagonize the South just when, under the terms of the Compromise, California was coming into the union as a free state. He likewise defended the fugitive slave law as a central element of the Compromise from the South's perspective, noting that it was permissible under the Constitution (Article IV, Section 2) and was necessary to keep the peace (as Lincoln too later agreed). In this speech, Webster was purposefully expending some of his hard-earned anti-slavery political capital on behalf of

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[131] *See, e.g.*, GUTMANN & THOMPSON, *supra* note 128, at 1, 22, 24, 204; DOBEL, *supra* note 129, at 3, 9, 80-84; BENJAMIN, *supra* note 129, at 139-43, 149; Joseph H. Carens, *Compromises in Politics*, *in* NOMOS XXI: COMPROMISE, *supra* note 123, at 123-41.

[132] William E. Nelson, *Reason and Compromise in the Establishment of the Federal Constitution, 1787-1801*, 44 WM. & MARY Q. 458 (1987); DAVID BRIAN ROBERTSON, THE ORIGINAL COMPROMISE: WHAT THE CONSTITUTION'S FRAMERS WERE REALLY THINKING (2013).

[133] PETER B. KNUPFER, THE UNION AS IT IS: CONSTITUTIONAL UNIONISM AND SECTIONAL COMPROMISE, 1787-1861 (1991).

[134] NOAH FELDMAN, THE BROKEN CONSTITUTION: LINCOLN, SLAVERY, AND THE REFOUNDING OF AMERICA (2021). *See also* Lena Zuckerwise, '*There Can Be No Loser': White Supremacy and the Cruelty of Compromise*, 5 AM. POL. THOUGHT 467 (2016).

a compromise that he thought could secure the union so that ultimately slavery could be ended without civil war. To critics who rejected compromise, he responded with this defense of it:

> There are men who, with clear perceptions, as they think, of their own duty, do not see how too eager a pursuit of one duty may involve them in the violation of others, or how too warm an embracement of one truth may lead to a disregard of other truths equally important. . . . They deal with morals as with mathematics; and they think what is right may be distinguished from what is wrong with the precision of an algebraic equation. They have, therefore, none too much charity towards others who differ from them. They are apt, too, to think that nothing is good but what is perfect, and that there are no compromises or modifications to be made in consideration of difference of opinion or in deference to other men's judgment. If their perspicacious vision enables them to detect a spot on the face of the sun, they think that a good reason why the sun should be struck down from heaven. They prefer the chance of running into utter darkness to living in heavenly light, if that heavenly light be not absolutely without any imperfection.[135]

Webster understood, as did the best of the founders before him and Lincoln after him, that preserving the union was the only realistic hope of eradicating slavery. Its permanent destruction was more likely in a nation based on natural rights and consent than in one that, like the Confederacy, rejected those principles. Prudence determined the right course according to circumstance: move toward freedom, compromise with slavery when necessary, and preserve the constitutional order of the union. An absolute demand for freedom in 1787 or 1850 likely would have caused disunion or civil war, and then perhaps a permanent slave-owning nation adjacent and antagonistic to the free one. This is not to deny that various compromises perpetuated the injustice of slavery, nor that war ultimately was required to put down secession.[136] Rather, the point is that the inevitable moral remainder of any serious compromise is not a sound argument against the practice of compromising,

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[135] Daniel Webster, *The Constitution and the Union*, Mar. 7, 1850, *in* THE GREAT SPEECHES AND ORATIONS OF DANIEL WEBSTER 604 (Edwin P. Whipple ed., 1879).

[136] This conclusion builds on the classic teaching of HARRY V. JAFFA, CRISIS OF THE HOUSE DIVIDED: AN INTERPRETATION OF THE ISSUES IN THE LINCOLN-DOUGLAS DEBATES (1959). *See also* Greg Weiner, *Lincoln and the Moral Dimension of Compromise*, 11 AM. POL. THOUGHT 253, 262-63 (2022).

which is normal and unavoidable if a diverse and pluralistic society is to govern itself.[137]

Compromise is not a virtue as such, nor an end in itself (though it is required in law and constitution making). But compromise can conduce to the ancient virtue of moderation. We might be intrepid in our philosophy or faithful in our religion, but moderation is usually the wiser course in politics. Often it is all that can be expected. Indeed, American constitutionalism can justifiably be understood as promoting—even requiring—the political moderation that emerges from compromise, given the different constituencies of its officeholders, its detailed mechanisms for distributing and recombining power, and its multiple points of delay, veto, and required agreement. As revealed especially in its complex system of checks and balances, the Constitution has been called "an attempt to institutionalize moderation."[138] Analysis that sees conciliation and coordination as integral to politics treats constitutionalism as a system of institutional interactions that first assumes disagreement, and then induces deliberation and compromise to produce policy rooted in shared social norms.[139] Politics in a healthy constitutional regime thus tends to be moderate and decent because the regime's structures encompass and accommodate political conflict. Such a constitutionalized politics is inevitably imperfect and open to criticism, yet it is also open to improvement. Those who want more from political life become immoderate, tending toward utopia or tyranny.

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[137] GUTMANN & THOMPSON, *supra* note 128, at 55-58 (making this point in the context of compromise with slavery).

[138] TOWARD A MORE PERFECT UNION: WRITINGS OF HERBERT J. STORING 320 (Joseph M. Bessette ed., 1995). *See also* LEO STRAUSS, LIBERALISM ANCIENT AND MODERN 24 (1968).

[139] For a sampling of analyses supporting this general view of constitutionalism, see CRICK, *supra* note 123, at 146-51; WALDRON, POLITICAL POLITICAL THEORY, *supra* note 124, at 36, 13-14, 21-22, 62-65, 283-84, 298-300; PETER BERKOWITZ, CONSTITUTIONAL CONSERVATISM: LIBERTY, SELF-GOVERNMENT, AND POLITICAL MODERATION 39-75 (2013); DOBEL, *supra* note 129, at 48, 52-53, 90; KNUPFER, *supra* note 133, at x, 10, 15, 17, 44, 51, 129; Jeffrey K. Tulis, *Deliberation Between Institutions*, *in* DEBATING DELIBERATIVE DEMOCRACY 200-11 (James S. Fishkin & Peter Laslett eds., 2003); Keith E. Whittington, *Constitutional Theory and the Faces of Power*, *in* THE JUDICIARY AND AMERICAN DEMOCRACY: ALEXANDER BICKEL, THE COUNTERMAJORITARIAN DIFFICULTY, AND CONTEMPORARY CONSTITUTIONAL THEORY 163-90 (Kenneth D. Ward & Cecelia R. Castillo eds., 2005); Johnathan O'Neill, *Carl J. Friedrich's Legacy: Understanding Constitutionalism as a Political System*, 14 THE EURO. LEGACY 283, 288-90 (2009); Jonathan Rauch, *Rescuing Compromise*, NAT'L AFFAIRS, Fall 2013, at 115, esp. 120, 126.

## VII. REFORMING CONGRESS

A healthier constitutionalism requires a healthier Congress. Its rules, structures, and procedures significantly affect the quality of deliberation that goes into lawmaking, even though Congress rarely acts directly to improve its methods and few scholars have concentrated on the subject.[140] How might Congress reform itself to become a more responsible and deliberative legislature? There is a lively and ongoing scholarly discussion on this and related topics. Earlier such discussions preceded the congressional reorganization and reform episodes of the 1940s and 1970s (which themselves had some unintended negative consequences that shape today's landscape). As in the past, the political and party contexts both incentivize and constrain any changes that might occur: reform of a political institution is inevitably a political process. Likewise, previous reforms in Congress did not wipe the slate clean and begin anew, but instead were typically laid over existing institutional forms and procedures. This complexity and contingency make reform inherently contested and incremental. Nevertheless, earlier Congresses did adapt to changed circumstances to defend the institution's constitutional authority as the national legislature.[141] The numerous and varied proposals of recent years cannot be treated comprehensively here, nor can we consider fully how changes in the party system, especially increased polarization, have altered the functioning of Congress and limited the potential for change. Described below are only a few of the more salient ideas that have been raised with some frequency and that seem constitutionally sound in principle.

Often driven by Congress itself, the administrative state has corrupted American constitutionalism.[142] The most basic thing Congress could do to reclaim its rightful authority and responsibility would be to assert more control over the regulatory bureaucracies it has created and empowered. This would entail less congressional delegation and deference to agencies via vague legal standards that allow them to govern of their own accord, and recovery

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[140] Paul J. Quirk & William Bendix, *Deliberation in Congress*, *in* THE OXFORD HANDBOOK OF THE AMERICAN CONGRESS (George C. Edwards III, Frances E. Lee, & Eric Schickler eds., 2011, online edition); Paul J. Quirk, *Deliberation and Decision Making*, *in* THE LEGISLATIVE BRANCH 314-48 (Paul J. Quirk & Sarah A. Binder eds., 2005). *See also* WALLACH, *supra* note 121.

[141] Eric Schickler, *Institutional Development of Congress*, *in* LEGISLATIVE BRANCH, *supra* note 140, at 35-62.

[142] *See* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994); PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014); POSTELL, *supra* note 113.

of some of what has already been given away.[143] Not only would this change be in accord with Congress's authority and responsibility to set legal norms, but less delegation and deference likely would induce more compromise and moderation in the laws that are passed. This would be an improvement from the swings in policy that occur as each incoming administration exploits regulatory-bureaucratic discretion in the opposite direction from its predecessor. If Congress recaptures or simply refrains from ceding more of its legislative discretion, the compulsion to arrive at clearer legal standards from amid diversity and disagreement would precipitate the classic legislative practices that produce compromise; the resulting compromise bill would contain more moderate content than what extremists on either side would prefer.[144]

Another proposal that has recurred for over a decade now is the Regulations from the Executive in Need of Scrutiny (REINS) Act. It would require prior congressional approval for a major agency regulation before it could take effect. REINS would be a significant tool in the congressional arsenal, and although it has not passed, it also has not disappeared, because the constitutional issues it addresses are real and substantial.[145]

Related to control of the administrative state is the more general need for Congress to reassert its governing authority via its power of the purse. A prime example is the decay of the budgeting and appropriations process. Whereas the longstanding practice was for Congress to consider usually a dozen separate appropriations bills and thus to maintain some control and oversight over what it funded, now the norm is for it to consider one or a few immense "omnibus" bills that are typically passed at the end of a session. Usually their contents are little discussed and little understood, but they become law for fear of a government shutdown or debt default. A return to the older system

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[143] Yuval Levin, *Four Steps for Reviving the First Branch*, *in* RESTORING CONGRESS AS THE FIRST BRANCH 11 (R Street Policy Study No. 50, Jan. 2016); SAIKRISHNA BANGALORE PRAKASH, THE LIVING PRESIDENCY: AN ORIGINALIST ARGUMENT AGAINST ITS EVER-EXPANDING POWERS 256-58 (2020); John O. McGinnis & Michael B. Rappaport, *Restoring a Constitution of Compromise*, NAT'L AFFAIRS, Spring 2022, at 83, 88-89; Melanie M. Marlowe, *Reclaiming Institutional Relevance Through Congressional Oversight*, *in* IS CONGRESS BROKEN?, *supra* note 127, at 117-18.

[144] McGinnis & Rappaport, *Restoring a Constitution of Compromise*, *supra* note 143, at esp. 83-84, 89, 90.

[145] Kevin R. Kosar, *How to Strengthen Congress*, NAT'L AFFAIRS, Fall 2015, at 59; McGinnis and Rappaport, *Restoring a Constitution of Compromise*, *supra* note 143, at 88; Levin, *Four Steps*, *supra* note 143, at 11; Joseph Postell, *From Administrative State to Constitutional Government*, HERITAGE FOUND. SPECIAL REPORT 26 (Dec. 7, 2012). *But see* Philip A. Wallach, *Losing Hold of the REINS: How Republicans' Attempt to Cut Back on Regulations has Impeded Congress's Ability to Assert Itself*, BROOKINGS SERIES ON REGULATORY PROCESS AND PERSPECTIVE (May 2, 2019), https://www.brookings.edu/research/losing-hold-of-the-reins/.

would be a return to both more responsible government spending and much needed oversight of regulatory agencies and the executive branch.[146]

The appropriations process illustrates that the way Congress conducts its business has changed substantially over the past several decades—too often for the worse. Scholars have long noted the shift from the "regular order" of conducting legislative business to "unorthodox lawmaking." The first is essentially the civics book version of "how a bill becomes a law": a bill is introduced and referred from the floor to a committee, which holds hearings, considers and revises a text, and reports it to the full chamber. There it is debated, possibly amended, and then voted on. A conference with the other chamber is held to resolve any differences. This system was designed to produce considered and deliberated legislation that had been thoroughly vetted in committee, that accrued support by accounting for minority party input, and that was open to fine-tuning through amendment.

Unorthodox lawmaking can take a variety of forms that to some extent disrupt or circumvent the regular order. In the House, the Rules Committee, controlled by the majority, can interrupt the day's order of business, severely limit debate on the floor, and restrict or prohibit amendments to a bill. The leadership also can bypass committee referrals altogether (no hearings or reports) and draft a bill behind closed doors, or it can substitute its own language for a committee draft. In the Senate, the once infrequent invocation of a supermajority (cloture) to end debate has now become a regular event that often kills legislation. The huge omnibus bills discussed above, often dealing with budget matters, are negotiated by leaders and passed so quickly that members often do not know what is in them.[147]

Regular order prevailed in the middle decades of the 20th century. During that period, both parties incorporated broad swathes of opinion, yet were more ideologically homogeneous vis à vis one another. In the recent era of greater intraparty unity and cross-party polarization, unorthodox lawmaking is frequently how legislation happens. Nevertheless, law made in the now-common unorthodox fashion is not necessarily more partisan or extreme. In fact, use of such methods is often the only way to legislate under severe time

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[146] *See* Peter C. Hanson, *Ending the Omnibus: Restoring Regular Order in Congressional Appropriations*, *in* IS CONGRESS BROKEN?, *supra* note 127, at 175-88; Marlowe, *Congressional Oversight*, *in id.* at 118; Levin, *Four Steps*, *supra* note 143, at 11. *See also* Walter J. Oleszek, *The "Regular Order": A Perspective*, CONGRESSIONAL RESEARCH SERV., at 27, 54 (Nov. 6, 2020).

[147] *See generally* BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS (5th ed., 2017); Oleszek, *supra* note 146.

constraints, to prevent the destruction of laboriously fashioned compromises on the floor, or to stop minority party obstruction that would keep anything from being done. Legislative leaders can use unorthodox lawmaking to privately negotiate deals that are able to garner the necessary votes for passage, and also to build grand bargains beyond the reach of one or a few committees.[148]

While polarization has normalized unorthodox lawmaking, and though it is not always pernicious, observers concerned about the quality of congressional deliberation continually affirm the need to value and support the work of committees that has suffered in the new era. It is in committees that authentic deliberation historically has occurred; such deliberation is far rarer on the floor. In committees, members hold hearings, use mark-up sessions to hone language, and consider amendments from the minority party. Before the drive for transparency, television, and publicly recorded votes, committees provided more of the privacy that facilitates negotiation, persuasion, and deal making across party lines. Likewise, prior to the contemporary practice of three-day work weeks, committees encouraged deliberation by fostering among members the repeated interactions through which people come to know each other on a humane and social level. Furthermore, committees' substantive knowledge and deliberative ability have been undermined by Republican-imposed term limits on chairs, inadequate staffing levels, and frequent staff turnover. Finally, committee deliberation is sabotaged or made irrelevant when party leaders substitute new language for the committee's work, or else bypass the committee entirely. Advocates of reform argue that reversal of some or all of these trends likely would improve congressional deliberation.[149]

Additionally, it has been well documented that for decades Congress has underinvested in itself and its capacity as an institution. The number of congressional staff has substantially declined over time, and their salaries are low,

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[148] Sinclair, *supra* note 147, at 268-69; James M. Curry & Frances E. Lee, *What is Regular Order Worth? Partisan Lawmaking and Congressional Processes*, 82 J. OF POL. 627 (2020); Oleszek, *supra* note at 146, at 26-27.

[149] Quirk, *Deliberation and Decision Making*, *supra* note 140, at 330-33; Palazzolo, *Return to Deliberation*, *in* IS CONGRESS BROKEN?, *supra* note 127, at 74; Marlowe, *Congressional Oversight*, *in id.* at 120-22; Donald R. Wolfensberger, *Changing House Rules: From Level Playing Field to Partisan Tilt*, *in id.* at 101-02; Kathryn Pearson, *The Constitution and Congressional Leadership*, *in id.* at 167-68; Binder & Lee, *supra* note 128, at 109-10; Kosar, *How to Strengthen Congress*, *supra* note 145, at 55-56; Molly E. Reynolds, *Will Ryan's Reforms Strengthen the House?*, *in* RESTORING CONGRESS, *supra* note 143, at 9. *See also* SINCLAIR, *supra* note 147, at 264-67.

leading to frequent turnover and the loss of experience and expertise relied upon by members and committees. A similar trend is reflected in the staff and funding levels at support agencies like the Congressional Research Service and the Government Accountability Office.[150] Consequently, Congress has come to rely on the information it receives from the executive branch and lobbyists, who have their own interests that may not align with those of members or their constituents. There is near universal agreement among advocates of reform that the time has come to reverse this decline.[151] While Congress has often shied away from investing in itself for fear of voter reprisals, this issue may not be as salient as previously thought, especially if the action is cast as a response to an overreaching executive and self-interested lobbyists.[152] Additionally, "members also ought to realize the reason Congress is so unpopular is because it's unable to accomplish much, in part because it lacks the capacity."[153] There may be some "reason for optimism" because, as in past eras of reform, there are indications that members themselves are growing more discontent with the constraints of severely limited resources and the confinement of procedures that diminish meaningful participation in the legislative process.[154]

Related to the issue of capacity, Congress lacks the deep constitutional knowledge of the judiciary and the numerous legal offices in the executive branch and the administrative state. To bolster its ability to consider constitutional issues from its own institutional perspective—not simply those of the executive or judicial branches—it should consider creating something like an office for constitutional issues akin to the Office of Legal Counsel in the Department of Justice. This could be done on the model of the research,

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[150] This trend is documented in detail in Molly E. Reynolds, *The Decline in Congressional Capacity*, *in* CONGRESS OVERWHELMED: THE DECLINE IN CONGRESSIONAL CAPACITY AND THE PROSPECTS FOR REFORM 34-50 (Timothy M. LaPira, Lee Drutman, & Kevin R. Kosar eds., 2020).

[151] PRAKASH, *supra* note 143, at 253-54; Kosar, *How to Strengthen Congress*, *supra* note 145, at 55, 56-58; Paul Glastris, *Congress Lobotomizes Itself*, *in* RESTORING CONGRESS, *supra* note 143, at 3-5; Kevin R. Kosar, *No Longer the First Branch*, *in id.* at 3; Lee Drutman, *A Congress Without Its Own Knowledge is a Dependent Congress*, *in id.* at 5-6; Marlowe, *Congressional Oversight*, *in* IS CONGRESS BROKEN?, *supra* note 127, at 122-24; Daniel Stid, *Two Pathways for Congressional Reform*, *in id.* at 31.

[152] Anthony Madonna & Ian Ostrander, *Dodging Dead Cats: What Would It Take to Get Congress to Expand Capacity?*, *in* CONGRESS OVERWHELMED, *supra* note 150, at 274-76.

[153] Drutman, *supra* note 151, at 6.

[154] Lee Drutman & Timothy M. LaPira, *Capacity for What? Legislative Capacity Regimes in Congress and the Possibilities for Reform*, *in* CONGRESS OVERWHELMED, *supra* note 150, at 32; Madonna & Ostrander, *supra* note 152, at 274 (quote) 275; Stid, *supra* note 151, at 32; Philip Wallach, *Congress Indispensable*, NAT'L AFFAIRS, Winter 2018, at 31-32.

investigative, and advisory institutions it already relies on, such as the Congressional Research Service and the Government Accountability Office.[155] This new constitutional office could produce opinions on constitutional questions, advise on the constitutional basis and implications of proposed legislation, and evaluate the constitutional arguments of the other branches. Such an institution would help Congress think for itself about its own authority instead of compelling it to rely on and defer to other entities whose facility in constitutional argumentation—from their own perspectives—currently far surpasses that of the legislature.

## VIII. CONCLUSION

Originalism has successfully altered the landscape of constitutional jurisprudence and affected the direction of constitutional law since its initial reemergence in the last part of the 20th century. In the first few decades of the 21st century, it has responded to criticisms and made new advances. During this evolution, the theory has become more variegated and diffuse. Although originalism initially criticized the basis and scope of modern judicial review, gradually it has become more accommodated to the American practice of judicial supremacy. This development has raised questions about originalism's overall purpose and direction as thinkers grapple with whether and how to constrain judicial discretion in the "construction zone." That problem will have to be addressed in depth, and a more modest judicial role embraced, if originalism is to avoid becoming a new version of the judicially-updated living constitutionalism it first arose to contest. An originalism more concerned to constrain judicial discretion than to exploit it would return to the concept of intent as the core of legal meaning. It likewise would turn to the philosophical and constitutional defense of the representative and deliberative legislature. It is the institution originally designed to undertake the negotiation, deliberation, and compromise by which a free people makes law from its plural and contending interests. Accordingly, originalism would better serve constitutional self-government if its focus were widened to account for the legitimacy and authority of the legislature and the need to address the many ills of today's Congress. An originalism renewed along these lines would accept that the discourse of jurisprudence and constitutional law is limited in

[155] Versions of this general proposal appear in Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 DUKE L.J. 1277, 1313-19 (2001); Alicea, *Originalist Congress*, *supra* note 119, at 46; PRAKASH, *supra* note 143, at 254-55.

its capacity to legitimately resolve political problems, and therefore conclude that less should be demanded of it. In doing so, originalism would be building on the deepest purposes of the first modern originalists, who sought to sustain the separation of powers and constitutional self-government by defending the prerogatives of the legislature from judicial overreach.

# Establishing an Agreement to Disagree about Church and State*

Donald Drakeman**

A review of Nathan Chapman & Michael McConnell, Agreeing to Disagree: How the Establishment Clause Protects Religious Diversity and Freedom of Conscience (Oxford University Press 2023)

This is a remarkably timely book. The Supreme Court has signaled its willingness to do a complete renovation of its church–state jurisprudence, or what we might call a remodel of the house that *Everson* built.[1] Yet while a majority of Justices seems prepared, to varying extents, to "dismantle [*Everson*'s] wall of separation between church and state,"[2] in Justice Sonia Sotomayor's unenthusiastic words, they are much more likely to agree on the outcome of the cases than the constitutional reasoning. In the *American Legion v. American Humanist Association* case involving the display of a cross on public land,[3] for example, there were seven separate opinions, with Justice Samuel Alito's opinion of the Court only speaking for a majority of the Justices part of the time.

There is little doubt that a full-scale renovation is underway, but, as with most construction projects, tearing down the old structures—such as the wall of separation metaphor and the much-derided *Lemon* test—has proceeded much more quickly than has the installation of something new and improved. At some point, the Court will need to settle on a constitutional design that

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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] Everson v. Board of Education, 330 U.S. 1 (1947).

[2] Carson v. Makin, 596 U.S. __ (2022) (Sotomayor, J., dissenting).

[3] American Legion v. American Humanist Association, 588 U.S. __ (2019).

appeals to a consistent majority of the Justices and that will be fit for the critical purpose of "say[ing] what the law is,"[4] as Chief Justice John Marshall enjoined 220 years ago. That design—the detailed plans for a full-scale renovation of Establishment Clause jurisprudence—is what Nathan Chapman and Michael McConnell have offered in this fascinating, thought-provoking, and crisply written volume.[5]

*Agreeing to Disagree: How the Establishment Clause Protects Religious Diversity and Freedom of Conscience* includes all of the key components of the Court's prior encounters with the Establishment Clause: religious history from the 16th through the 19th centuries; the views of James Madison, Thomas Jefferson, and other famous Founders; a new test to replace the unlamented *Lemon* test ("When a court describes its own doctrine as a Catch-22, you know there is a problem"[6]); and a guide to deciding the most common church–state cases. The design also includes a plan for how the Clause should get along with its next-door neighbor, the Free Exercise Clause. It even offers the Justices a memorable catch-phrase—"Agreeing to Disagree"—to replace "Wall of Separation" in the hearts and minds of both constitutional experts and the American public.

The book's basic theme for understanding the religion clauses is based on the authors' belief about what represents the "simplest and most sensible" interpretation, which is that the two clauses are "mutually reinforcing." The Free Exercise Clause "protects the right to practice religion according to conscience and conviction," while the Establishment Clause "prevents the government from coercing or using governmental power to induce religious beliefs and practices."[7] The Establishment Clause is thus not properly understood as a "thumb on the scale for secularism in public matters," but rather as "a constitutional commitment for Americans to agree to disagree about matters of religion—to refrain from using the power of government to coerce or induce uniformity of belief, *whether that belief is . . . secular or religious*."[8] The italicized language is a very significant interpretive move by Chapman and McConnell, and one that is likely to be controversial. It turns a provision that explicitly refers to religion ("Congress shall make no law respecting an

[4] Marbury v. Madison, 5 U.S. 137 (1803).

[5] NATHAN S. CHAPMAN & MICHAEL W. MCCONNELL, AGREEING TO DISAGREE: HOW THE ESTABLISHMENT CLAUSE PROTECTS RELIGIOUS DIVERSITY AND FREEDOM OF CONSCIENCE (2023).

[6] *Id.* at 91.

[7] *Id.* at 3.

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

establishment of religion") into a broader "principle [that] warns against using the power of the state to enforce conformity."[9]

The book is divided into two parts: "History" and "Modern Controversies." The four-chapter history portion starts with the founding, then recounts the framing of the First Amendment, followed by a discussion of disestablishment in the states, and concludes with the application of the Establishment Clause to the states. Part II devotes a chapter to each of the most controversial issues in Establishment Clause jurisprudence: government accommodation of religious exercise, including exemptions; religious schools; school prayer and Bible reading; the public display of religious symbols; and church autonomy. Part II's substantive issues are bookended by a chapter on the many failings of the Court's *Lemon* test, and a conclusion urging the Court to see the Clause as a commitment to neutrality and a model for how that neutrality principle could help us become less polarized on other controversial issues.

The first part of the book analyzes the history of the meaning of a religious establishment in some detail.[10] The authors do not commit themselves to any of the current approaches to constitutional originalism, or, in fact, to any particular methodology for deciding which aspects of the historical record are the most relevant for interpreting the Constitution. Instead, relying again on what they consider to be the most sensible approach, they simply state that "starting with the original meaning of a constitutional provision always makes good sense,"[11] citing the champion of the living constitution, Justice William J. Brennan, Jr. Their historical analysis begins with an impressively clear, even bold, claim: when the words of the Establishment Clause became part of the Constitution, "virtually every American knew from experience what those words meant."[12] The quintessential example of what everyone thought was an establishment of religion was the Church of England, which "was established by law in the mother country."[13]

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[9] *Id.* at 95. In the conclusion, they modify this interpretive approach to say that, although the Establishment Clause itself is "solely about religion . . . establishments can come in many different flavors," including "secular and ideological as well as religious." *Id.* at 190.

[10] Much of this portion of the book is based on Judge McConnell's well-known and widely cited article, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105 (2003), to which "readers seeking more copious citations of authority" should go for additional information. CHAPMAN & MCCONNELL, *supra* note 5, at 194, n.1. What would have been Part II's focus on disestablishment, which McConnell left unfinished when he was appointed to the Tenth Circuit, is added in this book.

[11] CHAPMAN & MCCONNELL, *supra* note 5, at 5.

[12] *Id.* at 9.

[13] *Id.*

So far, so good: there is little doubt that the founding generation understood the Church of England as an establishment of religion. The authors highlight the Supremacy Act, which gave the King "full power and authority" to establish doctrines and "repress . . . heresies";[14] the statutory Thirty-nine Articles of Faith establishing the doctrine of the church and the Book of Common Prayer, which set out the rites and ceremonies;[15] and the various Acts of Uniformity, which provided civil or criminal penalties for those departing from the church's rites and doctrines. Such an interpretation would track James Madison's statement to the First Congress when it was debating a proposed amendment reading, "no religion shall be established by law,"[16] and explained that some state conventions wanted to make sure that "Congress should not establish a religion, and enforce the legal observation of it by law."[17] Lest there be any concern that this provision could be misinterpreted and thought to apply to the states, Madison suggested adding "national" before "religion."[18] The newspapers printed these statements, along with the comments from others in the First Congress, who, in proposing language changes, said their versions were intended to accomplish the same goal.[19]

The prohibition of an American version of the Church of England would thus seem to be the original meaning of the Establishment Clause, as understood by the First Congress and the newspaper-reading public. Nevertheless, Chapman and McConnell do not end the historical analysis with the conclusion that the Clause was meant to ban a congressionally established "Church of the United States." Instead, they use a much broader definition of "establishment" for most of the book. They do not explain why they need to use a broader definition than the original one, except briefly to note that the Clause, in its 18th-century congressional context, "refers to legal arrangements that have gone the way of the dodo."[20] And so, their conclusion about prohibiting the American equivalent of the Thirty-nine Articles and the

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[14] *The Act of Supremacy*, in DOCUMENTS OF THE ENGLISH REFORMATION 98 (Gerald Bray ed., 3d ed. 2019).

[15] CHAPMAN & MCCONNELL, *supra* note 5, at 12.

[16] *House and Senate Debates Concerning the First Amendment*, in CHURCH AND STATE IN AMERICAN HISTORY: KEY DOCUMENTS, DECISIONS, AND COMMENTARY FROM FIVE CENTURIES 86–87 (John F. Wilson & Donald L. Drakeman eds., 4th ed. 2020).

[17] *Id.* at 87.

[18] *Id.*

[19] *See* DONALD L. DRAKEMAN, CHURCH, STATE, AND ORIGINAL INTENT 203–16 (2009).

[20] CHAPMAN & MCCONNELL, *supra* note 5, at 5. If the efforts of Colossal Biosciences are successful, this memorable turn of the phrase may become extinct. *See* William Sullivan, *This Company Wants to Bring the Dodo Back from Extinction*, SMITHSONIAN MAG., Feb. 2, 2023.

Supremacy and Uniformity Acts is introduced with the phrase, "whatever else the [the Clause] might mean."[21] Much of the rest of the historical analysis, and of the book itself, is devoted to that "whatever else."

After their initial historical investigation, the authors then make a definitional leap of faith. An establishment is not just what Madison had said it was in the First Congress: a national church that requires everyone to abide by religious rites and theological doctrines set out in federal statutes. Instead, "An establishment is the promotion and inculcation of a common set of beliefs through governmental authority."[22] To move toward that unusually comprehensive definition, they begin by arguing that there were establishments in both Puritan New England and Anglican Virginia held together by "a complex web of statutes and executive pronouncements."[23] Since the Anglican Church in Virginia was actually part of the church that was "by law established" in England under the narrow definition, the definitional expansion needs to rest heavily on Puritan New England. The authors then break the establishmentarian web into six categories: "(1) control over doctrine, governance, and personnel of the church; (2) compulsory church attendance; (3) financial support; (4) prohibitions on [other] worship; (5) use of church institutions for public functions; and (6) restriction of political participation to members of the established church."[24] The authors do a good job of showing that these kinds of laws existed in numerous colonies, but they do not address the key question of whether "virtually every American" at the time of the Constitution's framing understood those elements to be "an establishment of religion."[25]

Since the question of what exactly is a forbidden establishment has been the single most difficult and divisive element of religion clause jurisprudence, it is important to try to follow this line of historical reasoning. Although the authors say that there were religious establishments in colonial New England, they admit that "these colonies could not easily establish their religion by law" because the "Puritans were at religious odds with the authorities in London."[26] Accordingly, if the Church of England and Madison's definition both revolved around a national church that was formally established by statutory

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[21] CHAPMAN & MCCONNELL, *supra* note 5, at 14.
[22] *Id.* at 18.
[23] *Id.* at 12.
[24] *Id.* at 12, 18.
[25] *Id.* at 9.
[26] *Id.* at 18.

law, how could the New England Way become an "establishment of religion" as everyone in America understood that term (to use the authors' definitional gold standard)?

As it turns out, some very important public figures said that the New Englanders' church–state arrangement—which featured town-based religious taxes, among other things—was *not* an establishment. In 1796, Connecticut Judge Zephaniah Swift said that any establishment in his state ended with the 1784 revision of laws, which ended the "civil endorsement" of the Savoy Confession of Faith.[27] Chief Justice Jeremiah Smith of the New Hampshire Supreme Court said the Granite State did not have an establishment of religion because "a religious establishment is where the State prescribes a formulary of faith and worship for the rule of all the subjects."[28] In Massachusetts, there was a debate in the newspapers between Baptist leader Isaac Backus and "Hieronymus" over this definitional point. Backus had condemned religious taxes as establishment of religion, which was simply wrong, asserted Hieronymus, who explained that a "religious establishment by law is the establishment of a particular mode of worshipping God, with rites and ceremonies peculiar to such a mode, from which the people are not suffered to vary."[29]

If, as Chapman and McConnell argue, everyone in the founding era knew what "an establishment of religion" meant, it would be hard for the definition to expand beyond a formal, statutorily created Church of America. Indeed, Hieronymous (probably Massachusetts Attorney General Robert Treat Paine[30]) and two state supreme courts not only defined it that way, but rejected the notion that the New England states had religious establishments even though they had several of the elements of the authors' six part definition.[31]

Instead of wrestling further with founding-era counter-examples, the authors turn to the process of disestablishment in the states between the Revolution and the 1830s, much of which focused on the question of religious taxes. They continue to use their enlarged definition of establishment, arguing

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[27] 2 WILLIAM G. MCLOUGHLIN, NEW ENGLAND DISSENT, 1630–1833: THE BAPTISTS AND THE SEPARATION OF CHURCH AND STATE 923–24 (1971).

[28] *Id.* at 864. *See* Muzzy v. Wilkins, 1 Smith's (N.H.) 1 (1803).

[29] 1 MCLOUGHLIN, *supra* note 27, at 614.

[30] *See* THOMAS J. CURRY, THE FIRST FREEDOM: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 172 (1986).

[31] For more on these methodological issues, especially relating to the Establishment Clause, see DONALD L. DRAKEMAN, THE HOLLOW CORE OF CONSTITUTIONAL THEORY: WHY WE NEED THE FRAMERS (2020).

that "state disestablishment provisions clarify the sort of laws the Establishment Clause prohibited the federal government from enacting."[32] They do not explain why those subsequent state-level provisions should be read back several decades into the First Amendment. Moreover, they actually seem perplexed that the only state whose Constitution expressly stated that it had an established church, South Carolina, had "state-specified articles of faith, but no financial support."[33] Yet, again, that South Carolina approach tracks the language usage in the New Hampshire and Connecticut supreme courts, which declared that no establishment existed, despite the presence of religious taxes, because there were no statutorily set articles of faith.

Setting aside, for now, the interpretive choice to adopt this "living" definition of "establishment," Chapman and McConnell do an excellent job of summarizing the multiple political players and the range of legislative moving parts involved in the state-level battles that the Rev. Lyman Beecher described in Connecticut in 1820 as "the last struggle of the separation of Church and State."[34] In particular, they show the error of the Supreme Court's *Everson*-inspired fixation on the church–state exploits of Madison and Jefferson in Virginia. "We must," they conclude, "look . . . to the debates in all [the] states, and not just that in Virginia, for an understanding of the arguments for and against compulsory support for religion."[35] Especially valuable is their argument that opposition to religious taxes was not rooted in a secularist impulse. Rather, "popular opposition was concentrated among the most intensely evangelical" Baptists and other Protestants whose "opposition was largely theological in nature."[36] For these ardent believers, "the support of religion is a duty to God alone, for which believers are not answerable to the state."[37]

The authors are so convincing on the theological roots of this separationist movement that it seems that what they call disestablishment—or at least the elimination of religious taxes—could actually be considered an unconstitutional establishment of evangelical Baptist theology. The Establishment Clause, in their view, was meant to ensure that Americans would "refrain from using the power of government to coerce or induce uniformity of belief."[38] Those who believe that government needs to support religion to promote civic

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[32] CHAPMAN & MCCONNELL, *supra* note 5, at 73.

[33] *Id.* at 66.

[34] Wilson & Drakeman eds., *supra* note 16, at xiv (quoting Beecher).

[35] CHAPMAN & MCCONNELL, *supra* note 5, at 68.

[36] *Id.*

[37] *Id.* at 69.

[38] *Id.* at 6.

virtue, or to usher in the millennium, or for any other reason, have been required to abide by a competing theological viewpoint that has become constitutionalized because the Baptists experienced exponential growth in membership—and, therefore, political power—throughout the 19th century.[39] A national establishment of Baptist theology—now *that* would have been an interesting discussion, but unfortunately the authors did not choose to go that direction. (Maybe they could have at least revised the title to "Establishing an Agreement to Disagree.")

As an admirer of Professor Chapman's previous work, I expected a chapter discussing how the federal government thought about the Establishment Clause in the 19th century, especially in the context of the many millions of dollars appropriated by Congress to fund missionary churches, schools, and church personnel to "civilize" Native Americans. In his recent article on the topic, Chapman points out that "the government's funding of missions to the Native nations is most closely analogous to two practices that generated disestablishment objections . . . within the early republic,"[40] and they happened at about the same time. "Why didn't anyone contest them?" he has asked.[41] That is a good question. One possible answer is that the then-accepted definition of "establishment"—along with its original meaning—was simply not as broad as the one advanced in *Agreeing to Disagree*.

Rather than analyzing the Civilization Program and how it might cause a revision to how we see the 19th-century understanding of "establishment,"[42] the authors move to the incorporation doctrine—that is, the 20th-century idea that the 19th century's Due Process Clause in the Fourteenth Amendment made the 18th-century Establishment Clause directly applicable to the actions of state and local governments. This short chapter identifies various challenges to the incorporation doctrine. But it ultimately makes a pragmatic decision to move on since "no justice of the Supreme Court now questions the applicability of the personal rights of the Bill of Rights to the states," and at least the aspect of the Establishment Clause that "disabled Congress from

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[39] *See* EDWIN SCOTT GAUSTAD & PHILIP L. BARLOW, NEW HISTORICAL ATLAS OF RELIGION IN AMERICA (2000).

[40] Nathan S. Chapman, *Forgotten Federal-Missionary Partnerships: New Light on the Establishment Clause*, 96 NOTRE DAME L. REV. 677, 723 (2020).

[41] *Id.* at 724.

[42] The authors briefly mention the Civilization Program in the chapter on education, where they cite numerous examples of federal and state government support for religious education in the 19th century. *See* CHAPMAN & MCCONNELL, *supra* note 5, at 120–21.

'establish[ing] a religion, and enforc[ing] the legal observation of it by law' . . . is easily understood as a personal rights provision."[43]

The brief incorporation discussion highlights a recurring problem with trying to remodel *Everson*'s house of mirrors. The authors are stuck with 80 years of church–state jurisprudence in which "Congress" no longer means Congress, but anything that is somehow connected to a federal, state, or local government, including instrumental music played by a high school band.[44] "Law" no longer means law, but practically anything that any of those loosely defined governmental entities ever do. And an "establishment of religion" seems to mean anything that might be considered religious by some people, including displaying a holiday creche that has not been adequately camouflaged by elves, reindeer, and Frosty the Secular Snowman.[45] As a result, any and all church–state disputes arising anywhere in America must be resolved by the federal judiciary. This book seeks to give the Justices a sound principle by which to adjudicate those cases, and the authors' interpretive elasticity serves their core purpose of identifying an agreeing-to-disagree principle underlying what they consider to be a desirable constitutional ban on using "the power of government to coerce or induce uniformity of belief, whether . . . secular or religious."[46]

Once Chapman and McConnell complete their historically-informed argument for the agreeing-to-disagree standard, they largely leave the 18th century behind. Historical examples only occasionally arise in the remaining chapters on specific Establishment Clause issues. Those chapters focus instead on Supreme Court doctrine. The authors' basis for applying their agreeing-to-disagree interpretation primarily involves an appeal to what they believe is a simple and sensible approach. Inasmuch as virtually every possible interpretation of the Establishment Clause can claim to be informed by one aspect of American history or another, the extent to which readers—including sitting Supreme Court Justices—agree with the authors' conclusions will therefore most likely be determined primarily by whether they share Chapman's and McConnell's views of what church–state policy makes the most sense rather than by any particular 18th-century-based argument.

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[43] *Id.* at 79–80 (quoting James Madison).

[44] *See* Nurre v. Whitehead, 580 F.3d 1087 (9th Cir. 2009). *See also* Nurre v. Whitehead, 559 U.S. 1025 (2010) (Alito, J., dissenting from denial of certiorari).

[45] See the various cases discussed in CHAPMAN & MCCONNELL, *supra* note 5, at 157–72.

[46] *Id.* at 6.

Part II of the book begins with a dismissal of *Lemon*'s three-part Catch-22 requiring that laws "(1) must have a secular purpose, (2) must have a 'primary effect' that 'neither advances nor inhibits religion,' and (3) may not foster an 'excessive entanglement' between government and religion."[47] Arguing that it was "plagued by conceptual ambiguity, overemphasized separationism at the expense of religious freedom, and was a mismatch with the historical understanding of disestablishment," the authors reject the test, and they express considerable unhappiness with the fact that the Court has quietly retreated from the test rather than explicitly overruling it.[48] The problem with this approach is that "lower courts are instructed to follow Supreme Court holdings until expressly overruled."[49] This is a valuable and important reminder—especially from Professor McConnell, a highly respected former federal appellate judge—of the need for Supreme Court Justices to set out an Establishment Clause doctrine that can provide lower court judges with the tools they need to decide concrete cases in a coherent and consistent manner.

The authors then take on one of today's most controversial issues: religious exemptions from otherwise applicable legal requirements. The controversy arises not only from "the increasingly sharp divide between secular and religious elements of our culture," but also because some proposed exemptions "have involved religiously motivated resistance to triumphs of the cultural left with respect to hot-button issues like abortion, same-sex marriage, and transgender rights."[50] Chapman and McConnell offer a number of reasons why exemptions make good political sense and conclude that these kinds of "accommodations often are a win-win solution for the problem of ineradicable conscientious differences."[51] They note that the legislative and executive branches have frequently granted religious exemptions throughout American history, while state and federal courts have been inconsistent as to whether the Free Exercise Clause requires them.

Since this book specifically addresses the Establishment Clause, the authors focus their attention on arguments that these kinds of religious accommodations violate the Establishment Clause. After considering the various costs and benefits of such policies, the authors conclude that the nation's "tradition of generous religious accommodations" should be upheld, even if the

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[47] *Id.* at 88 (quoting Lemon v. Kurtzman, 403 U.S. 602 (1971)).
[48] *Id.*
[49] *Id.* at 92.
[50] *Id.* at 94.
[51] *Id.*

costs to others are substantial[52] because they are "a good thing for religious freedom and diversity."[53] They base this conclusion primarily on "long-standing practice and precedent,"[54] while noting that "courts are understandably [wary when] an accommodation might have the effect of pressuring people to change (or pretend to change) their religion . . . to claim an exemption."[55]

Readers who share the authors' view that religious freedom and diversity are good things are likely to agree. Others will not necessarily be convinced that Chapman and McConnell have made a powerful enough constitutional argument to change their minds. To convince skeptics, they would need to expand the reasoning behind their claim that when "the anti-establishment principle warns against using the power of the state to enforce conformity,"[56] it should encompass all types of secular laws that religious believers find objectionable. As the authors point out, these cases seemed easier when they considered accommodations for "Native American religious practitioners, Jewish sabbatarians[, and] Amish farmers."[57] Recent "conspicuous" claims by "religious traditionalists who seek to avoid compulsory support for abortion, contraception[, and] same-sex marriage"[58] have been opposed by those embracing these "progressive causes,"[59] who do not necessarily agree that promoting religious freedom and diversity is a more important (or constitutionally required) goal than pursuing the legislative policies involved in those causes.

It would have been interesting if the authors had followed their agreeing-to-disagree thesis to what might be its logical conclusion on the subject of accommodations. They say that the "anti-establishment principle warns against using the power of the state to enforce conformity," especially in cases of "ineradicable conscientious differences,"[60] and that even atheism should be treated as a religion in the context of accommodations.[61] In that case, it would seem that if conservatives legislate against abortion, contraception, and same-sex marriage, it would be consistent with the anti-establishment principle to

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[52] *Id.* at 111.
[53] *Id.* at 116.
[54] *Id.*
[55] *Id.* at 107.
[56] *Id.* at 95.
[57] *Id.* at 109.
[58] *Id.*
[59] *Id.*
[60] *Id.* at 95.
[61] *Id.* at 107.

provide exemptions for progressives even if they are not adherents of any particular religion.

The authors next address the Court's legion of education-related cases. Their fundamental point is that "when the Supreme Court first brought the Establishment Clause to bear on these issues . . . it interpreted that Clause to stifle religious pluralism and to foster religious uniformity."[62] That was actually the reverse of what the authors see as the First Amendment's "historic purposes," and they are happy to report that, more recently, "the Court has done a U-turn, producing the most extreme doctrinal about-face in all the volumes of U.S. Reports."[63] After long "holding that neutral funding programs" are forbidden if they "support religious activities," the Court has more recently held that "discrimination against an otherwise eligible school on the basis of its religious status is unconstitutional."[64] Today, "neutrality is the reigning principle," which is "truer to the history and theory of disestablishment in America."[65]

What about prayer and Bible reading in the legislatures and public schools? This politically charged question provides the authors with a chance to highlight the role of coercion in at least some Establishment Clause issues. The biggest barrier to embracing this principle comes from language in the *Engel v. Vitale* school prayer case saying that the "Establishment Clause, unlike the Free Exercise Clause, does not depend on any showing of direct government compulsion."[66] The authors list the many ways that statement is wrong, including the fact that it "subordinate[s] the Free Exercise Clause to the Establishment Clause."[67] They are pleased to see that the Court is bringing the idea of coercion back into "Establishment Clause analysis,"[68] although they note that some governmental acts, such as "an official proclamation of religious doctrine by law would *likely* violate the clause,"[69] even in the absence of coercion. (Unfortunately, they do not discuss when a statutory declaration of official religious doctrine would *not* be a violation. Nor do they say whether the national motto, "In God We Trust," might be a statutory declaration of official religious doctrine.) Yet while a no-coercion principle is the authors'

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[62] *Id.* at 118.
[63] *Id.*
[64] *Id.* at 141.
[65] *Id.* at 142.
[66] *Id.* at 147–48 (citing Engel v. Vitale, 370 U.S. 421 (1962)).
[67] *Id.* at 150.
[68] *Id.* at 153.
[69] *Id.* at 149 (emphasis added).

major theme for how courts should decide many questions arising under the Establishment Clause, their recurring minor theme is that the "line will often not be clear."[70] Moreover, since they argue that some actions could be unconstitutional even without an element of coercion, their guidance to the Court also becomes considerably less clear.

Chapman and McConnell begin the next discussion about controversies involving the public display of religious symbols with two observations: "almost no one admires" the Court's decisions in this area, and "[n]o one . . . ever claimed at the founding that the display of religious symbols was a form of religious establishment."[71] Then they abandon the agreeing-to-disagree interpretive approach of the preceding chapters in favor of a straightforward admission that "it would have been better if the Court had never entered this minefield."[72] After all, the Founders were not concerned about the issue, there were no challenges to these displays under the Establishment Clause until the 1950s,[73] and the authors' description of one case could easily fit all the others: "most[ly] remembered as a symbol of pointless and expensive culture-war litigation."[74] Ultimately, they conclude, "as a practical matter,"[75] the Court should probably stick with its "irenic, if less principled,"[76] approach in recent cases.

At this point, about 90% of the way through the book, the authors have arrived at a new—and potentially promising—test for whether the Establishment Clause has anything to say about a political dispute. Instead of discarding principle in favor of practicalities, Chapman and McConnell could have emphasized this chapter's theme that the Supreme Court Justices should simply refrain from making culture war disputes into constitutional cases. This test would offer considerably more clarity and consistency than mixing coercion (but only some of the time) and irenic pragmatism (but not all the time). Was a practice known at the time of the First Amendment's ratification? If so, was it challenged on Establishment Clause grounds in the first 150 years the Clause was in effect? Since the authors admit that the Court's

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[70] *Id.* at 156.

[71] *Id.* at 159.

[72] *Id.* at 162.

[73] *Id.* at 158.

[74] *Id.* at 162 (citing Salazar v. Buono, 559 U.S. 700 (2010) (involving a cross in the Mojave Desert)).

[75] *Id.*

[76] *Id.* at 163.

decisions have often been divisive and leave "no one . . . satisfied,"[77] why not just throw these cases out of the Court if the answer to the second question is no?

If we go back and apply this approach to the other issues discussed in the book—cases involving accommodations, aid to religious schools, legislative prayers, school prayers, religious symbols, and so on—most would not present a constitutional issue at all. Virtually all these practices pre-date the First Amendment, and no one challenged them under the Establishment Clause until after the 1940s *Everson* decision. In fact, the Establishment Clause was seen as such a constitutional dead letter until that time that Mr. Everson's lawyer was not even willing to make a First Amendment argument until his arm was twisted by the American Civil Liberties Union.[78] Since then, there has been an outpouring of contentious litigation, and a series of inevitably unpopular Supreme Court decisions.

If Chapman and McConnell's thoughtful analysis of the symbol cases is persuasive, then perhaps the most irenic *and* principled approach to the Establishment Clause would be for the Supreme Court simply to declare virtually all modern Establishment Clause controversies non-justiciable. If the church–state arrangements addressed by the Clause have gone the way of the dodo, perhaps Establishment Clause jurisprudence should follow suit. But, alas, Chapman and McConnell take the interpretive road most traveled by, instead. For the symbol cases, they just point to what seems like a reasonable outcome considering all the facts and circumstances: distinguishing between new displays and ones that already exist.[79] Their hope for that approach is that it "will dry up most litigation."[80]

The authors take yet another approach in the chapter on church autonomy. That chapter only occasionally touches on the Establishment Clause as it argues strongly in favor of autonomy largely on religious liberty and freedom of assembly grounds. They see as potential establishment issues the "two most prominent sources of [government] intrusion" into "internal church governance," which are "employment law and the application of property law to church splits."[81] The critical constitutional principle, according to the authors, is that "disestablishment invariably guaranteed a right of self-

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[77] *Id.* at 158.

[78] DRAKEMAN, *supra* note 19, at 92.

[79] *See American Legion*, 588 U.S. __.

[80] CHAPMAN & MCCONNELL, *supra* note 5, at 172.

[81] *Id.* at 174.

governance to religious institutions."[82] The authors favor the concept of church autonomy, and they seek to make the Establishment Clause the place courts turn to when they consider church property disputes. In doing so, they introduce a new concept: that the Clause prohibits "civil 'entanglement' in religious matters."[83] To avoid such entanglement, the authors argue, courts deciding property cases should follow the "neutral principles doctrine" (essentially asking who holds the deed, what the charter says, and so on)[84] rather than the "deference" approach (which involves judges trying to decide whether any particular church is fundamentally hierarchical or congregational).[85]

Overall, this short chapter reads more like a manifesto than a rigorous account of the complex history of the concept of church autonomy, especially as it relates to the First Amendment. Most of the book addresses a post-*Everson* environment in which the religion clauses, after being silent for 150 years, suddenly emerged to apply to just about every possible dispute about religion. But the federal government was conspicuously active in church autonomy disputes during various parts of the 19th century. It would have been helpful if the authors had taken those activities into account. The Edmunds–Tucker Act of 1887, for example, disincorporated the Mormon Church and confiscated many church properties.[86] Those actions were upheld by the Supreme Court, which noted that the Mormon community's support for polygamy—or what their church called "celestial marriage"[87]—was "contrary to the spirit of Christianity, and of the civilization which Christianity has produced in the Western world."[88] This act of Congress is undoubtedly contrary to what the authors believe are the best "Establishment Clause principles,"[89] but since the Supreme Court found no First Amendment problem, it would have been helpful for the authors to explain why their view of religion clause principles should trump that of the 19th-century Supreme Court.

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[82] *Id.* at 173.

[83] *Id.* at 182.

[84] *Id.*

[85] *Id.* at 183–85.

[86] 48 U.S.C. § 1461.

[87] *See generally* SARAH BARRINGER GORDON, THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA (2002).

[88] Mormon Church v. U.S. 136 U.S. 1, 49 (1890).

[89] *See, e.g.,* CHAPMAN & MCCONNELL, *supra* note 5, at 185 (referring to the "grave violation" of those principles by courts that have adopted the "deference" approach in property disputes).

In the end, are the authors right? Did the Framers mean for us to agree to disagree? The answer is yes, but not quite as Professors Chapman and McConnell propose. The Framers knew that Americans not only disagreed about religion itself, but also about whether state power should support religion (and vice versa).[90] The Framers' agreeing-to-disagree approach was to leave these issues in the hands of the states, which would undoubtedly make different choices based on their own local political realities.[91] With the Establishment Clause, the Framers were essentially saying, we agree that the American people can continue to disagree. Rhode Island can go one direction, and Massachusetts another, and nobody is going to make a federal case out of it. And no one did for 150 years.

Does the Chapman and McConnell version of agreeing to disagree share enough of the same spirit to be the 21st-century equivalent of the Framers' First Amendment choices? That will be up to the reader and, even more importantly, the Justices to decide.

This thought-provoking and potentially very influential volume ends on a remarkably optimistic note, especially for a book overflowing with descriptions of contentious and divisive cases dealing with a perennially controversial topic. After a series of chapters chronicling the Supreme Court's many wrongheaded decisions and dubious doctrines, the authors suggest that "[p]erhaps America's experience with the Establishment Clause can provide a model for handling analogous disputes of other kinds," such as "Marxism, environmentalism[, and] anti-racism."[92] These "other 'isms,'" the authors note, can "resemble religions in their intensity, their seeming imperviousness to evidentiary challenge, and their thirst to enforce their own brand of virtue."[93] Presumably, the authors do not mean the Supreme Court's Establishment Clause jurisprudence to date is such a model, but its potential future decisions, as it follows the authors' guidance as to the Clause's true purpose of

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[90] *See* VINCENT PHILLIP MUÑOZ, RELIGIOUS LIBERTY AND THE AMERICAN FOUNDING: NATURAL RIGHTS AND THE ORIGINAL MEANINGS OF THE FIRST AMENDMENT RELIGION CLAUSES 88–116 (2022).

[91] For a more detailed discussion of what the Framers were doing when they drafted and debated the Establishment Clause, see Donald L. Drakeman, *Which Original Meaning of the Establishment Clause Is the Right One?*, *in* THE CAMBRIDGE COMPANION TO THE FIRST AMENDMENT AND RELIGIOUS LIBERTY 365–95 (Michael D. Breidenbach & Owen Anderson, eds., 2020) and DRAKEMAN, *supra* note 19, at 326–46.

[92] CHAPMAN & MCCONNELL, *supra* note 5, at 190.

[93] *Id.*

preventing the government from using its power to "impose an orthodoxy and suppress disagreement."[94]

In this important book, two outstanding church–state scholars have offered us a blueprint for Establishment Clause jurisprudence that they believe will "help to protect cultural pluralism" by "guarantee[ing] that neither side" in the various culture wars "can use its momentary political power to impose an orthodoxy."[95] Professors Chapman and McConnell have thus set out to show the Court and the country how we can construct an amicable public understanding on contentious issues of religion, politics, and culture. That would certainly be an excellent outcome.

[94] *Id.* at 189.
[95] *Id.* at 189, 191.